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NEGLIGENCE

RULES—DECISIONS—OPINIONS

SECOND EDITION

BY
EDWARD B. THOMAS
UNITED STATES JUDGE

IN TWO VOLUMES

VOL. II

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I. Burden of Proof, &c. *

(See "Presumption of Negligence," &c., p.1095.)

The burden is on the person, controlling property, to show that a person about the premises doing damage to a passer-by was there despite the owner's care to exclude negligent persons. *Althorf v. Wolfe*, 22 N. Y. 355, aff'g judg't for pl'ff.

The plaintiff must show, that the defendant was negligent, *within the special contract*, when such contract provides that the defendant shall only be liable for fraud or gross negligence. *Cochran v. Dinsmore*, 49 N. Y. 249, rev'g judg't for pl'ff.

When goods are taken from a warehouse by a burglary, the plaintiff must show lack of due care to prevent the burglary. *Clafin v. Meyer*, 75 N. Y. 260; rev'g 11 J. & S. 1 and judg't for pl'ff.

From opinion.—"Where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them, or account for such non-delivery, or, to use the language of Sutherland, J., in *Schmidt v. Blood*, where 'there is a total default in delivering or accounting for the goods' (9 Wend. 268), this is to be treated as *prima facie* evidence of negligence. (*Fairfax v. N. Y. C. & H. R. R. Co.*, 67 N. Y. 11; *Steers v. Liverpool Steamship Co.*, 57 id. 1; *Burnell v. N. Y. C. R. Co.*, 45 id. 184.) This rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts and that he is able to give the reason for his non-delivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods and by his refusal converts them.

But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume in the absence of proof on the point that such fire or theft was the result of his negligence. *Lamb v. Camden & Amboy R. Co.*, 46 N. Y. 271, and cases there cited; *Schmidt v. Blood*, 9 Wend. 268; *Platt v. Hibbard*, 7 Cow. 500 note." See "Bailments" 105, 130.

The burden is on the plaintiff to show not only that the negligent condition or act existed, but also that such condition or act contributed

* NOTE.—See also specific headings.

proximately to the injury. *Ring v. City of Cohoes*, 77 N. Y. 83; rev'g s. c., 13 Hun, 76.

The defendant's negligence may be of such a kind as to *prima facie* prove the whole issue.

A horse car of the defendant was proceeding upon its railroad without lights or bells on a dark night in the streets of New York city, obstructed by a sewer in the process of construction. The plaintiff, a sober cartman, was found dead upon the track, under circumstances authorizing the inference that he had fastened his horse, and was groping in the dark to find a safe passage for his team, when struck by defendant's car. There was no witness to the accident. The dangerous tendency of the defendant's conduct was such as, in the absence of any other evidence than the presumption that the plaintiff had the same regard for his safety as other men, to authorize the attributing of the accident to the negligence of the defendant, and the refusal of a nonsuit.

Johnson v. N. Y. C. & H. R. R. Co., 20 N. Y. 65, aff'g judg't for pl'ff, s. c., 5 Duer, 21.

Evidence tending, *prima facie*, to show negligence does not shift the burden of proof. Negligence must be determined from all the evidence and the burden is on the plaintiff. *Heinemann v. Heard*, 62 N. Y. 448; rev'g s. c., 2 Hun, 324, and judg't for pl'ff.

Citing *Lamb v. Camden &c. R. Co.*, 46 N. Y. 271. See *Caldwell v. New Jersey S. Co.*, 47 id. 282, 296.

The burden is in the plaintiff to show absence of contributory negligence. In an action for injury to plaintiff's horse, the defendant contended that the viciousness of the horse caused the injury; the burden of proof was on the plaintiff to show that the horse was not vicious and did not contribute to the injury. *Hale v. Smith*, 78 N. Y. 480, aff'g judg't for def't.

See also, *Whalen v. Citizen's Gaslight Co.*, 151 N. Y. 70; *Dorr v. McCullough*, 8 App. Div. 327; *Kuhnen v. Union R. Co.*, 10 id. 195; *Ryan v. New York &c. R. Co.*, 17 id. 221; *Sawyer v. King*, 21 id. 624; *Caven v. Troy*, 32 id. 154; *Williams v. Delaware &c. R. Co.*, 39 id. 647; *Neumeister v. Eagers*, 29 id. 385.

Where the evidence is that a properly constructed engine in good order will not drop coals, the dropping of coals from the defendant's engine puts the burden upon the defendant to show absence of negligence. *Field v. N. Y. C. & H. R. R. Co.*, 32 N. Y. 339, aff'g judg't for pl'ff.

See "Fires from Locomotives," p. 1276.

Where a person with the deliberately formed purpose of using another as a screen from anticipated danger, of which the other person is entirely ignorant, places such person between himself and a party by whom the danger is threatened, and then gives such party an answer which precipitates the catastrophe, a wrong is done the person thus used as a shield, and should such person suffer injury, it is incumbent upon the person

using him as a human buffer between himself and the anticipated injury, in order to establish that he is not liable for the damage resulting from the personal injuries sustained by the person thus used as a shield, to show that no part of such injury resulted from the wrong which he had committed toward him.

If, however, the action of the person in making use of the other as a shield is involuntary or such as would instinctively result from a sudden and irresistible impulse in the presence of a terrible danger, he is not liable for the damages resulting from the personal injuries sustained by such person. *Laidlaw v. Sage*, 80 Hun, 550.

Court instructed that the burden was on the defendant to show such facts as would demonstrate its freedom from negligence. Held error. *Kuys v. Metropolitan Street R. Co.*, 163 N. Y. 447.

From opinion.—"When a party alleges the existence of a fact as the basis of a cause of action or defense, the burden is always upon the party who alleges the fact to establish it by proof. The *onus probandi* is upon him throughout. In the case at bar, the plaintiff made out her cause of action *prima facie* by the aid of a legal assumption, but when the proof was all in the burden of proof had not shifted, but was still upon the plaintiff."

Proof tending to show accidental destruction of a warehouse, requires plaintiff to show that it was due to negligence. *Kaiser v. Latimer*, 9 App. Div. 36.

Lessee sought to take advantage of a provision in a lease, avoiding it in case of destruction of the premises otherwise than through his negligence. He had the burden of establishing that it did not so occur. *Tocci v. Powell*, 9 App. Div. 283.

Plaintiff cannot avoid the burden of proving negligence where there is no evidence raising a presumption thereof. *Kuhnlen v. Union R. Co.*, 10 App. Div. 195.

And he must show, not only that it might have been due to negligence, but that it in fact was. *Jones v. Union R. Co.*, 18 App. Div. 267; *Piehl v. Albany R. Co.*, 19 id. 471.

He must at least show a casual connection between the accident and the injury. *Dettmers v. Brooklyn Heights R. Co.*, 22 App. Div. 488; *Parents v. Taylor*, 26 id. 518.

So that where the evidence is evenly balanced, there can be no recovery. *Caven v. Troy*, 32 App. Div. 154.

See, also, *Hirsch v. Hudson River Line*, 26 Misc. 823.

Proof of fire in a warehouse, does not relieve plaintiff of the burden of proving negligence. *Liberty Ins. Co. v. Central Vt. R. Co.*, 19 App. Div. 509; *Grieve v. New York &c. R. Co.*, 25 id. 518.

See, however, *Lynch v. Kluher*, 20 Misc. 601.

The office of a presumption of negligence is not to shift the burden

of proof from the plaintiff. When the presumption is rebutted, plaintiff fails unless he produces further evidence. *Wiley v. Bond*, 23 Misc. 658.

See *Kay v. Metropolitan Street R. Co.*, 163 N. Y. 447. *Caspar v. Dry Dock &c.*, R. Co., 56 App. Div. 372; *Hollahan v. Metropolitan Street R. Co.*, 73 id. 164.

Burden is on plaintiff to show:

Negligence of defendant. *Groark v. Laemelle*, 56 App. Div. 372; *Casper v. Dry Dock &c. R. Co.*, 56 id. 372; *McConnell v. New York &c. R. Co.*, 63 id. 545; *Harbison v. Metropolitan R. Co.*, 9 App. D. C. 60; *Newell v. Rahn*, 64 Ill. App. 249; *Schmidt v. Chicago &c. R. Co.*, 99 Iowa, 425; *Young v. Chicago &c. R. Co.*, 100 id. 357; *Morley v. Chicago &c. R. Co.*, 105 id. 46; *Rouse v. Osborne*, 3 Kan. App. 139; *Louisville &c. R. Co. v. Harned*, (Ky.) 66 S. W. Rep. 25; *Louisville &c. R. Co. v. McClain*, id. 391; *Regan v. Adams Ex. Co.*, 49 La. Ann. 1579; *Romach v. Crescent C. R. Co.*, 50 id. 473; *Weber v. New Orleans &c. R. Co.*, 104 La. 367; *Smith v. American Ex. Co.*, 108 Mich. 572; *Koslowski v. Thayer*, 66 Minn. 150; *Palmer v. Winono R. &c. Co.*, 78 id. 138; *Bartley v. Metropolitan Street R. Co.*, 148 Mo. 124; *Smith v. St. Louis &c. R. Co.*, 151 Mo. 391; *Davenport v. Pennsylvania R. Co.*, 10 Pa. Super. Ct. 47; *The Flintshire*, 69 Fed. Rep. 471; *The Fred Schlesinger*, 71 id. 747; *Garrett v. Southern R. Co.*, 101 id. 102; *Talbott v. West Virginia &c. R. Co.*, 42 W. Va. 560.

Or such facts at least as raise a presumption of negligence. *Gordon v. Louisville R. Co.*, (Ky.) 44 S. W. Rep. 972; *Owen v. Illinois C. R. Co.*, 77 Miss. 142; *Cleveland &c. R. Co. v. Marsh*, 63 Oh. St. 236; s. c., 52 L. R. A. 142; *Bien v. Unger*, 64 N. J. L. 596; *Scott v. Texas &c. R. Co.*, (Tex.) 57 S. W. Rep. 801; rev'g s. c., 56 id. 97.

Freedom from contributory negligence. *Bruce v. Brooklyn G. R. Co.*, 68 App. Div. 242; *Florida &c. R. Co. v. Burney*, 98 Ga. 1; *Augusta &c. R. Co. v. McDade*, 105 Ga. 134; *Haner v. Northern R. Co.*, (id.) 62 Pac. Rep. 1028; *Chicago &c. R. Co. v. Levy*, 160 Ill. 385; *Jorgenson v. Johnson Chair Co.*, 169 Ill. 429; aff'g s. c., 67 Ill. App. 80; *Illinois C. R. Co. v. Cozby*, 174 Ill. 109; aff'g s. c., 69 Ill. App. 256; *Peoria v. Adams*, 72 Ill. App. 662; *Chicago &c. R. Co. v. Stewart*, 71 Ill. App. 647; *MacCarty v. Springer*, 76 id. 626; *Wabash R. Co. v. Janson*, 99 id. 312; *Lamport v. Lake Shore &c. R. Co.*, 142 Ind. 269; *Pittsburg &c. R. Co. v. Frazee*, 150 id. 576; *Young v. Citizens' S. R. Co.*, 148 id. 54; *Salem v. Walker*, 16 Ind. App. 687; *Todd v. Danner*, 17 id. 268; *Stuber v. Gannon*, 98 Iowa, 228; *Crawford v. Chicago &c. R. Co.*, 109 id. 433; *Falls v. Stewart*, 3 Kan. App. 403; *Grieve v. Illinois C. R. Co.*, 104 La. 659; *Maine C. R. Co.*, 96 Me. 136; *Cunningham v. Bath Iron Works*, 92 id. 501; *Murphy v. Boston &c. R. Co.*, 167 Mass. 64; *Guthrie v. Thistle*,

5 Okla. 517; Judge v. Narragansett &c. L. Co., 21 R. I. (Part 1) 131; Barksdale v. Laurens, 58 S. C. 413; Daniels v. Florida &c. R. Co., 62 S. C. 1.*

Rebuttal of a presumption of contributory negligence raised by plaintiff's own testimony. *Cincinnati v. Frazer*, 18 Oh. C. C. 50; Pennsylvania R. Co. v. Mahoney, 22 id. 469; Lake Shore &c. R. Co. v. Whidden, 23 id. 85; Missouri &c. R. Co. v. Merrill, 68 Kan. 671; Cummings v. Helena &c. Co., 26 Mont. 434; Chicago &c. R. Co. v. Featherly, (Neb.) 89 N. W. Rep. 792; Lewin v. Pauli, 19 Pa. Super. Ct. 447; Stewart v. Nashville, 96 Tenn. 50; Southern R. Co. v. Bruce, 97 Va. 92; Richmond v. Leaker, 99 id. 1.

That the negligence in question caused the accident. *Whisten v. Brengal*, 16 Misc. 37; *Beger v. Louisville &c. R. Co.*, 114 Ala. 424; Alabama &c. R. Co. v. Boyd, 124 id. 525; Little Rock &c. R. Co. v. Locke, (Ark.) 45 S. W. Rep. 909; s. c., 65 Ark. 631; Denver &c. R. Co. v. Priest, 9 Colo. App. 103; Southern R. Co. v. Forsythe, (Ky.) 64 S. W. Rep. 506; Brady v. Consolidated Gas Co., 85 Md. 637; Osborne v. Chicago &c. R. Co., 111 Mich. 15; Pleafka v. Knapp &c. Co., 145 Mo. 316; Deserant v. Cerrillos C. R. Co., 9 N. M. 495; Cleveland &c. R. Co. v. Osborn, 66 Oh. St. 45; Thomason v. Southern R. Co., 113 Fed. Rep. 80.

Proof of facts which might have caused death, together with circumstances showing that to be the natural result, put upon the defendant the burden of rebuttal. *Purcell v. Lauer*, 14 App. Div. 33.

Further facts establishing negligence when presumption has been rebutted. *Louisville &c. R. Co. v. Marbury Lumber Co.*, (Ala.) 28 South. Rep. 438; Atchinson &c. R. Co. v. Cahill, 11 Colo. App. 245; Chicago &c. R. Co. v. Kendall, 72 Ill. App. 105.

That goods were stolen while in possession of carrier. *Hirsch v. Hudson River Line*, 26 Misc. 823.

The relationship of master and servant. *Saunders v. Boston*, 167 Mass. 595.

That another servant at the same general work, was not a fellow servant. *Kansas City &c. R. Co. v. Becker*, 63 Ark. 477; Florida &c. R. Co. v. Mooney, 40 Fla. 17.

That a standpipe is a dangerous structure. *Doyle v. Sycamore*, 81 Ill. App. 589.

That loss of goods was by negligence, where the bill of lading relieved defendant of all liability. *Insurance Co. v. Lake Erie &c. R. Co.*, 152 Ind. 333.

Sejalon v. Woolverton, 31 Misc. 752.

* NOTE.—See also "Contributory Negligence," ante p. 656.

So, as to one whose property was set afire by defendant's negligence. *Wabash R. Co. v. Miller*, 18 Ind. App. 549.

Freedom from contributory negligence, in loss of property destroyed by fire set to burn off stubble on railroad right of way, though a statute imposes absolute liability for fire set in the operation of railways. *Connors v. Chicago &c. R. Co.*, 111 Iowa, 384.

That train could have been stopped without risk to passengers, in time to avoid injury to plaintiff who had fallen onto the track in front of the train. *Reed v. Louisville &c. R. Co.*, 104 Ky. 603.

That a spark arrester of the kind in general use, was insufficient or negligently used. *Gumbel v. Illinois C. R. Co.*, 48 La. Ann. 1180.

Due care at crossing. *Wheelwright v. Boston &c. R. Co.*, 135 Mass. 225.

Chaffee v. Boston &c. R. Co., 104 Mass. 108.

Negligence of carrier, as a warehouseman. *Murray v. International S. S. Co.*, 170 Mass. 166.

The difficulty of making proof does not remove the burden. *Miller v. Lebanon &c. R. Co.*, 186 Pa. St. 190.

Facts constituting actual negligence, where there is a contract exempting carrier from all other liability. *Davenport v. Pennsylvania R. Co.*, 10 Pa. Super. Ct. 47.

That injuries occurred on defendant's line, where the latter limited its liability to negligence occurring thereon only. *Texas &c. R. Co. v. Slano Livestock Co.*, (Tex. Civ. App.) 33 S. W. Rep. 748.

That injury occurred through defendant's negligence, where plaintiff accompanied the shipment to care for it. *Texas &c. R. Co. v. Arnold*, 16 Tex. Civ. App. 74.

See, also, *St. Louis &c. R. Co. v. Vaughn*, (Tex. Civ. App.) 41 S. W. Rep. 415.

Negligence of railroad company, where public necessity or convenience prevented erection of statutory fence at the point in question. *Texas &c. R. Co. v. Scriviner*, (Tex. Civ. App.) 49 S. W. Rep. 649; *Gulf &c. R. Co. v. Weens*, 38 id. 1028.

The relationship of carrier and passenger. *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.) 55 S. W. Rep. 517.

That owner or keeper of dog or other domestic animal must have had knowledge of its disposition; though it would be otherwise if the animal was of a nature fierce and untamable, such as bears, tigers, etc. *Spring Co. v. Edgar*, 99 U. S. 654.

See "Domestic Animals," p. 973.

The lapse of reasonable time during which defendant, a carrier of passengers, might have acquired knowledge of a negligent practice by an employé. *Southern R. Co. v. Rhodes*, 86 Fed. Rep. 422.

Negligence, where bill of lading exempts defendant except in case of negligence. *Schaller v. Chicago &c. R. Co.*, 97 Wis. 31.

That a washout might have been discovered in time to have avoided injury, where it had existed but a few hours before the accident. *Crouse v. Chicago &c. R. Co.*, 102 Wis. 196.

Until plaintiff supports his theory of the accident, defendant need not account for it. *Duncan v. St. Louis &c. R. Co.*, 51 La. Ann. 1775; *Price v. Philadelphia &c. R. Co.*, 84 Md. 506.

Burden is not on plaintiff, to show:

That cattle tracks were those of the animals killed on defendant's premises. *Louisville &c. R. Co. v. Brinkerhoff*, 119 Ala. 606.

The negligence of each of the operators of a train which combined to produce injury. *Alabama &c. R. Co. v. Siniard*, 123 Ala. 557.

That a loss of goods does not fall within the limitation of bill of lading. *Louisville &c. R. Co. v. Cowherd*, 120 Ala. 51.

Both negligence and freedom from contributory negligence in a railroad accident. *Johnston v. Richmond &c. R. Co.*, 95 Ga. 685.

That a highway at a crossing, at which injury occurred, was legally established. *Chicago &c. R. Co. v. Heinrich*, 157 Ill. 388.

That there was a necessity to cross the track at the crossing, as long as there was a right to do so. *Illinois Street Co. v. Szutenbach*, 64 Ill. App. 642.

The specific defect in machinery, where it appears that the master had notice of its defective condition. *Norton Bros. v. Sczpurak*, 70 Ill. App. 686.

Freedom from contributory negligence. *Schneider v. Market Street R. Co.*, 134 Cal. 482; *Augusta S. R. Co. v. McDade*, 105 Ga. 134; *Wortman v. Minich*, 28 Ind. App. 31; *Citizens' Street R. Co. v. Hobbs*, 15 id. 610; *Missouri &c. R. Co. v. Preston*, (Kan.) 63 Pac. Rep. 444; *Lexington &c. Co. v. Stephens*, (Ky.) 47 S. W. Rep. 321; *Och v. Missouri &c. R. Co.*, 130 Mo. 27; *Lincoln S. R. Co. v. McClellan*, 54 Neb. 672; *Chicago &c. R. Co. v. Oyster*, 58 id. 1; *Pulp v. Roanoke &c. Co.*, 120 N. C. 525; *Wood v. Bartholomew*, 122 id. 177; *Purnell v. Raleigh &c. R. Co.*, 122 id. 832; *Cox v. Norfolk &c. R. Co.*, 123 id. 604; *Cogdell v. Wilmington R. Co.*, 130 id. 313; *Schwenforth v. Cleveland &c. R. Co.*, 60 Oh. St. 215; *Pittsburg &c. R. Co. v. Hart*, 10 Oh. C. C. 411; *Stoltz v. Baltimore &c. R. Co.*, 7 Oh. D. 435; *Sopherstein v. Bertels*, 178 Pa. St. 401; *Phillips v. Duquesne Traction Co.*, 8 Pa. Super. Ct. 210; *Burke v. Citizens' Street R. Co.*, 102 Tenn. 409; *Hogan v. Missouri &c. R. Co.*, 88 Tex. 679; *Belcher v. Missouri &c. R. Co.*, 92 id. 593, 384; *International &c. R. Co.*, 89 id. 583; *Missouri &c. R. Co. v. Foreman*, (Tex. Civ. App.)

46 S. W. Rep. 834; *Houston &c. R. Co. v. Kelly*, 13 Tex. Civ. App. 1, 25; *International &c. R. Co. v. Dalwigh*, (Tex. Civ. App.) 48 S. W. Rep. 527, 529; s. c. rev'd, 51 id. 500; *Galveston &c. R. Co. v. Collins*, 57 id. 884; *International &c. R. Co. v. Brooks*, 54 id. 1056; *Houston &c. R. Co. v. White*, 23 Tex. Civ. App. 280; *Galveston &c. R. Co. v. Dehnisch*, (Tex. Civ. App.) 57 S. W. Rep. 64; *Texas &c. R. Co. v. Mayfield*, 56 id. 942; *Berry v. Lake Erie &c. R. Co.*, 70 Fed. Rep. 193; *Watertown v. Greaves*, 112 id. 183; *Hemminway v. Illinois C. R. Co.*, 114 id. 843; *Thoreson v. La Crosse C. R. Co.*, 94 Wis. 199.

That injury happened through the negligence of a fellow servant. *Chicago &c. R. Co. v. House*, 172 Ill. 601; aff'g s. c., 71 Ill. App. 147; *Wetzel v. Philadelphia Trac. Co.*, 184 Pa. St. 407.

That deceased did not know the appliance was not defective. *Gulf &c. R. Co. v. Royall*, 18 Tex. Civ. App. 86.

That he did not purposely get under the wheels of the train on which he was. *Crumley v. Cincinnati &c. R. Co.*, 12 Oh. C. C. 164.

Limitation of the time for use of a ticket is for defendant to prove. *Boyd v. Spencer*, 103 Ga. 828.

II. Presumption of Negligence.*

The principle is basic that the mere happening of an accident through the existence of a defect does not *per se* impute negligence, that is, raise a presumption of negligence; but evidence must be given tending to show that the defect existed by reason of some culpable act or omission of the person charged. *Holbrook v. Utica-Syracuse R. Co.*, 12 N. Y. 236; aff'g judg't for pl'ff.

Cosulich v. Standard Oil Co., 122 N. Y. 118, rev'g judg't for pl'ff; *Dobbins v. Brown*, 119 N. Y. 188; *DeVau v. Pennsylvania &c. R. Co.*, 130 N. Y. 632; *Western v. City of Troy*, 139 N. Y. 281, rev'g judg't for pl'ff; *Barren v. East Boston Ferry Co.*, 11 Allen 312; *Kendall v. Boston*, 113 Mass. 234.

This rule is of very general application, and the exceptions to it are limited, and may be classified under two heads:

(1) When the relation of carrier and passenger exists and the accident arises from some abnormal condition in the department of actual transportation.

(2) Where the injury arises from some condition or event, that is in its very nature so obviously destructive of the safety of person or property, and is so tortious in its quality, as in the first instance, at least to permit no inference, save that of negligence on the part of the person in the control of the injurious agency.

This second class principally concerns injuries to people in the street from flying or falling missiles, obstructions, excavations and the like, but it may also

* NOTE.—As to statutory presumptions of negligence and presumptions of negligence arising from violation of statute, see "Statutes and Ordinances," *post*. p. 1166.

include casualties in any relation where the elements stated in the definition are present.

Error has crept into the law from the inconsiderate citation of cases relating to the transportation of passengers and the injury to travelers upon the street.

As regards cases of passengers the reason of the exception has been carefully pointed out by the authorities. In *Curtis v. Rochester &c. R. Co.*, 18 N. Y. 534, it was said, "whenever it appears that the accident occurred through some defect in the vehicle or other apparatus used by the carrier, a strong presumption of negligence arises, founded upon the improbability of the existence of any defect which extreme vigilance, aided by science and skill, could not have detected," for it is said to be "extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have foreseen or discovered it." This was the first statement in the court of appeals of the primary doctrine, that, as extreme care was required of the carrier, that extreme care and skill would most probably reveal any defect, hence the existence of the defect showed presumptively this absence of the requisite care.

This doctrine was re-stated in *Edgerton v. N. Y. &c. R. Co.*, 39 N. Y. 227, where Judge Grover, writing the opinion said: "The latter (defendant) not only had the entire control of the vehicle, but also of the track upon which the vehicle was run, and it owed the duty to the plaintiff to keep both in a perfect and safe condition for the transportation of passengers with entire safety, so far as human prudence can accomplish this result. Experience proves that, when the track and machinery are in this condition and prudently operated, the trains will keep upon the track and run thereon with entire safety to those on board; whenever a car or train leaves the track it proves that either the track or machinery, or some portion thereof, is not in proper condition or that the machinery is not properly operated, and presumptively proves that the defendant, whose duty it is to keep the track and machinery in proper condition and to operate it with necessary prudence and care, has, in some respect, violated this duty."

In *Seybolt v. N. Y., L. E. & W. R. Co.*, 95 N. Y., 568, the accident arose from a misplaced switch or a broken axle. It was said, in the opinion of the court, that "while it is true as a general proposition that the burden of showing negligence on the part of the defendant, occasioning an injury, rests in the first instance upon the plaintiff, yet in an action of this character, when he has shown a situation which could not have been produced except by the operation of abnormal causes, the onus then rests upon the defendant to prove that the injury was caused without his fault. Citing *Caldwell v. N. J. S. S. Co.*, 47 N. Y. 291, and the cases heretofore considered.

In *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, the question arose over injuries to adjoining property from an explosion on premises adjacent thereto. The court, after laying down the rule in the case, to wit, that the explosion of the oil whence the injury followed did not raise a presumption of negligence, pointed out some of the exceptions to the rule, and for that purpose the court used the following language: "Sometimes, it is true, the duty which the defendant owes to the plaintiff is of such a nature that proof of the happening of the accident under certain circumstances and given conditions would be of such legal value as to afford presumptive evidence of negligence, and cast upon the defendant the burden of explanation. This rule has been applied to the carrier of passengers, especially in conveyances propelled by steam, where the

consequences of an accident are frequently fatal to human life, and the public interests require that in such cases the carrier shall use every precaution which human skill and foresight can provide to prevent the accident and its results. Even in those cases there must be reasonable evidence of negligence before a defendant can be called upon to relieve himself from the presumption of negligence." And the opinion continues to point out the distinction between the cases where the rule *res ipsa loquitur* applied, and the general rule that the fact that the accident happened to the plaintiff will not amount to *prima facie* proof of negligence. To this end the court illustrates that the cases applying the rule of *res ipsa loquitur* were either passenger cases or were such as fell within the decision of *Mullen v. St. John*, hereinafter considered. This distinction is pointed out in *Huff v. Austin*, 46 Ohio St. 386, and *W., S. L. & P. R. Co. v. Locke*, 2 Am. St. Rep. 193. To these authorities may be well added that of *Baltimore & C. R. Co. v. State*, 63 Md. 135.*

This high degree of care does not apply to staircases, approaches, platforms of stations, or even, as to snow and ice, to the platforms of cars. See *Common Carrier of Passengers*. See "Platforms of Cars, Maintenance and Care of," *ante*, p. 498.

In such case that degree of care only is exacted, as a man of ordinary prudence would use under the circumstances of the case; and as the existence of a defect is not necessarily inconsistent with the exercise of ordinary care, no legal presumption of negligence arises, unless the case also fall under the second class above. See *Millie v. Manhattan Railway Co.*; opinion by Pryor, J., 5 Misc. 301; and opinion by Bookstaver, J., 10 Misc. R. 734.

Hence the generalization as to passenger cases, would be this (so far as they are exceptions to the general rule). When a maximum degree of care and skill is required the slightest departure from it will impute negligence; and the slightest defect will presumptively impute some lack of care.

As to the second class of exceptions above reference need only be made to injuries to travelers. The decided cases falling under this head in New York go back to *Dygert v. Schenck*, 23 Wend. 446, where a person built a culvert under the highway to connect his land, on either side and neglected to give it any care, whereby injury arose to a traveler.

The action was held to be based on nuisance; and of course under such ruling, when the interference with the highway and consequent injury was proven not only did the presumption of wrong arise, but was not rebuttable, and even contributory negligence was not a defense.

This case was followed in *Congreve v. Smith*, 18 N. Y. 79; *Creed v. Hartman*, 29 id. 591. It is only within recent years that the courts of New York have distinctly modified and more precisely stated the true rule, viz.: That an action for injury in the street was based on nuisance, when the person charged as a wrong-doer had no public authority whatever to do the act, from the doing of which the injury arose, irrespective of any question of care or skill, or when there was a nominal grant of public authority, but the grantor for instance, the municipality itself, had not the power to endow the wrong-doer with the privilege of doing the act, save at the peril of saving harmless those entitled to use the street. *Cohen v. The Mayor*, 113 N. Y. 532; and see *Barton v. City of Syracuse*, 36 id. 54; and that such action was based on negligence, when the person charged with the wrong had the primary or delegated right to do the

* NOTE.—See *Ennis v. Gray*, 87 Hun, 355.

act, but was obliged to use a requisite care and skill in the performance thereof. *Irvine v. Wood*, 51 N. Y. 224; *Babbage v. Powers*, 130 id. 281. In all cases where there was lack of authority to do the act, from which the injury arose, a presumption of liability arises from the act and injury therefrom, but when the authority exists, then the usual rule of negligence would apply. Nevertheless, the person sought to be charged would be strictly judged on account of the solicitude of courts for the safety of travelers on the highway, where as has been established, he is not obliged to expect any harm and hence not obliged to use any care to provide against injuries from sources not connected with the legitimate use of the highway. *Brusso v. City of Buffalo*, 90 N. Y. 679.

Hence, in *Mullen v. St. John*, 57 N. Y. 567, where a house fell into a street, and *Volkmar v. Manhattan Co.*, 134 id. 418, where a bolt fell from an elevated railway into the street, the presumption of negligence arose and an explanation was placed upon the defendant. It should be noticed that every authority cited in these two cases involved injury to a person on the street from the falling of a dangerous object under circumstances indicating great danger, save in one instance, where the injury was to a traveler at the crossing of the highway by a railroad and where *all the facts* were before the court. Of the same nature is *Woodman v. R. Co.*, 149 Mass. 335.

This much has been written to illustrate the rule, and its exceptions, and it is only by a judicious application of the rule, or the exceptions, that the fundamental principle of the law can be maintained, *that whoever charges another person with a tort, must show that such person has omitted a requisite duty, viz.: in cases involving negligence to use such care and skill to prevent the defect, that caused the injury, as his relation to the party injured, and the circumstances present required.*

A presumption cannot be based upon a presumption. *Globe Accident Ins. Co. v. Gerisch*, 163 Ill. 625.

See, also, *Chicago & C. R. Co. v. Rhoades*, 64 Kan. 553.

None arises, where there is abundant testimony on the subject. *Smith v. City & C. R. Co.*, 29 Or. 539.

Negligence cannot be presumed where it can be directly and positively proved. *Bartley v. Metropolitan S. R. Co.*, 148 Mo. 124.

Allegation of a particular act does not deprive one of the benefit of a presumption raised by the facts. *Gallagher v. Edison Illum. Co.*, 72 Mo. App. 576.

Ordinarily, the mere happening of an accident does not raise a presumption; facts must be shown which admit of no other inference than that of negligence. *Stearns v. Ontario Spinning Co.*, 184 Pa. St. 519; s. c., 39 L. R. A. 842; *Johnson v. Walsh*, 83 Minn. 74; *Whitcomb v. Detroit & C. R. Co.*, 125 Mich. 572; *Griffen v. Maince*, 47 App. Div. 70; *Fisher v. Ruch*, 12 Pa. Super. Ct. 240; *Snyder v. Wheeling Electric & C. R. Co.*, 43 W. Va. 661; *Pierce v. Davis*, 80 Fed. Rep. 865.

Presumption of diligence prevails until overthrown by facts sufficient to raise an inference of negligence. *Swift & C. R. Co. v. Holoubek*, 62 Neb. 231.

One having exclusive control of that which causes injury by an accident preventable by ordinary care, is *prima facie* liable, and has the burden of proving that he did not cause such injury, and is not responsible therefor. *Spencer v. McManus*, 5 Misc. 267.

See, also, *Wall v. Gallin Printing Co.*, 21 Misc. 649; *Matthews v. Railroad Co.*, 18 Pa. Super. Ct. 10.

(a). ARISING IN THE PERFORMANCE OF THE DUTY OF A COMMON CARRIER.

1. COMMON CARRIER OF GOODS.

Raised by proof of:

Failure to deliver goods or baggage by common carrier. *Magnin v. Dinsmore*, 56 N. Y. 168.

Burnell v. New York Central R. Co., 45 N. Y. 189; *Bostwick v. Baltimore & Ohio R. Co.*, 45 id. 712; *Blum v. Monahan*, 36 Misc. 179; same as to warehouseman, *Cass v. Railroad Co.*, 14 Allen 448; *Clafin v. Meyer*, 75 N. Y. 260; but where warehouseman proves loss from burglary, fire, etc., plaintiff must show negligence on part of defendant, *Clafin v. Meyer*, 75 N. Y. 260; rev'g 11 J. & S. 1.

Loss or injury while in hands of carrier. *Springer v. Westcott*, 2 App. Div. 295; *Aaronson v. Pennsylvania R. Co.*, 23 Misc. 666; *Campe v. Weir*, 28 id. 243; *Hutkoff v. Pennsylvania R. Co.*, 29 id. 770; *Louisville &c. R. Co. v. Cowherd*, 120 Ala. 51; *Pennsylvania Co. v. Cohen*, 66 Ill. App. 319; *Ketchum v. Merchants' Union Ex. Co.*, 52 Mo. 390; *Steele v. Townsend*, 37 Ala. 247; *Graham v. Davis*, 4 Oh. St. 363; *Allan v. Pennsylvania R. Co.*, 3 Pa. Super. Ct. 335; *Menner v. Delaware &c. Canal Co.*, 7 id. 135; *The Warren Adams*, 74 Fed. Rep. 413; *Densmore Comm. Co. v. Duluth &c. R. Co.*, 101 Wis. 563.

Delay in transportation. *Belcher v. Missouri &c. R. Co.*, 92 Tex. 593.

Injury to cattle in car with broken floor. *Ohio &c. R. Co. v. Tabor*, (Ky.) 32 S. W. Rep. 168.

Delivery in good order and re-delivery damaged. *Hudson &c. L. Co. v. Wheeler*, 93 Fed. Rep. 374; *Gulf &c. R. Co. v. Jones*, (Ind. Terr.) 37 S. W. Rep. 208.

Delivery of goods received in apparently good order by final carrier, so marked by a preceding carrier, and delivery to consignee damaged. *Morganton Man. Co. v. Ohio &c. R. Co.*, 121 N. C. 514.

See, also, *Georgia &c. R. Co. v. Forrester*, 96 Ga. 428.

Fact that consignee inquired for the goods on three different occasions, and finally found them himself in the depot. *Central Trust Co. v. Tennessee &c. R. Co.*, 70 Fed. Rep. 764.

Delivery of baggage to carrier in good condition and redelivery damaged. *Springer v. Westcott*, 2 App. Div. 295.

Baggage is presumed to have been injured on the line of the last carrier. *Moore v. New York & C. R. Co.*, 173 Mass. 335.

Not raised by proof of:

Injury to live stock which might have arisen from inherent vice on their part, or negligence of the shipper in caring for them. *Norfolk & C. R. Co. v. Reeves*, 97 Va. 284.

2. COMMON CARRIER OF PASSENGERS.

Raised by proof of:

Derailment of train. *Curtis v. Rochester & Syracuse R. Co.*, 18 N. Y. 534, aff'g judg't for pl'ff. *Edgerton v. N. Y. & H. R. Co.*, 39 N. Y. 227, aff'g judg't for pl'ff.

Derailment of train from broken axle. *Seybolt v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 568; aff'g s. c., 31 Hun, 100, and judg't for pl'ff.

Explosion of boiler. *Caldwell v. N. J. Steamboat Co.*, 47 N. Y. 291, aff'g judg't for pl'ff.

Passenger's person was struck by a swinging door on a passing train. *Breen v. N. Y. C. R. Co.*, 109 N. Y. 297, aff'g judg't for pl'ff.

By obstruction on car on side track. *Holbrook v. N. J. S. R. Co.*, 12 N. Y. 236, aff'g judg't for pl'ff.

By a crane used to deliver mail to passing cars. *Hallihan v. N. Y., L. E. & W. R. Co.*, 102 N. Y. 195, aff'g judg't for pl'ff.

The presence of a freight car in the night time upon the track. That it was blown there by the wind was not a defense. *Webster v. Rome, Watertown & Ogdensburg R. Co.*, 115 N. Y. 112; aff'g s. c., 40 Hun, 162, and judg't for pl'ff.

Plaintiff in alighting from defendant's stake was thrown by the sudden starting of the horses; the fact showed *prima facie* that the horses were unsuitable for the business or that the driver was incompetent. *Roberts v. Johnston*, 58 N. Y. 613; aff'g 5 J. & S. 157, and judg't for pl'ff.

Explosion of a boiler from a steam pressure beyond that permitted in a certificate, issued by an act of the government. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, aff'g judg't for pl'ff.

Deviation of ship from its course and the wrecking thereof. *Marckwald v. Oceanic Steam Nav. Co.*, 11 Hun, 462.

Fact of accident; against the carrying company, but not against the company whose car was collided with. *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380; rev'g s. c., 16 App. Div. 152.

Brake suddenly set free, starting car. *Gilmore v. Brooklyn Heights R. Co.*, 6 App. Div. 117.

Fall of upper berth in stateroom. *Horn v. New Jersey Steamboat Co.*, 23 App. Div. 303.

Rear end collision of street cars. *Anderson v. Brooklyn Heights R. Co.*, 32 App. Div. 266.

There must be some evidence of a defective condition of defendant's track to cast upon it the burden of showing that it was not guilty of negligence. *Hoffman v. Third Ave. R. Co.*, 45 App. Div. 586.

See, also, *West Chicago Street R. Co. v. Kennedy*, 66 Ill. App. 244; *Calumet Electric S. R. Co. v. Jennings*, 83 Ill. App. 612.

Unexplained fall of baggage on deck of ship. *Horowitz v. Hamburg-American P. Co.*, 18 Misc. 24.

Unexplained stopping of a car. *Langley v. Metropolitan Street R. Co.*, 36 Misc. 804.

Broken rail. *Morgan v. St. Louis &c. R. Co.*, 34 Ark. 613.

Collision. *Green v. Pacific Lumber Co.*, 130 Cal. 435; *Gardner v. Waycross Air-Line R. Co.*, 97 Ga. 482; *Baltimore &c. R. Co. v. Hausman*, (Ky.) 54 S. W. Rep. 841; *Copson v. New York &c. R. Co.*, 171 Mass. 233; *Hamilton v. Great Falls S. R. Co.*, 17 Mont. 334, 351; *Iron &c. R. Co. v. Mowery*, 36 Oh. St. 418.

Upsetting of a stage coach. *Wall v. Livezey*, 6 Col. 465.

Derailment. *Electric R. Co. v. Carson*, 98 Ga. 652; *Roberts v. Chicago &c. R. Co.*, 78 Ill. App. 526; *Chicago &c. R. Co. v. Grimm*, 25 Ind. App. 494; *Atchison &c. R. Co. v. Elder*, 57 Kan. 312; *Meador v. Missouri P. R. Co.*, (Kan.) 61 Pac. Rep. 442; s. c., 62 Kan. 865; *Felton v. Holbrook*, (Ky.) 56 S. W. Rep. 506; *Chicago &c. R. Co. v. Young*, 58 Neb. 678; *Chicago &c. R. Co. v. Zernecke*, (Neb.) 82 N. W. Rep. 26; *Bergen County Traction Co. v. Demarest*, 62 N. J. L. 755; *McNeill v. Durham &c. R. Co.*, 130 N. C. 256; *Texas &c. R. Co. v. Suggs*, 62 Tex. 323; *Texas &c. R. Co. v. Kirk*, id. 227; *Pittsburg &c. R. Co. v. Williams*, 74 Ind. 462; *Cleveland R. Co. v. Newall*, 104 id. 264; *Feital v. R. Co.*, 11 Allen, 398; *Walker v. R. Co.*, 63 Barr. 260; *Albion Lumber Co. v. De Nobra*, 72 Fed. Rep. 739.

Falling of a gangplank on passengers. *Eagle &c. Co. v. Defries*, 94 Ill. 598.

Being caught between cars while alighting, where the train had stopped to allow plaintiff to water his cattle. *New York &c. R. Co. v. Blumenthal*, 160 Ill. 40.

Fact that car jerked so violently, in passing over an obstruction, as to throw plaintiff from her seat. *North Chicago &c. R. Co. v. Schwartz*, 82 Ill. App. 493.

Fall of lantern while train was standing. *Cramblet v. Chicago &c. R. Co.*, 82 Ill. App. 542.

An accident to appliance on a train wholly within the control of the defendant. *Chicago &c. R. Co. v. Morse*, 98 Ill. App. 662; *Choquette v. Southern R. Co.*, 80 Mo. App. 515.

Falling of a bridge. *Redford &c. R. Co. v. Rainbolt*, 99 Ind. 551.

Sudden starting of car after coming to full stop. *McDevitt v. Des Moines &c. R. Co.*, 99 Iowa, 141.

A defect in anything a carrier is bound to supply. *Davis v. Paducah &c. R. Co.*, (Ky.) 68 S. W. Rep. 140; *Whalen v. Consolidated Traction Co.*, 61 N. J. L. 606.

Fact that passenger was drowned in an attempt to convey her ashore. *La Blanc v. Sweet*, 107 La. 355.

Fall of a lamp shade injuring plaintiff, was caused by the insufficiency of the fixture. *White v. Boston &c. R. Co.*, 144 Mass. 404.

See, however, *Kleimenhagan v. Chicago &c. R. Co.*, 65 Wis. 66; *Haspes v. Chicago &c. R. Co.*, 29 Fed. Rep. 763.

Train of cars running down upon a wharf, whereon passengers were landing from a boat. *Malensten v. Marquette &c. R. Co.*, 49 Mich. 94.

Sudden jerking of street car such as to injure a passenger. *Dougherty v. Mo. &c. R. Co.*, 81 Mo. 325.

Broken paddle wheel. *Yerkes v. Keokuk &c. Co.*, 7 Mo. App. 265.

Extraordinary jerk or lurch of car. *Consol. Traction Co. v. Thalheimer*, 59 N. J. L. 474; *Scott v. Bergen County Traction Co.*, 63 N. J. L. 407; *Burr v. Pennsylvania R. Co.*, 64 N. J. L. 30.

Loss of money in a sleeping car. *Kates v. Pullman Palace Car Co.*, 95 Ga. 810.

Injury by passing train while riding in usual position. *Chicago &c. R. Co. v. Rood*, 62 Ill. App. 556.

Fact that plaintiff was struck by the driver in using his whip. *Sparks v. Citizens' Coach Co.*, 68 N. J. L. 365.

Washing away of embankment of railway. *Phila. &c. R. Co. v. Anderson*, 94 Pa. St. 351.

Breakage of a trolley pole while subjected to its ordinary uses. *Keator v. Scranton Traction Co.*, 191 Pa. St. 102.

Defect in the roadway. *McCafferty v. Pennsylvania R. Co.*, 193 Pa. St. 339.

Fact that a freight train separated and the two portions collided. *Steele v. Southern R. Co.*, 55 S. C. 389.

Escape of a redhot cinder. *Texas Midland R. Co. v. Jumper*, (Tex. Civ. App.) 60 S. W. Rep. 797.

Breakage of draw bar while a train is running down a steep grade. *Thomas v. Cincinnati &c. R. Co.*, 91 Fed. Rep. 206.

Collision of separated portions of a train with such force as to throw plaintiff from her seat. *Southern R. Co. v. Dawson*, 98 Va. 577.

Tipping over of a bucket in the removal of ore from a vessel. *Cummings v. National Furnace Co.*, 60 Wis. 603.

Injury caused by other acts of carrier's. *McCurrie v. Southern P. Co.*, 122 Cal. 558; *Bosqui v. Sutro R. Co.*, 131 Cal. 390; *West Chicago &c. R. Co. v. Peters*, 196 Ill. 298; *Illinois C. R. Co. v. Beebe*, 69 Ill. App. 363; *Calumet E. S. R. Co. v. Jennings*, 83 id. 612; *Memphis &c. R. Co. v. McCool*, 83 Ind. 392; *Terre Haute &c. R. Co. v. Sheeks*, 155 id. 74; *Shuber v. Omaha &c. R. Co.*, 87 Mo. App. 618; *Whitney v. New York &c. R. Co.*, 102 Fed. Rep. 850.

Not raised by proof of:

Running a car around a curve in an ordinary manner. *Wilder v. Metropolitan Street R. Co.*, 10 App. Div. 364; s. c. aff'd, 161 N. Y. 665; *Poulsen v. Nassau Electric R. Co.*, 18 App. Div. 221.

Collision between cars of different lines. *Falker v. Third Ave. R. Co.*, 38 App. Div. 49; *Phila. &c. R. Co. v. Boyer*, 91 Pa. St. 91.

Plaintiff is not presumed guilty of contributory negligence. Defendant must establish that. *McDonald v. Montgomery S. R. Co.*, 110 Ala. 161.

Collision between car and truck. *Harrison v. Sutter Street R. Co.*, 134 Cal. 459; s. c., 55 L. R. A. 608.

An accident, not shown to be due to an appliance on a train. *Denver &c. R. Co. v. Fotheringham*, (Colo. App.) 68 Pac. Rep. 978.

A lurch or jerk, not shown to have been extraordinary or unusual. *Adams v. Washington &c. R. Co.*, 9 App. D. C. 26.

Unusually violent jerk, so as to permit inference of gross negligence to counterbalance contributory negligence. *Williams v. Louisville &c. R. Co.*, (Ky.) 45 S. W. Rep. 71.

Injury from cause not shown to have been within defendant's control. *Chicago &c. R. Co. v. Rood*, 163 Ill. 477; *Chicago &c. R. Co. v. Catlin*, 70 Ill. App. 97; *Elwood v. Chicago &c. R. Co.*, 90 id. 397; *Jarrell v. Charleston &c. R. Co.*, (S. C.) 36 S. E. Rep. 910; *Spencer v. Chicago &c. R. Co.*, (Wis.) 81 N. W. Rep. 407.

Injury to passenger in the act of boarding a train. *Illinois C. R. Co. v. Hobbs*, 58 Ill. App. 130.

Facts pointing as strongly to contributory negligence as to negligence. *Dressler v. Citizens' Street R. Co.*, 19 Ind. App. 383; *Ellis v. Leonard*, 107 Iowa, 487; *McLane v. Perkins*, 92 Me. 39; *Mt. Adams R. Co. v.*

Isaacs, 18 Oh. C. C. 177; Harrington v. Eureka Hill Min. Co., 17 Utah, 300; Silcock v. Rio Grande &c. R. Co., (Utah) 61 Pac. Rep. 565; Southern R. Co. v. Bruce, 97 Va. 92; Richmond v. Leaker, (Va.) 37 S. E. Rep. 348.

Or to inevitable accident. *St. Louis &c. R. Co. v. Burrows*, (Kan.) 61 Pac. Rep. 439.

Fact of injury, where cause unknown. *Benedict v. Potts*, 88 Md. 52.

Jolt of an electric car, passenger being on steps at the time. *Etson v. Ft. Wayne &c. R. Co.*, 110 Mich. 494; *Bartley v. Metropolitan Street R. Co.*, 148 Mo. 124.

Fall from a street car. *Paynter v. Bridgeton &c. R. Co.*, (N. J. L.) 52 Atl. Rep. 367.

That a passenger in a sleeping car lost money while asleep. *Fall River &c. R. Co. v. Pullman Palace Car Co.*, 6 Oh. D. 85.

Ejection from a car without proof of right to passage thereon. *Central &c. R. Co. v. Cannon*, 106 Ga. 828.

(b). ARISING IN PERFORMANCE OF OTHER DUTIES.

Raised by proof of:

Loss of goods while in possession of a bailee. *Onderkirk v. C. N. Bank*, 119 N. Y. 263, and cases there cited. *Fairfax v. N. Y. C. R. Co.*, 67 N. Y. 11; but not when loss arose from fire. *Stewart v. Stone*, 127 N. Y. 500.*

Return of article by bailee in an injured condition without explanation. *Cummings v. Wood*, 44 Ill. 416.

Logan v. Matthews, 6 Barr. 416; *Bush v. Miller*, 13 id. 481; Story on Bailments, sec. 410.

Evidence of a deposit, demand or return and refusal raise presumption of liability. *Wiser v. Chesley*, 53 Mo. 547.

Delivery of the article in good condition and failure to return it upon demand. *Rayl v. Kreilich*, 74 Mo. App. 246; *Hadley v. Orchard*, 77 id. 141.

Failure after reasonable time to account for money delivered to a person to transfer to another. *Graves v. Tichnor*, 6 N. H. 537.

Not raised by proof of:

Loss of horse while in the barn of another. *Stoddard v. Brazell*, 92 Hun, 607.

Loss of a bailment, except in case of an innkeeper and common carrier of goods. *Wharton on Evidence* sec. 422.

Citing *Adams v. Carlisle*, 21 Pickering, 46; *Carsley v. Whites*, id. 254; *Newton v. Pope*, 1 Conn. 109.

* NOTE. See, also, "Bailments," *ante*, p. 97.

Destruction of the goods in the hands of warehouseman. *Liberty Ins. Co. v. Central Vt. R. Co.*, 19 App. Div. 509.

Death of race horse while in hands of trainer. *Casey v. Donovan*, 65 Mo. App. 521.

(c). ARISING FROM NATURE OF THE ACT.

Raised by proof of :

Fall of an elevator. *Griffen v. Manice*, 166 N. Y. 188; rev'g s. c., 47 App. Div. 70; *Fairbanks Canning Co. v. Innes*, 24 Ill. App. 33; s. c. aff'd, 125 Ill. 410; *Hartford Deposit Co. v. Sollit*, 172 Ill. 222; aff'g s. c., 70 Ill. App. 166; *Ellis v. Waldron*, 19 R. I. 369.

Blasting upon land so as to cast rocks upon adjoining land doing injury. The action was founded on trespass. *Hay v. The Cohoes Company*, 2 N. Y. 159.

This case is not regarded as authoritative.

The falling of dangerous object, a house, upon person in a public street. *Mullen v. St. John*, 57 N. Y. 567.

Fact that cylinder burst and fell into the street. *Gall v. Manhattan R. Co.*, 24 N. Y. S. Rep. 24; s. c. aff'd, 125 N. Y. 714.

Fall into the street of a bolt from an elevated railway. *Volkmar v. Manhattan R. Co.*, 134 N. Y. 418; *Metropolitan West Side El. R. Co. v. McDonough*, 87 Ill. App. 31.

Accumulation of water upon one's premises and the breaking away of same. *Pixley v. Clark*, 35 N. Y. 520.

Fall of brick from house in course of construction into street. *Guldsseth v. Carlin*, 19 App. Div. 588; *Sheridan v. Foley*, 58 N. J. L. 230.

Fall of boom of derrick. *Reed v. McCord*, 18 App. Div. 381.

Fall of chisel from a structure into street. *Calahan v. Cochren*, 2 N. Y. S. Rep. 583.

Fact that the team run against was standing at the extreme side of the street and there was plenty of room to pass. *Axlebrood v. Rosen*, 21 Misc. 352.

Fact that horse ran on sidewalk of a public street. *Gannon v. Wilson*, 69 Cal. 541.

Fact that team ran away for third time. *Thane v. Douglass*, 102 Tenn. 307.

Fall of live wire into street. *Jones v. Union R. Co.*, 18 App. Div. 267; *Denver Consol. Electric Co. v. Simpson*, 21 Colo. 371; *Gannon v. Laclede Gas Co.*, 145 Mo. 502.

Escape of electricity injuring horses in street. *Trenton P. R. Co. v. Cooper*, 60 N. J. L. 219.

Receiving shock from handrail of car. *Dallas Consolidated &c. Co. v. Broadhurst Traction Co.*, (Tex. Civ. App.) 68 S. W. Rep. 315.

Scattering sparks and coals along the track by engines, in such quantity as to endanger abutting property. *Field v. N. Y. Central R. Co.*, 32 N. Y. 346.

Flinn v. N. Y. Cent. R. Co., 67 Hun, 637.

Fire set by sparks from locomotive. *Peck v. New York &c. R. Co.*, 165 N. Y. 347; *Cleveland &c. R. Co. v. Case*, 71 Ill. App. 459; *Chicago &c. R. Co. v. American Steamboat Co.*, 91 id. 635; *Edwards v. Bonner & Campbell*, 12 Tex. Civ. App. 237; *Galveston &c. R. Co. v. Burnett*, (Tex. Civ. App.) 37 S. W. Rep. 779; *Highland v. Houston &c. R. Co.*, 65 id. 649; *Patteson v. Chesapeake &c. R. Co.*, 94 Va. 16; *Kimball v. Borden*, 95 Va. 203; *McCullen v. Chicago &c. R. Co.*, 101 Fed. Rep. 66.

Fire originating shortly after the passage of a locomotive having a defective spark arrester. *Louisville &c. R. Co. v. Miller*, 109 Ala. 500.

Fall of a platform. *Green v. Banta*, 97 N. Y. 627; aff'g 48 N. Y. Super. Ct. 156.

The unexplained breaking down of a scaffold upon which the servant is at work makes out a case sufficiently strong to require a submission to the jury of the question of the master's negligence in furnishing a safe place for the work. *Solarz v. The Manhattan R. Co.*, 8 Misc. 656.

Fall of bins for the holding of crushed stones. *Hastorf v. Hudson River &c. Co.*, 110 Fed. Rep. 669.

Fall of building. *Giles v. Diamond &c. Co.* (Del.) 6 Cent. 867.

Fall of a wall. *Mulcaivies v. Jamesville*, 67 Wis. 24.

Serious disrepair of tracks at switch, whereby a servant was injured. *Ind., B. & C. R. Co. v. Bonehart*, (Ind.) 13 West. 425.

Breaking of a shank to a ladle for carrying molten iron. *Coleman v. Mechanics' Iron Foundry Co.*, 168 Mass. 254.

Fall of a drum used by a contractor repairing the room where plaintiff worked, injuring her. *Sackewitz v. American &c. Co.*, 78 Mo. App. 144.

Derailment of a train, though injury happened through the negligence of a fellow servant. *Wright v. Southern R. Co.*, 127 N. C. 225.

Defect in track at the point of derailment. *International &c. R. Co. v. Johnson*, 23 Tex. Civ. App. 160.

Stevedore, while about his usual work, fell through the hatch used for storing cargo. *The Gladiolas*, 21 Fed. Rep. 417.

Fact that the bonnet on the service valve in a pipe of apparatus for furnishing steam to a house, blew off between Saturday and Sunday whereby a tenant's goods were injured. The action was against the steam company putting in the plant. *Reiss v. N. Y. S. Co.*, 103 N. Y. 107.

Breaking of bitt of tug resulting in loss of two tows. *Parker v. New York*, 9 App. Div. 518.

Not raised by proof of:

Cinder from locomotive on an elevated railway injuring eye of passerby in the street. *Weidmer v. N. Y. &c. R. Co.*, 114 N. Y. 462, rev'g 41 Hun, 284; *Van Orden v. Acken*, 28 App. Div. 160.

Fire escaping from private premises and spreading to the premises of another. *Hines v. Barton*, 25 N. Y. 544.

Fires from locomotive igniting neighboring property. *Collins v. N. Y. C. R. Co.*, 71 N. Y. 609, aff'g 5 Hun, 503.

See *Fires &c. post*, p. 1255.

Fire set by locomotive with proper spark arrester. *Lake Erie &c. R. Co. v. Gossard*, 14 Ind. App. 244.

The clamp of an elevator falling and injuring employé. *Lawson v. Merrill*, 69 Hun, 278.

The running away of a horse. *Butten v. Frink*, 51 Conn. 342; *Rowe v. Such*, 134 Cal. 573; *Creamer v. McIlvain*, 89 Md. 343; *Hart v. Washington Park Club*, 157 Ill. 9.

Collision of car with truck. *Guilloz v. Ft. Wayne &c. R. Co.*, 108 Mich. 41.

Collision of cars of different lines. *Bailey v. Citizens' R. Co.*, 152 Mo. 449.

Fall of ice from ice house upon one loading it. *Allen v. Banks*, 7 App. Div. 405.

Fall of iron trusses from roof. *May v. Iron Bridge Co.*, 43 App. Div. 569.

Fall of a door of a freight car on a person passing along the street. *Case v. Chicago &c. R. Co.*, 64 Iowa, 762.

Fall of gas holder. *Wodrocicka v. Consolidated Gas Co.*, 29 Misc. 637.

Fact that bridge was carried away by an extraordinary flood. *Livezey v. Philadelphia*, 64 Pa. St. 106.

Breaking of a trolley wire. *Kepner v. Harrisburg Traction Co.*, 183 Pa. St. 24.

Selling a dangerous for a harmless drug. *Howes v. Rose*, 13 Ind. App. 674.

Fact that an axe flew off its handle while cutting bale wire. *Stearns v. Ontario Spinning Co.*, 184 Pa. St. 519.

Fall of something from above and knocking a servant out of a bucket while it was descending into a deep shaft; where afterwards was found broken the cable that supported the bucket. *Dobbins v. Brown*, 119 N. Y. 188.

Car was out of order so as to jump up and down in motion, and therefore parted from the engine through a coupling pin breaking, and soon after the train had been recoupled and proceeded, a fireman was missed from locomotive and found dead about where the train parted. *Borden v. D., L. & W. R. Co.*, 131 N. Y. 671.

Fall of employé from a hand car while crossing employer's bridge. *Jones v. Alabama Min. R. Co.*, 107 Ala. 400.

Obstruction on the track of a railroad. *Denver &c. R. Co. v. McComas*, 7 Colo. App. 121.

Injury to servant by a defective appliance. *Donovan v. Harlan &c. Co.*, 2 Penn. (Del.) 190; *Green v. Sansom*, 41 Fla. 94; *Railey v. Garbutt & Co.*, 112 Ga. 288; *The Lydia M. Deering*, 97 Fed. Rep. 971; *Hodges v. Kimball*, 104 id. 745; *Terre Haute &c. R. Co. v. Seeper*, 60 Ill. App. 194; *Wabash R. Co. v. Farrell*, 79 id. 508; *Viles v. Stantes*, 83 id. 398.

Injury to servant by act of fellow servant. *Chicago &c. R. Co. v. Myers*, 83 Ill. App. 469.

Fall of pin from passing tender striking plaintiff 10 feet distant. *Cleveland &c. R. Co. v. Berry*, 152 Ind. 607.

Derailment of car. *Brownfield v. Chicago &c. R. Co.*, 107 Iowa, 254; *Smith v. Louisiana &c. R. Co.*, 49 La. Ann. 1325.

Mere happening of the accident. *Missouri &c. R. Co. v. Crowder*, (Tex. Civ. App.) 55 S. W. Rep. 380; *Pieschel v. Miner*, 30 Misc. 301; *Patton v. Texas &c. R. Co.*, 179 U. S. 658; *Higgins v. Fanning*, 195 Pa. St. 599.

Mere breaking of a bolt in a hoisting machine, especially where it has been used some time with severer strains. *Spille v. Wisconsin B. &c. Co.*, 105 Wis. 340.

Giving way of a bracket of a staging. *Brady v. Norcross*, 172 Mass. 331.

Defects were found to exist in the car after the accident. *Oglesby v. Missouri &c. R. Co.*, 150 Mo. 137.

Breaking of a coupling pin. *Moore v. Jones*, 15 Tex. Civ. App. 391.

Where plaintiff was standing on a skidway safe from danger when the cars were properly loaded. *Missouri &c. R. Co. v. Scarborough*, (Tex. Civ. App.) 68 S. W. Rep. 196.

Finding of an employ  dead in a hole filled with water, in defendant's factory. *Soverison v. Menasha &c. R. Co.*, 56 Wis. 338.

Finding of body beside railroad tracks. *Welsh v. Erie &c. R. Co.*, 181 Pa. St. 461; *Bryant v. Illinois C. R. Co.*, (La.) 22 South. 799.

Explosion on one's own premises, whereby injury occurred to a person or property on neighboring premises. *Cosulich v. Standard Oil Co.*, 122 N. Y. 123.

Losee v. Buchanan, 51 N. Y. 476, rev'g 61 Barb. 86; and distinguishing *Hay v. The Cohoes Co.*, 2 N. Y. 159.

Explosion of a boiler and injury to one repairing and testing it. *Olive v. Whitney Marble Co.*, 103 N. Y. 292.

Explosion of a boiler. *Young v. Bransford*, (Tenn.) 12 Lea, 232.

Huff v. Austin, 46 Ohio St. 387; *Spencer v. Campbell*, 9 Watts. & S. 32; *Kirby v. Delaware &c. C. Co.*, 20 App. Div. 473; *Brunner v. Blaisdell*, 170 Pa. St. 25; *Baron v. Reading Iron Co.*, (Pa.) 51 Atl. Rep. 979; *Vieth v. Hope &c. Co.*, (W. Va.) 41 S. E. Rep. 187.

The mere keeping of explosives. *Laftin &c. Co. v. Tearney*, (Ill.) 21 N. E. 516.

Explosion of dynamite on a car in defendant's yard. *Walker v. C. R. I. & P. R. Co.*, 71 Iowa, 658.

Unexplained explosion in a closet connected with a sewer. *Kramer v. Fay*, 4 Oh. N. P. 233.

Bursting of a flywheel in satisfactory use for two years. *Piehl v. Albany R. Co.*, 30 App. Div. 166; s. c. aff'd, 162 N. Y. 617.

Injury to one on railroad track. *Atchison &c. R. Co. v. McFarland*, 2 Kan. App. 662; *Anderson v. Union &c. R. Co.*, 8 Colo. App. 521; *Tucker v. International &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 914.

Fall from car while in tunnel of an amusement railway. *Benedick v. Potts*, 88 Md. 52.

III. Presumptions of and from Ownership.

The fact that the defendant owned horses, that did injury by running away, is sufficient evidence, that those in charge of the horses were his servants, although at the time apparently engaged in the business of another whose name, as carrying on such business, was painted on the wagon. *Norris v. Kohler*, 41 N. Y. 42, rev'g nonsuit.

Action for negligent use of a dredge against two parties; as to one the court said: *Hinds v. Barton*, 25 N. Y. 544, aff'g judg't for pl'ff, "There was certainly some evidence to go to the jury that he was as liable as the other defendant. Previous to this burning he and the other defendant had used and worked this dredge as partners, and at the time of the fire it was being used in the same way. No change in the relations of the defendant Richardson to the machine having been shown, the presumption would be, from the circumstances, that they continued the same at the time the plaintiff's buildings were consumed. This presumption is strengthened by the proof of one of the employes on the machine, working there, as I understand the case, at the time, that he was so employed by the defendant Richardson. This proof was sufficient to send the case to the jury."

Plaintiff proved that the firm in which "K." defendant's testator was a partner, was engaged in the brewery business; that the truck had the firm name on it; that many trucks of the same kind were employed in its business; that the truck was loaded with ale barrels at the time of the accident, and was engaged in delivering ale from the brewery of the firm. Held, the evidence was sufficient to authorize a finding that the truck belonged to defendant's firm, and that the driver was in its employ when the accident happened. *Seaman v. Koehler*, 122 N. Y. 646.

In the absence of evidence the presumption is that the party in possession is the owner and that a sign "Flat to Let" was displayed through his authority. *Fogarty v. Bogert*, 43 App. Div. 43.

The complaint alleged that the appellant-defendant was, at the time of plaintiff's injury, engaged in the brewing business in the city of New York, and owned trucks and horses, and employed drivers and assistants in and about its business. This was not denied by answer, and must, therefore, be taken as ad-

mitted (Code Civ. Proc. sec. 522); and the admission, with the evidence that the truck from which the ale was being delivered at the time of the plaintiff's injury, bore the name of "O'Reilly, Skelly & Fogarty," coupled with appellant-defendant's refusal to disprove its ownership thereof, and the employment of the men assisting in the delivery of the ale, on the trial, was sufficient to sustain a finding that such was the property of the appellant-defendant, and the men its servants and employes. (*Seaman v. Koehler*, 122 N. Y. 646; *Wylde v. Northern R. Co.*, 53 id. 156.) *Tuomey v. O'Reilly, Skelly & Fogarty Co.*, 3 Misc. 302, 307. (N. Y. Com. Pleas.)

An allegation that the wagon which caused the accident belonged to the defendants and was driven by one of their agents or servants is sufficient to charge them, although it does not otherwise allege that the servant was then engaged in the defendant's business. *Birnbaum v. Lord*, 7 Misc. 493. (New York Common Pleas.)

Presumption as to an overflow of water from an upper floor arises against the party in exclusive possession thereof. *Martin v. Coleman*, 14 Misc. 505; *Greco v. Bernheimer*, 17 Misc. 592.

It will not be presumed that a landlord in conveying the premises included a right of action then existing against a tenant. *Wilder v. Moffatt*, 33 Misc. 777.

The plaintiff fell over a scantling one end of which rested upon a door-sill of the house of the defendant. To hold the defendant, proof was required that he placed the obstruction, or knew of it. *Ackerly v. Sullivan*, 34 La. Ann. 1156.

Admission of ownership of a road together with the fact that all the engines bear its name, raised the presumption of ownership on the part of defendant. *Bush v. Southern R. Co.*, 63 S. C. 96.

Tiles negligently piled were in the control and custody of the defendant, but this did not prove that he owned the same. *Palmer v. St. Albans*, 56 Vt. 664.

IV. Presumptions Respecting Personal Actions.

There is a presumption:

That all creatures are desirous of preserving life and safety. *Morrison v. New York Central & C. R. Co.*, 63 N. Y. 643.

See, *Shaw v. Jewett & C. Co.*, 86 N. Y. 616; *Warner v. N. Y. Cent. R. Co.*, 44 id. 471.

Of disposition to avoid injury. *N. Y. C. R. Co. v. State*, 31 Md. 357.

As to love of life and instinct of self preservation. *Cleveland & C. R. Co. v. Rowan*, 66 Pa. St. 393.

Of accident and not intention in case of death from a bullet. *Travelers' Ins. Co. v. Nicklas*, 88 Md. 470.

That lookout, stationed at the rear of a train, did his duty. *Johnson v. Rio Grande & C. R. Co.*, 19 Utah, 77.

That a traveler did stop, look and listen upon crossing a railroad track. *Mynning v. Detroit R. Co.*, 64 Mich. 93.

Chicago City R. Co. v. Fennimore, 99 Ill. App. 174; Atchison &c. R. Co., v. Hill, 57 Kan. 139; Louisville &c. R. Co. v. Clark, (Ky.) 49 S. W. Rep. 323; Chesapeake &c. R. Co. v. Steele, 84 Fed. Rep. 93; McVey v. Chesapeake &c. R. Co., 46 W. Va. 111.

So as to a railroad employé. *Texas &c. R. Co. v. Gentry*, 163 U. S. 353.

And is chargeable with knowledge of what he could have seen if he had looked. *Herbert v. Southern R. Co.*, 121 Cal. 227; *Lamport v. Lake Shore &c. R. Co.*, 142 Ind. 269.

That servant of a railroad company exercised due care. *Cameron v. Great Northern R. Co.*, 8 N. D. 124.*

That the way is clear for passage at a crossing. *Martin v. Baltimore &c. R. Co.*, 2 Marv. (Del.) 123.

That habit of intoxication continued. *Lane v. Missouri &c. R. Co.*, 132 Mo. 4.

That openings left in a train at a crossing are for the convenience of the road and not for the public. *Weldon v. Philadelphia &c. R. Co.*, (Del.) 43 Atl. Rep. 156.

That servant knew of master's rules respecting his duties. *Galveston &c. R. Co. v. Gormley*, 91 Tex. 393.

And of defects, it was his duty to look for. *Pittsburg &c. R. Co. v. Ackworth*, 10 Oh. C. C. 583.

Of reasonableness in selection of a physician, who was a university graduate of 18 years' practice. *Reed v. Detroit*, 108 Mich. 224.

That a party took a train with a lawful intent. *Inness v. Boston &c. R. Co.*, 168 Mass. 433.

There is no presumption:

That a person is free from contributory negligence. *Warner v. N. Y. C. R. Co.*, 44 N. Y. 465; *McDonald v. L. I. R. Co.*, 116 id. 546, 550; *Jencks v. Lehigh Valley R. Co.*, 33 App. Div. 635; *Johnson v. Brooklyn &c. R. Co.*, 34 id. 271; *Bell v. Clarion*, (Ia.) 84 N. W. Rep. 962.

That person exposed to danger will exercise care and prudence for his own safety, so as to alone justify a finding of absence of contributory negligence. *Wiwiroski v. L. S. & M. S. R. Co.*, 124 N. Y. 420; *Riordan v. Ocean Steamship Co.*, id. 655; *Tucker v. N. Y. Cent. R. Co.*, 124 N. Y. 308.

That a passenger was acting with care. *Bonce v. Dubuque &c. S. Co.*, 53 Iowa, 278; *Junction City v. Blades*, 1 Kan. App. 85.

That a boy riding on a car was a trespasser. *Jackson v. St. Paul C. R. Co.*, 74 Minn. 48.

* NOTE.—See also "Crossings," *ante*, p. 733.

That a person was negligent. *Reegan v. Western R. Co.*, 8 N. Y. 175; *Lyndsay v. Conn. &c. R. Co.*, 27 Vt. 643; *Texas &c. R. Co. v. Gentry*, 163 U. S. 353.

That servant was violating his instructions. *Morbey v. Chicago &c. R. Co.*, 105 Iowa, 46.

That servant knew the danger of work with which he was not familiar. *Hillsboro Oil Co. v. White*, (Tex. Civ. App.) 54 S. W. Rep. 432.

That a person will violate the law. *International &c. Co. v. Gray*, 65 Tex. 32.

That a gas lamp in a city is lighted at night. *Fisher v. Rankin*, 78 Hun, 407.

Of performance of duty where the facts show inattention. *Central Trust Co. v. East Tennessee &c. R. Co.*, 70 Fed. Rep. 764.

That intermittent insanity continued. *State v. Hayward*, 62 Minn. 474.

That a contract would have been performed had the telegram been delivered. *Brewster v. Western U. Teleg. Co.*, 65 Ark. 537.

That deceased became unconscious before the minister telegraphed for arrived. *Western U. Teleg. Co. v. Robinson*, 97 Tenn. 638.

V. How Presumption of Negligence May Be Overcome.

It is for the jury to say and determine whether the evidence rebuts the presumption of negligence. *Kenny v. Hannibal &c. R. Co.*, 80 Mo. 573; *Eldridge v. Minn. &c. R. Co.*, 32 Minn. 223.

Overcome by proof:

That due care was in fact exercised. *Stoodt v. Detroit &c. R. Co.*, (Mich.) 83 N. W. 26; *Newberger Cotton Co. v. Illinois &c. R. Co.*, 75 Miss. 303; *Lachner Bros. v. Adams Exp. Co.*, 72 Mo. App. 13; *Mitchell v. Carolina C. R. Co.*, 124 N. C. 236; *Toledo &c. R. Co. v. Amboch*, 10 Oh. C. C. 490; *St. Louis &c. R. Co. v. Martin*, (Tex. Civ. App.) 35 S. W. Rep. 28; *International &c. R. Co. v. Johnson*, 23 Tex. Civ. App. 160; *Thomas v. Cincinnati &c. R. Co.*, 91 Fed. Rep. 206; *Whitney v. New York &c. R. Co.*, 102 id. 850.

Proper equipment, inspection and management of engine and cars. *Cleveland &c. R. Co. v. Case*, 71 Ill. App. 459; *Lockwood v. Chicago &c. R. Co.*, 55 Wis. 50; *Menomonie River S. & D. Co. v. Milwaukee &c. R. Co.*, 91 Wis. 447; *Patteson v. Chesapeake &c. R. Co.*, 94 Va. 16; *Kimball v. Borden*, 95 Va. 203; *Atchison &c. R. Co. v. Ayres*, 56 Kan. 176; *Savannah &c. R. Co. v. Tiedeman*, 39 Fla. 196; *Great Northern R. Co. v. Coats*, 115 Fed. Rep. 452; *Illinois C. R. Co. v. Barnett*, (Ky.) 66 S. W. Rep. 9; *Rogers v. Kansas City &c. R. Co.*, 52

Neb. 86; Texas &c. R. Co. v. Jumper, (Tex. Civ. App.) 60 S. W. Rep. 797; Edwards v. Bonner, 12 Tex. Civ. App. 237; Galveston &c. R. Co. v. Burnett, (Tex. Civ. App.) 37 S. W. Rep. 719; Arkansas &c. R. Co. v. Griffith, 62 Ark. 491; electric wire, Snyder v. Wheeling Electrical Co., 43 W. Va. 661.

That the case is covered by a stipulation for exemption. *Shea v. Minneapolis &c. R. Co.*, 63 Minn. 228; *Hinton v. Eastern R. Co.*, 72 Minn. 339; *St. Louis &c. R. Co. v. Hays*, 13 Tex. Civ. App. 577; *Texas &c. R. Co. v. Payne*, 15 Tex. Civ. App. 58; *Galveston &c. R. Co. v. Efron*, 38 S. W. Rep. 639; *Houston &c. R. Co. v. Bath & Co.*, 17 Tex. Civ. App. 697.

Of the reasonableness of a stipulation in a bill of lading requiring notice of loss. *Cox v. Central Vt. R. Co.*, 170 Mass. 129.

Of other causes that might have produced the damage. *Hynes v. Hickey*, 109 Mich. 188; *Pieschel v. Miner*, 30 Misc. 301; *Parish v. Western &c. R. Co.*, 102 Ga. 285; *Texas &c. R. Co. v. Tom Green &c. Co.*, 15 Tex. Civ. App. 147.

That the negligence presumed was not the proximate cause of the accident. *Jones v. Illinois C. R. Co.*, 75 Miss. 970.

That injury to stock could not have been avoided without danger to passengers. *Faulkner v. Kean*, (Ky.) 32 S. W. Rep. 265.

That a defect in the track was caused by a trespasser without its knowledge or means of prevention. *Marcom v. Raleigh &c. R. Co.*, 126 N. C. 200.

That injury to goods shipped was by act of God. *The Majestic*, 166 U. S. 375.

That conductor used no more force than was reasonably necessary to protect himself from assault. *St. Louis &c. R. Co. v. Berger*, 64 Ark. 613.

Careful handling of a beam placed in such a position at the place where plaintiff was working as to be dangerous. *Sackewitz v. American Biscuit Man. Co.*, 78 Mo. App. 144.

Of a continuous and notorious custom to extend an invitation to ride, where presumption arose from riding on a hand car. *Willis v. Atlantic &c. R. Co.*, 120 N. C. 508.

Of freedom from defects not apparent by inspection, when presumption arose from an unusual action of a machine. *Vorbich v. Geuder &c. Co.*, 96 Wis. 277.

Condition of wires and why they were out of order, on presumption arising from failure to deliver telegram. *Western &c. Teleg. Co. v. Smith*, (Tex. Civ. App.) 46 S. W. Rep. 659.

That the track was in good condition; the break in the rail was fresh and

without flaw and resulted from frost. (This evidence does not justify a non-suit.) *Hipsley v. Kansas City R. Co.*, 88 Mo. 348.

From bursting of boiler by proof of the application of every test recognized as necessary by experts. (Every test *known* to experts need not be applied.) *Robinson v. N. Y. C. & H. R. R. Co.*, 20 Blatchf. C. C. 338.

Not overcome by proof:

Of sufficiency and skillful operation merely. *Burud v. Great Northern R. Co.*, 62 Minn. 243.

That the train was going down hill, when there was no necessity of emitting sparks. *De Camp v. Chicago &c. R. Co.*, 62 Minn. 207.

Of general guard over baggage in the possession of the railroad as a warehouseman. *Aaronson v. Pennsylvania R. Co.*, 23 Misc. 666.

As to the time, place and manner of the injury, merely. *Menner v. Delaware &c. C. Co.*, 7 Pa. Super. Ct. 135.

Of blowing out of fuse, where presumption arose from fire beneath a trolley car; as such an accident is not usually attended with such results. *Poulsen v. Nassau Electric R. Co.*, 18 App. 221.

Of inspection, where defective device, if in proper order, would have prevented injury. *O'Flaherty v. Nassau Electric R. Co.*, 34 App. Div. 74.

VI. What Is Sufficient Evidence of Negligence.

A single act of casual neglect, in one who has previously shown himself competent, careful and trustworthy, and has acquired a reputation therefor, does not, *per se*, tend to prove him careless, imprudent, or unfitted for a position requiring care and prudence, or render the corporation liable for retaining him in such position.

To justify a recovery from proof of a single former instance of negligence, it must appear not only to have been intentional, or in some way that it was a characteristic of the employé, but want of due care in the corporation in investigating the occurrence and retaining the employé in its service must also be shown. *Baulec v. N. Y. & Harlem R. Co.*, 59 N. Y. 356, *aff'd* nonsuit, s. c., 5 Lansing, 436.

From opinion.—"And if a reasonable man might infer that a switchman was careless, or acted unadvisedly and without proper caution, it does not follow that general carelessness and imprudence can be inferred from this simple act in a man as to whose conduct on other occasions there could be no imputation of negligence or inattention, or that a want of reasonable care could be inferred on the part of the corporation in retaining him. * * * It is not enough to authorize the submission of a question, as one of fact, to a jury, that there is 'some evidence. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, would not justify the judge in leaving the case to the jury.' (Per Williams, J., *Toomey v. Railway Co.*, 3

C. B. N. S. 146.) The same learned justice adds that every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. In another case it is held that a judge will not be justified in leaving the case to the jury when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant."

See "Master and Servant," *post*, 1511.

As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. *Culhane v. N. Y. C. &c. R. Co.*, 60 N. Y. 133, rev'g judg't for pl'ff. *S. P. McKeever v. N. Y. C. &c. R. Co.*, 88 id. 667, aff'g judg't for pl'ff. (See *post*, 1163.)

When the fact is, that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which it is not responsible, the plaintiff must show that the damage was produced by the former cause, and the plaintiff must fail also if it is just as probable that the damages were caused by the one as by the other, as the plaintiff is bound to make out his case by a preponderance of evidence. The jury must not be left to mere conjecture of the possibility that the damage was caused in consequence of the negligence and unskillfulness of the defendant.

Searles v. M. R. Co., 101 N. Y. 661, rev'g judg't for pl'ff.

Borden v. D. L. & W. R. Co., 131 N. Y. 671; *Dobbins v. Brown*, 119 id. 188; *Hayes v. Forty-Second &c. R. Co.*, 97 id. 259; *Grant v. Penn. &c. R. Co.*, 133 id. 657; *Taylor v. City of Y.*, 105 id. 208; *Kaveny v. City of T.*, 108 id. 577; *Nellie Flagg*, 23 Fed. Rep. 671; *Dwight v. Germania &c. Co.*, 103 id. 341, rev'g judg't for pl'ff; *Improvement Co. v. Munson*, 14 Wall. 442; *Nason v. West*, (Me.) 2 N. E. 73.

From opinion.—"The rule held by the Supreme Court of the United States is expressed by Mr. Justice Clifford in *Improvement Co. v. Munson* (14 Wall. 442), as follows: 'Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof rests.'

To the same effect are *Pleasants v. Fant*, 22 Wall. 120; *Commissioners &c. v.*

Clark, 94 U. S. 284; *Griggs v. Houston*, 104 id. 553; *Bailey v. Cleveland Rolling Mills* 21 Fed. Rep'r 159; *Witherbee v. Wasson*, 71 N. C. 451."

The mere fact that the injury might have been produced by falling from a bridge is not sufficient evidence that the person did so fall. *Gardiner v. N. Y. C. & H. R. R. Co.*, 103 N. Y. 674, rev'g judg't for pl'ff.

Tolman v. Syracuse &c. R. Co., 98 N. Y. 203.

From opinion.—"The burden of establishing affirmatively freedom from contributory negligence, may be successfully borne, though there were no eye-witness of the accident, and even although its precise cause and manner of occurrence are unknown. If, in such case, the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence of the deceased, that inference becomes possible, in addition to that which involves a careless or willful disregard of personal safety, and so a question of fact may arise to be solved by a jury, and require a choice between possible but divergent inferences.

If, on the other hand, those facts and circumstances coupled with the occurrence of the accident do not indicate or tend to establish the existence of some cause or occasion of the latter, which is inconsistent with the exercise of proper prudence and care, then the inference of negligence is the only one left to be drawn, and the burden resting upon the plaintiff is not successfully borne and a nonsuit for that reason becomes inevitable." See, *Morris v. Lake Shore &c. R. Co.*, 148 N. Y. 182.

The fact that a plow fell from a car, from which dirt and gravel was being removed by its use, and injured an employé, is not alone evidence that the defendant was negligent. *De Vau v. Pa. & N. Y. C. R. R. Co.*, 130 N. Y. 632, rev'g judg't for pl'ff.

A person was killed while delivering a safe in the defendant's elevator by the sudden starting of the same; no direct proof of the cause of the starting was given, but experts offered theories to explain the necessary cause, but these theories were not supported by the facts. No cause of action was proven. *Murphy v. Hayes*, 68 Hun, 450.

Proof of fast driving is not alone sufficient to support finding of negligence, unless the right be forbidden of law. *Keck v. Sanford*, 2 Misc. 484.

Geoghegan v. The Atlas S. S. Co., 3 Misc. 224, rev'g judg't for pl'ff.

From opinion.—"In the case before us, no one saw the accident. The only facts in evidence are: that the place was dark; that the door in the side of the vessel was open, and the vacant space insufficiently guarded by a rope; that a man was seen struggling for a moment in the water and then disappear; and that, upon a muster of the crew, the decedent was missing. Supposing him to have fallen in the sea by accident, what circumstance appears to repel an inference of his negligence? 'There is no presumption that a person exposed to danger will exercise care and prudence in regard to his own safety.' *Wiwrowski v. Lake Shore &c. R. Co.*, 124 N. Y. 420. The woman Dinsmore had just gone to the same spot, without incurring a similar casualty; who can say that proper care on decedent's part would not have averted the catastrophe? Beyond all

controversy, the evidence is of no significance in negating an inference of decedent's negligence; and the learned trial judge should, on that ground, have granted the motion to dismiss.

Indeed, conceding defendant's negligence, the action might well have miscarried for want of proof that it was the cause of plaintiff's injury. *Dobbins v. Brown*, 119 N. Y. 188; *Conlin v. Rogers*, 39 N. Y. St. Repr. 51."

Plaintiff was injured by a fall on the stairs of one of defendant's stations, alleged to have been caused by the rubber covering of one of the steps being loose. No witness testified to seeing her fall, and there was no direct proof that the rubber was loose before the accident. The complaint was properly dismissed.

The fact that a nail was found on the step below the loose rubber on the day following the accident, and another sticking upright in the rubber, is insufficient to show that they were in the same position at the time of the accident.

The fact that the nails were rusty is insufficient to justify an inference that the rubber had been out of repair for a sufficient length of time to impute notice to defendant, in the absence of proof as to the extent of the rest when they were found, that rusty nails are more likely to draw out of wood than others, or that nails driven in green wood will not rust while securely in place. *Millie v. Manhattan R. Co.*, 10 Misc. 734.

Negligence must be established by a preponderance of evidence. *Maxwell v. Wilmington C. R. Co.*, 1 Marv. (Del.) 199.

See, also, *Chiclinsky v. Hoopes & Co.*, 1 Marv. (Del.) 273; *Brown v. Wilmington C. R. Co.* (Del.) 1 Penn. 332; *Donovan v. Harlan & H. Co.*, 2 id. 190; *Adams v. Wilmington & C. R. Co.*, (Del.) 52 Atl. Rep. 264; *Tully v. Philadelphia & C. R. Co.*, (Del.) 50 id. 95; *Norfolk & C. R. Co. v. Poole*, (Va.) 40 S. E. Rep. 627.

But not to the absolute satisfaction of the jury. *San Antonio v. Lynch*, (Tex. Civ. App.) 55 S. W. Rep. 517.

Defendant is only required to meet plaintiff's *prima facie* case; he need not rebut it by a preponderance of evidence. *Gulf & C. R. Co. v. Johnson*, (Tex. Civ. App.) 67 S. W. Rep. 182.*

Where contributory negligence is a defence, it must be established by a preponderance of evidence. *Louth v. Thompson*, 1 Penn. (Del.) 149; *Stoltz v. Baltimore & C. R. Co.*, 7 Oh. Dec. 435.

So, where freedom from contributory negligence, is part of plaintiff's case. *Illinois-Mutual Wheel Co. v. Mosher*, 85 Ill. App. 240; *Stuber v. Gannon*, 98 Iowa, 228.

Negligence need not be so proved, when a statute raises a presumption of negligence on proof of injury. *Killian v. Georgia R. & C. Co.*, 97 Ga. 727.

* NOTE.—Where the evidence of plaintiff is evenly negated by that of defendant's, the testimony balancing, plaintiff cannot recover. See "Positive and Negative."

Negligence must be established by direct proof under Colo. St.; or by such circumstances as will preclude all other probabilities. *Stratton v. Union &c. R. Co.*, 7 Colo. App. 126.

Plaintiff cannot rely on a presumption, where he alleges a specific fact capable of being shown by direct proof. *Bartley v. Metropolitan Street R. Co.*, 148 Mo. 124.

Instead of relying on the presumption raised by proof of derailment of a car, plaintiff went on to show how it happened. It was held that he thereby assumed the burden of showing negligence. *Buckland v. New York &c. R. Co.*, (Mass.) 62 N. E. Rep. 955.

If there is not direct proof of negligence there must at least be facts from which a reasonable inference may be drawn. *Cleveland &c. R. Co. v. Marsh*, 63 Oh. St. 236.

See, also, *Northern Milling Co. v. Mackay*, 99 Ill. App. 57.

And such facts are sufficient. *Stapleton v. Newburgh*, 9 App. Div. 39; *Egan v. Dry Dock &c. R. Co.*, 12 id. 556; *Washington &c. R. Co. v. Grant*, 11 App. D. C. 107; *Coffman v. McCauslin*, 70 Mo. App. 34; *Sinclair v. Missouri &c. R. Co.*, id. 588; *Sontag v. O'Hare*, 73 Ill. App. 432; *Wachtel v. East St. Louis &c. R. Co.*, 77 id. 465; *Corbin v. Western E. Co.*, 78 id. 516; *Dixey v. Philadelphia Trac. Co.*, 180 Pa. St. 401.

Likewise, of freedom from contributory negligence. *Harper v. Delaware &c. R. Co.*, 22 App. Div. 273; *Illinois C. R. Co. v. Cozby*, 174 Ill. 109; aff'g s. c., 69 Ill. App. 256; *Chicago &c. R. Co. v. Gunderson*, 74 Ill. App. 356; *Pittsburg &c. R. Co. v. Parish*, (Ind. App.) 62 N. E. Rep. 514.

Must be only such inference as a reasonable man can draw. *Chicago &c. R. Co. v. Rhoades*, (Kan.) 68 Pac. Rep. 58.

Need not be so strong as to exclude every other possible inference. *Crissey &c. Co. v. Denver &c. R. Co.*, (Colo. App.) 68 Pac. Rep. 670.

Need not go beyond a preponderance of evidence however under Oh. R. S. secs. 4426-2. *Deveaux v. Clemens*, 17 Oh. C. C. 33.

Where the circumstances out of which the injury arose or is claimed to have arisen are conjectural, it is not sufficient. *State v. Philadelphia &c. R. Co.*, 60 Md. 555.

A verdict cannot rest on surmise, speculation or conjecture. *Kirby v. Delaware &c. C. Co.*, 20 App. Div. 473; *Idel v. Mitchell*, 158 N. Y. 134; rev'g s. c., 5 App. Div. 268; *Chicago &c. R. Co. v. Esten*, 178 Ill. 192; aff'g s. c., 78 Ill. App. 326; *Swenson v. Erlandson*, (Minn.) 90 N. W. Rep. 534; *Crites v. New Richmond*, 98 Wis. 55; *Omaha S. R. Co. v. Leigh*, 49 Neb. 782; *Omaha v. Bonnian*, 52 Neb. 293; *Atchison &c. R. Co. v. Alsdurf*, 68 Ill. App. 149; *Spencer v. Chicago &c. R. Co.*, 105 Wis.

311; *Pacific Coast Ss. Co. v. Bancroft-Whitney Co.*, 94 Fed. Rep. 180; *Chicago v. Wisconsin, S. Co.*, 91 id. 107.

So the fact that the mangled body of a person, not an employé, is found under a car and every indication that he slipped are not sufficient. *State v. Baltimore &c. R. Co.*, 58 Md. 221.

So it is not enough to show that the injury was the natural consequence of an act, but it must be shown that it might be reasonably expected to result. *Atkinson v. Goodrich &c. Co.*, 60 Wis. 141.

But a request to charge that proof of contributory negligence must be satisfactory and the inference strong, was objectionable. *Benedict v. Port Huron*, 124 Mich. 600.

A personal representative is not held to as strict proof of freedom from contributory negligence as the deceased would himself have been held, had he survived. *Schafer v. New York*, 154 N. Y. 466; rev'g s. c., 12 App. Div. 384.

Citing *Rodrian v. N. Y. R. Co.*, 125 N. Y. 526; *Fitzgerald v. N. Y. R. Co.*, 154 N. Y. 263.

Verdict cannot rest on evidence leaving it uncertain whether injury was the result of an accident for which defendant was not liable. *Hanrahan v. Brooklyn &c. R. Co.*, 17 App. Div. 588; *Missouri &c. R. Co. v. Johnson*, (Tex. Civ. App.) 39 S. W. Rep. 323.

A statement at the time of the accident as to how it happened is not sufficient proof thereof to permit recovery. *Patterson v. Hochster*, 38 App. Div. 398.

Plaintiff stopped, looked and listened when a few feet from the crossing and hearing nothing went on. Evidence was conflicting, but established that signals had not been given. *St. Louis &c. R. Co. v. Carwile*, (Tex. Civ. App.) 67 S. W. Rep. 160.

Testimony that a whistle was not heard though witness was in a position to hear it was sufficient to take the case to the jury. *Edwards v. Atlantic &c. R. Co.*, 129 N. C. 78; *Crane v. Michigan C. R. Co.*, 107 Mich. 511.

Evidence that a person in a position to hear did not heed the whistle is competent. *Haun v. Rio Grande R. Co.*, 22 Utah, 346.

Habit of carelessness is not established by a single act. *Galveston &c. R. Co. v. Davis*, 92 Tex. 372.

Testimony that witness had often been deceived by defendant's manner of handling its cars was too indefinite. *Agulino v. New York &c. R. Co.*, 21 R. I. 263.

A mere possibility or supposition will not justify recovery. *Sullivan v. Crysolite &c. Co.*, 21 Fed. Rep. 892; *Atchison &c. R. Co. v. Aderhold*, 58 Kan. 293.

SCINTILLA OF EVIDENCE.—A mere *scintilla* of evidence to charge the defendant with liability will not suffice to send a case to the jury.

“Formerly, it was held that, if there was what was called a *scintilla* of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to a jury; there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the parties producing it, upon whom the *onus* rests.”

Improvement Co. v. Munson, 14 Wall. 442.

See, also, *Wilds v. H. R. R. Co.*, 24 N. Y. 430; *Deyo v. N. Y. C. R. Co.*, 34 id. 14; *Baulec v. N. Y. & Harlem R. Co.*, 59 id. 366; *Claffin v. Meyer*, 75 id. 266; *Dwight v. Germania Life Ins. Co.*, 103 id. 359; *Ryan v. Manhattan R. Co.*, 121 id. 133; *Hannigan v. Lehigh &c. R. Co.*, 157 N. Y. 244; *rev'g s. c.*, 91 Hun, 300.

VII. Custom and Customary Acts.

Evidence offered to show that the plaintiff, who was killed in boarding a moving car, was accustomed to jump on a car when in motion, was inadmissible. *Eppendorf v. B. C. & N. R. Co.*, 69 N. Y. 195, *aff'g* 7 Hun 455, and *judg't* for pl'ff.

On the question of person's contributory negligence at a crossing, the evidence of a custom to keep a flagman is proper. *Casey v. N. Y. C. & H. R. Co.*, 78 N. Y. 518; *aff'g* *judg't* for pl'ff.

The custom of getting a receipt for coal delivered is proper, as bearing upon the lawful act of a deceased person, killed while making such delivery. No one saw deceased at moment of accident. *Galvin v. Mayor &c.*, 112 N. Y. 223; *rev'g* 22 J. & S. 295, and *judg't* for def't in nonsuit.

It was proper to show, in an action based upon negligence in the maintenance of telltales at a railroad bridge, the usual and ordinary distance of erecting such telltales from the bridge, on the same and possibly on other roads, and jury could consider absence of telltales on the question of the plaintiff's contributory negligence. *Wallace v. Cent. Vt. R. Co.*, 138 N. Y. 302, *rev'g* nonsuit.

Evidence of a customary manner of doing business by other persons, in the conduct of their business, was not competent to excuse the defendant's negligence, in the conduct of his business. A board blew from defendant's lumber pile and hit the plaintiff passing in the street. Evidence of the custom not to fasten lumber when a pile had once been broken was incompetent. *Wright v. Baller*, 42 Hun 77, *rev'g* *judg't* for def't; distinguishing *Barnum v. Merchant's &c. Fire Ins. Co.*, 97 N. Y. 88.

From opinion.—“A rule of law cannot be changed by a local custom. The Corn Exchange Bank v. The Nassau Bank, 91 N. Y. 74; *Higgins v. Moore*, 34 id. 417; *Wheeler v. Newbould*, 16 id. 392; *Case v. Perew*, 34 Hun, 130; *West v. Kier-*

sted, 15 W. D. 549; *Babcock v. N. Y. C. & H. R. R. Co.*, 20 id. 477; *Eastham v. Riedell*, 125 Mass. 585."

It is not competent for the plaintiff to show that his servant, through whose alleged negligence the injury is claimed, was generally careful. *Wooster v. B. & Seventh Ave. R. Co.*, 72 Hun, 197.

Evidence to show the qualifications of a man in charge of engine which inflicted the injury complained of, is proper upon the question as to whether the train was run by skillful and careful engineers. Action to recover for the burning of awning by a spark from engine. *Flynn v. Manhattan R. Co.*, 1 Misc. 188, rev'g judg't for pl'ff.

Evidence of a custom was allowed in the following instances:

Habits of a contractor, to show his competency. *Berg v. Parsons*, 90 Hun, 267.

To stop on the easterly crossing, to show the improbability of plaintiff's claim that the motorman assented to his signal to stop at the westerly crossing. *Maisels v. Dry Dock &c. R. Co.*, 16 App. Div. 391.

To load material on a floor in an uncompleted building. *Gardner v. Frederick*, 25 App. Div. 521; s. c. aff'd, 163 N. Y. 568.

To submit boilers to a certain test, as tending to show negligence in failing to do so. *Bell v. Consolidated Gas &c. Co.*, 36 App. Div. 242.

Usual method of examining securities deposited to secure a loan, to disprove negligence. *Clinton Nat. Bank v. National Park Bank*, 37 App. Div. 601.

To pass over a crossing around the end of a freight train obstructing the crossing, on the question of care required of defendant. *Leary v. Fitchburg &c. R. Co.*, 53 App. Div. 52.

Of running cars on to a switch when persons are engaged thereon examining cars. *Pa. R. Co. v. Stoelke*, 104 Ill. 201.

Frequent negligence in operating a mine cage on the question of engineer's competency. *Consolidated Coal Co. v. Seniger*, 179 Ill. 370; aff'g s. c., 79 Ill. App. 456.

Of passengers running and jumping on moving cars which defendant encouraged by assisting them. *North Chicago &c. R. Co. v. Kaspers*, 186 Ill. 246; aff'g s. c., 85 Ill. App. 316.

Habitual carelessness or prudence where there were eyewitnesses to the accident. *Illinois C. R. Co. v. Pummill*, 58 Ill. App. 83; *Chicago &c. R. Co. v. Gunderson*, 65 id. 638; *Atchison &c. R. Co. v. Alsdurf*, 68 id. 149; *Chicago &c. R. Co. v. Downey*, 85 id. 175; *Swift &c. Co. v. Zerwick*, 88 id. 558.

Of flagman in signaling at crossing. *Lingreen v. Illinois C. R. Co.*, 61 Ill. App. 174.

Not to ring engine bell, required throughout a city, within defendant's own yards, and known to plaintiff. *Chicago &c. R. Co. v. Kane*, 70 Ill. App. 676.

To provide a servant at a circular saw with a helper. *Colson v. Craver*, 80 Ill. App. 99.

Of passengers running and jumping on moving cars, on an issue of due care by them. *Kaspers v. Chicago &c. R. Co.*, 85 Ill. App. 316; s. c. aff'd, 186 Ill. 246.

To equip elevators with safety appliances. *Stover Man. Co. v. Mil-lane*, 89 Ill. App. 532.

Of constructing interlocking switches in general. *Indiana &c. R. Co. v. Bundy*, 152 Ind. 590.

In the use of different kinds of sleeves for connecting gas pipes. *Consumer's Gas &c. Co. v. Corbaley*, 14 Ind. App. 549.

To establish contributory negligence the custom of employes, or danger attending a certain course of action. *McKean v. B. &c. R. Co.*, 55 Iowa, 192.

That it was the custom of the company to block all frogs, in an action on account of an unblocked frog. *Coates v. B. &c. R. Co.*, 62 Iowa, 486.

In a mining district, of an operating company to attend to the safety of mine entry roofs. *Taylor & Star Coal Co.*, (Iowa), 81 N. W. Rep. 249.

As to manner of detecting defects in wires where shown to be the best known method. *East Tennessee Telep. Co. v. Sims*, (Ky.) 38 S. W. Rep. 131; s. c., 99 Ky. 404.

Of a railroad company to give the residents of a town on a connecting road the privilege of making a return trip on an express to make connections. *Baltimore &c. R. Co. v. Kirby*, 91 Md. 313.

Of allowing passengers to give the signal for the starting of trains. *Nichols v. Lynn &c. R. Co.*, 168 Mass. 528.

Or take the short cut across the street, plaintiff took. *Baker v. Grand Rapids*, 111 Mich. 447.

The customary speed of a train as bearing on the speed at the time of the accident. *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103.

In a warehouse, of the customary way of sending the elevator from one floor to another. *Tvedt v. Wheeler*, 70 Minn. 161.

For switchmen and brakemen engaged in coupling, etc., to walk in front of cars when moving slowly. *Rifley v. Minneapolis &c. R. Co.*, 72 Minn. 469.

That a person was accustomed to walk a track or path whereon he was injured. *Eckert v. St. Louis &c. R. Co.*, 13 Mo. App. 352; *Townley v.*

Chicago &c. R. Co., 53 Wis. 626; *Western R. Co. v. Meigs*, 74 Ga. 837; *Cassida v. Oregon &c. R. Co.*, 14 Or. 551.

Habit of plaintiff in stealing a ride and jumping off when seen by the conductor, on the question of whether or not he was, on the occasion in question, a real passenger and was thrown off by the conductor. *Preston v. Hannibal &c. R. Co.*, 132 Mo. 111.

For agents of property to look after it while vacant. *Cameron v. McNair &c. Co.*, 76 Mo. App. 366.

In an action for ejection for refusal to pay fare unless given a credit check passenger may show a custom to issue them. *Holt v. Hannibal &c. R. Co.*, 87 Mo. App. 203.

Of mounting moving cars, where the negligence in doing so is doubtful. *Prosser v. Montana C. R. Co.*, 17 Mont. 372.

To drive cautiously and carefully over a crossing, on the question of whether deceased was negligent. *Davis v. Concord &c. R. Co.*, 68 N. H. 247.

For persons to traverse defendant's track at a given point, on the question of whether it could have ascertained the presence of deceased thereat. *Mitchell v. Boston &c. R. Co.*, 68 N. H. 96.

To use a tight rope in a quarry instead of a swinging drag rope. *Belleville Stone Co. v. Comben*, 61 N. J. L. 353.

In guarding and lighting excavations in streets, where it is claimed that they were safe as they were. *Gillespie Co. v. Cumming*, 62 N. J. L. 370.

As to where defendant stopped its trains at a crossing and the use both it and the public made thereof, on the question of care required by each thereat. *Bradley v. Ohio River &c. R. Co.*, 126 N. C. 735.

To provide for the safe passage over tracks to connecting streets, where railroad claims passenger to be a trespasser. *Cincinnati &c. R. Co. v. Murphy*, 17 Oh. C. C. 223.

Of street car in making unreasonably short stops, on the question of reasonableness in a passenger's going to the steps to alight before it stopped. *Mt. Adams &c. R. Co. v. Isaacs*, 18 Oh. C. C. 177.

To stop a train upon seeing another on a side track displaying a red light, on the question of negligence in failing to do so. *Carl v. Pierce*, 20 Oh. C. C. 68.

To maintain a light on an old toll gate, on the question of negligence in failing to do the same on a new one. *Stewart v. Chester &c. R. Co.*, 3 Pa. Super. Ct. 86.

Reputation for recklessness in a fellow servant, to charge defendant with notice thereof. *Galveston &c. R. Co. v. Henning*, 39 S. W. Rep. 302; s. c. aff'd, 90 Tex. 656.

To violate rule not to carry passengers on a freight train. *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.) 40 S. W. Rep. 631.

Switchman to disprove his negligence may show that it is not customary to order switchman to make a coupling and then, without notice, order the cars struck. *Missouri &c. R. Co. v. Crane*, 13 Tex. Civ. App. 426.

As to the place at which crossing signals were given. *Galveston &c. R. Co. v. Harris*, (Tex. Civ. App.) 36 S. W. Rep. 776.

Of an employé to be negligent and disobedient, to defendant's knowledge. *Branch v. International &c. R. Co.*, 40 S. W. Rep. 208.

To signal at a crossing near the place at which deceased was killed. *Houston &c. R. Co. v. Rodican*, 15 Tex. Civ. App. 556.

As recognizing it as a public one. *Galveston &c. R. Co. v. Eaton*, (Tex. Civ. App.) 44 S. W. Rep. 562.

To provide an additional engine for a heavy train at a given point on the road. *Missouri &c. R. Co. v. Johnson*, (Tex. Civ. App.) 49 S. W. Rep. 265; aff'g s. c., 48 id. 568.

Of a brakeman to ride on the pilot of an engine to make a coupling. *San Antonio &c. R. Co. v. Beam*, (Tex. Civ. App.) 50 S. W. Rep. 411.

Defendant may show plaintiff's knowledge of its uses of a switch track and its custom of operating trains thereon. *International &c. R. Co. v. Brooks*, (Tex. Civ. App.) 54 S. W. Rep. 1056.

To board trains, to assist passengers to seats. *Texas &c. R. Co. v. Crockett*, (Tex. Civ. App.) 66 S. W. Rep. 114.

To couple cars while in motion, to show waiver of rule against it. *Wright v. Southern P. Co.*, 14 Utah, 383.

So, of going between them. *Lake Erie &c. R. Co. v. Craig*, 80 Fed. Rep. 488.

For stockmen to pass over cars while in motion, to show negligence in defendant in permitting it to be done and freedom from contributory negligence in doing it. *Nelson v. Southern P. Co.*, 18 Utah, 244.

For passengers to alight on the wrong side of the train on the question as to contributory negligence. *Illinois C. R. Co. v. Davidson*, 76 Fed. Rep. 517.

As to firing or not firing engines while passing stations. *Philadelphia &c. R. Co. v. Young*, 90 Fed. Rep. 709.

In digging trenches in the vicinity to shore the sides thereof. *Baird v. Reilly*, 92 Fed. Rep. 884.

Custom of punching holes in a spark arrester where it was without holes. *Lesser Cotton Co. v. St. Louis &c. R. Co.*, 114 Fed. Rep. 133.

In a switch yard, to chain a car before waiting for the return of a

flagman sent to notify a crew at the other end of the switch. *Pier v. Chicago &c. R. Co.*, 94 Wis. 357.

Evidence of a custom was not allowed in the following instances:

That a fireman was known as "crazy Nolan," to show a careless disposition. *Merrinan v. New York &c. R. Co.*, 13 App. Div. 439.

See, also, *Baird v. New York &c. R. Co.*, 16 App. Div. 490.

That street had been used for some time for racing purposes, but without plaintiff's knowledge, to show his negligence. *Hanrahan v. Cochran*, 12 App. Div. 91.

In the absence of evidence that conductor did not notify passengers of an approach to a curve, evidence of a custom to do so, was properly excluded. *Merrill v. Metropolitan &c. Ry. Co.*, 73 App. Div. 401.

As to lighting the headlight of an engine, on an issue as to whether it was burning. *Tennessee Coal Co. v. Hansford*, (Ala.) 28 South Rep. 45.

As to the number of servants maintained on cars, on an issue of sufficiency of manning of a particular car. *Redfield v. Oakland &c. R. Co.*, 112 Cal. 220.

As to running cars, upon the question of negligence in a given instance. *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475.

Motorman's habitual diligence, where his competency was not in issue. *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462.

That persons were accustomed to jump on trains to show contributory negligence. *Peoria &c. R. Co. v. Clayberg*, 107 Ill. 644.

As to priority in passage of cars at intersecting points, at a different time, and place. *Chicago &c. R. Co. v. Taylor*, 170 Ill. 49; aff'g s. c., 68 Ill. App. 613.

As to ballasting track, where the injury arose from another cause. *Lake Erie &c. R. Co. v. Wilson*, 189 Ill. 89; rev'g s. c., 87 Ill. App. 360.

Where there is direct evidence as to the rate of plaintiff's speed in driving toward an unguarded ditch, it was error to admit evidence of disposition to drive fast. *Salem v. Webster*, 192 Ill. 369; aff'g s. c., 95 Ill. App. 120.

Habitual recklessness of a traveler at a crossing, where there were eye-witnesses. *Chicago &c. R. Co. v. Gibbons*, 65 Ill. App. 550; or habitually careful in such a case. *Indiana &c. R. Co. v. Koons*, 72 Ill. App. 497.

To care for injured employé, regardless of fault. *Kirk v. Scally*, 79 Ill. App. 67.

Of children to play in the street, in which there was a street car track. *North Kankakee S. R. Co. v. Blatchford*, 81 Ill. App. 609.

Customary speed of trains. *Cleveland &c. R. Co. v. Newell*, 75 Ind. 542.

Habits as to care and prudence of deceased. *Gould v. Schermer*, 101 Iowa, 582.

That people were accustomed to walk on trestle. *Mason v. Mo. R. Co.*, 29 Kas. 83.

General reputation of deceased for prudence. *Erb v. Popritz*, 59 Kan. 264.

As an excuse for negligent coupling, that it was the customary manner. *Carrier v. Union P. R. Co.*, 61 Kan. 447.

A general custom of action in an action for negligence. *Pulsifer v. Berry*, 87 Me. 405.

Among blacksmiths not to use refined iron in forgings to be subjected to a strain. *Dulch v. Bodwell Granite Co.*, 94 Me. 34.

To leave, in factories, a collar with a projecting set screw near where an employé has to work. *Ford v. Mt. Tom &c. Co.*, 172 Mass. 544.

Of practice of employer to allow servants to make any sort of a hitch in hoisting apparatus they chose, where deceased was ignorant thereof. *Knight v. Overman Wheel Co.*, 174 Mass. 455.

For a motorman to go back into the car to give warning to a following car where the route was in the country and unlike ordinary conditions. *Blanchette v. Holyoke S. R. Co.*, 175 Mass. 51.

Among street sprinklers, not to visit their water boxes and pipes after the close of their season. *Crocker v. Schureman*, 7 Mo. App. 358.

Habit of jumping on trains in motion, on issue of how the accident was caused. *Mulville v. Pacific &c. Co.*, 19 Mont. 95.

That conductor and brakeman were careful and prudent men, upon the question of the proper management of a train. *Butler v. South Carolina &c. R. Co.*, 130 N. C. 15.

Habit of jumping off an elevator in motion, on issue as to how the accident was caused. *Baker v. Irish*, 172 Pa. St. 528.

To allow a child to play on streets alone, on issue of. *Woekner v. Erie E. M. Co.*, 182 Pa. St. 182; s. c., 187 Pa. St. 206.

To allow a child to play on the streets alone. *Lawrence v. Scranton Traction Co.*, 3 Lack. L. News, 101.

Custom must not only be clear, but known to the shipper. *Allam v. Pennsylvania R. Co.*, 3 Super. Ct. (Pa.) 335.

As to what is sufficient to establish a custom, see *Grabowski v. Pennsylvania S. Co.*, 2 Dauph. C. R. 118.

Of the custom of other companies to keep turntable locked. *Gulf &c. R. Co. v. Evansich*, 61 Tex. 3.

As to making flying switches, on an issue as to the manner of doing it. *Weatherford &c. R. Co. v. Duncan*, 88 Tex. 611.

Of a conductor to drink, where drunkenness is not in issue. *Galveston &c. R. Co. v. Davis*, 92 Tex. 372.

Likewise, as to sleeping. *Missouri &c. R. Co. v. Johnson*, 92 Tex. 380.

For brakeman to go between cars to couple them. *Galveston &c. R. Co. v. Petts*, (Tex. Civ. App.) 42 S. W. Rep. 255.

For a brakeman to look where he goes before making a coupling. *Gulf &c. R. Co. v. Hockaday*, 14 Tex. Civ. App. 613.

Of other roads to keep oil in and fill their lamps in, their freight rooms. *Texas &c. R. Co. v. Payne*, 15 Tex. Civ. App. 58.

As to speed before and after the accident. *Houston &c. R. Co. v. Jones*, 16 Tex. Civ. App. 179.

To look for cars before crossing. *Gulf &c. R. Co. v. Hamilton*, 17 Tex. Civ. App. 76.

Of employes to deliver parcels for others. *Texas &c. R. Co. v. Taylor*, (Tex. Civ. App.) 44 S. W. Rep. 892.

Of conductors, to assist passengers to alight, in absence of evidence that defendant had knowledge thereof. *St. Louis &c. R. Co. v. McCullough*, 18 Tex. Civ. App. 534.

That plaintiff was reckless. *Mayton v. Sonnefield*, (Tex. Civ. App.) 48 S. W. Rep. 608.

Not to make promises to repair, to show that none was made. *Missouri &c. R. Co. v. Nordell*, 20 Tex. Civ. App. 362.

To jam cars against a gravel bank on issue of defendant's negligence. Otherwise, as to plaintiff's, where it appears he knew of such custom. *Sullivan v. Salt Lake City*, 13 Utah, 122.

As to loading wood where the street is defective. *Simonds v. Baraboo*, 93 Wis. 40.

Riding a cycle with head and body over handle bars, as usual racing position, on question of negligence. *Benedict v. Union Agricultural Soc.*, (Vt.) 52 Atl. Rep. 110.

VIII. Former Safety of a Structure, Appliance &c.

Where a structure, appliance, or machine has been, for some time, shown to be safe in practice, a failure of the same to perform the function required of it may not establish negligence.

Plaintiff's intestate, a child six years old, while leaving one of defendant's boats, fell through one of the openings in the guard of a float bridge used to land passengers from a ferryboat and was drowned. In an action to recover damages it appeared that the bridge had been constructed five or six years before the accident and was similar to bridges at other ferries of the defendant over which millions of people passed

annually and no similar accident had previously happened. Held, that defendant was not liable. *Loftus v. Union Ferry Co.*, 84 N. Y. 455; aff'g 22 Hun, 33, granting a new trial.

Cleveland v. N. J. S. Co., 68 N. Y. 306; rev'g 6 Hun, 523, and judg't for pl'ff; *Dougan v. Champlain &c. Co.*, 56 N. Y. 1; *Crocheron v. North Shore &c. Co.*, 56 id. 656.

The platform of a station had been used for many years by passengers, and prior to the accident no one had been injured or had suffered any inconvenience on account of the distance between the platform and the cars. It did not appear but that the platform was constructed in the ordinary way, or that the space between it and the car was more than was requisite, and there was no complaint that the platform was out of order or improperly constructed. Held, the facts did not justify a verdict for plaintiff; and that a refusal to direct a verdict for defendant was error. *Laflin v. B. &c. R. Co.*, 106 N. Y. 136; rev'g judg't for pl'ff.

Plaintiff who was a passenger on one of the defendant's cars, while crossing a canal bridge, was injured by the breaking of an attachment to the bridge, which was defective when placed in position, the defect being discoverable by the maker in the process of manufacture, but not discoverable from any examination that could be made by any person using the bridge for crossing. The plan and method of construction of the bridge were approved by and it was built under the direction and supervision of the proper state officers; it had been in position and use for over a year, and nothing had occurred to raise a doubt as to its entire safety. Held, that an action was not maintainable against the defendant to recover damages for the injury. *Birmingham v. R. C. & B. R. Co.*, 137 N. Y. 13, rev'g judg't for pl'ff.

The proof on the part of the defendant showed that all its ferries were managed in substantially the same way and that while they carried many millions of passengers yearly, no accident of this kind was ever reported or known. *Race v. Union Ferry Co.*, 138 N. Y. 644, rev'g judg't for pl'ff.

A fastener for splicing a belt had been manufactured, sold and used in large numbers in this country and elsewhere for several years before the accident. It did not appear that they were less safe than any other fasteners or that any serious accident had ever happened before from the breaking of any fastener. Held, that the evidence failed to show any negligence on the part of the defendant; that it was not liable. *Harley v. Buffalo Car Man. Co.*, 142 N. Y. 31, rev'g judg't for pl'ff.

As an empty car was descending, the supporting hook in some way became detached and plaintiff's intestate was killed. In an action to recover damages it appeared that in the other mines, as well as this,

where cars were thus operated, the hook was always used on account of the facility with which it could be changed from one car to another. It had been used in this mine over a year, night and day, without the happening of any previous accident of the kind. The evidence did not justify an inference of negligence on the part of the defendants; and nonsuit should have been granted. *Burke v. Witherbee*, 98 N. Y. 562, rev'g judg't for pl'ff.

(See "Former Acts and Statements.")

That an appliance may have broken before did not tend to show defectiveness where it was bought of a reputable dealer. *Doyle v. White*, 9 App. Div. 521; s. c. aff'd, 159 N. Y. 548.

Car was shown to have been run in the usual manner. Company was allowed to show that no report of a similar accident had been received, to show diligence on its part. *Wilder v. Metropolitan Street R. Co.*, 10 App. Div. 364.

Previous bad condition of brakes, admitted in connection with testimony that they were in bad condition at the time of the accident. *Rockford C. R. Co. v. Blake*, 173 Ill. 354; aff'g s. c., 74 Ill. App. 175.

No previous accident, not admitted, on issue of negligence in building a bridge too low. *Bryce v. Chicago &c. R. Co.*, 103 Iowa, 665.

So, on issue of defective sidewalk. *Friend v. Burleigh*, 53 Neb. 674.

Or of defective highway. *Anderson v. Taft*, 20 R. I. 362.

Stone v. Pendleton, 21 R. I. 332.

Or of defective construction of freight depot. *Sullivan v. Delaware &c. Canal Co.*, (Vt.) 47 Atl. Rep. 1084.

IX. Former Acts and Statements.

In an action for injury, from slipping on an icy sidewalk, the plaintiff's witness was erroneously allowed to testify that he fell on ice at the same place and that there was then about the same amount of ice, as when the plaintiff fell. It did not appear that the prior accumulation was caused by the same defect in the sidewalk, that caused the plaintiff to fall. *Gillrie v. City of Lockport*, 122 N. Y. 403, rev'g judg't for pl'ff.

Distinguishing *Quinlan v. City of Utica*, 11 Hun, 217; 74 N. Y. 603; *District of Columbia v. Armes*, 107 U. S. 519.

From opinion.—"It was necessary to show in the event of a failure to prove that the defendant had actual notice of the condition of the sidewalk at this place, that it had been in that condition for such a length of time that the defendant ought to have known it, and, therefore, chargeable with constructive notice of its actual condition. In the attempt to make such proof it has been held competent to permit one who is giving testimony as to the condition of the sidewalk to testify that he had fallen himself. It tends to show how he came to know

the condition of the walk. *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459-469. Proof of the happening of a prior accident in the same place, has also been held to be competent upon the ground that it tended to show that the walk, tested by actual use, had been demonstrated to be in an unsafe and improper condition, and that such was its condition at the time of the happening of the accident. *Quinlan v. City of Utica*, 11 Hun, 217; 74 N. Y. 603; *District of Columbia v. Armes*, 107 U. S. 519.

Had the plaintiff confined her proofs so far as it related to the falling of others during the continuance of this mound or hummock of ice it would have come within the protection of the rule established by the decisions of which the cases cited are a type. But mere proof of a fall occasioned by the existence of ice two years before was not competent, for any purpose."

Evidence that the locomotives of the defendant had thrown sparks farther than the building burned by the defendant's alleged negligence is proper, probability of fire from other sources having been precluded by the evidence. *Sheldon v. Hudson R. R. Co.*, 14 N. Y. 218, rev'g nonsuit.

Evidence, that the defendant's engines passing on other occasions emitted sparks, and coals, which fell further from the track than the building destroyed is proper. Exclusion of other causes need only present a question for the jury. *Christ v. E. R. Co.*, 58 N. Y. 638, aff'g, 1 N. Y. S. C. (T. & C.) 435, and judg't for pl'ff.

Citing *Sheldon v. H. R. Co.*, 14 N. Y. 218; *Hinds v. Barton*, 25 id. 544; *Field v. N. Y. C. R. Co.*, 32 id. 339, aff'g judg't for pl'ff.

It is proper to show coals on the track both before and after the accident, in action for fire from its engines. *Webb v. R., W. & O. R. Co.*, 49 N. Y. 420, aff'g 3 Lansing 453, and judg't for pl'ff.

Evidence of former accidents to travelers at a defective switch in a public street is proper evidence. *Wooley v. Grand Street &c. R. Co.*, 83 N. Y. 121; aff'g judg't for pl'ff.

An elevator had been in use for two years before an accident and was continued for several years thereafter without causing other harm. The continued use did not impute negligence. *Stringham v. Hilton*, 111 N. Y. 188, 197.

See, also, *Kaye v. Rob Roy Hosiery Co.*, 51 Hun, 519.

Whatever was said to or by the deceased member of the defendant's firm, before the accident, respecting defective appliances, which produced the accident, is properly received in evidence. *Newell v. Bartlet*, 114 N. Y. 399; aff'g judg't for pl'ff.

Citing *Chapman v. Erie R. Co.*, 55 N. Y. 579.

An elevator had slipped from its place before the time of the accident, but so seldom in comparison with the usual action of the machine as to indicate, instead of defect in it, haste or carelessness in its operation by

the person in charge. *Kern v. DeCastro &c. Refining Co.*, 125 N. Y. 50, 55.

Where the walk, whereon the plaintiff was hurt was shown to have been in a similar condition for several years, the fact of other accidents there, was proper to show unsafe condition. *Quinlan v. City of Utica*, 11 Hun, 217, aff'g judg't for pl'ff.

Citing *Hill v. Portland Railroad Co.*, 55 Me. 438; *House v. Metcalf*, 27 Conn. 631; *Darling v. Westmoreland*, 52 N. H. 401; s. c., 13 Am. Rep. 55; *Kent v. Lincoln*, 32 Vt. 591; *Bailey v. Trumbull*, 31 Conn. 581; *Calkins v. Hartford*, 33 id. 57.

Emission of sparks by a locomotive prior and subsequent to a fire was proper. *Home Ins. Co. v. Penn. R. Co.*, 11 Hun, 182, modifying judg't for pl'ff.

In an action for injury from fright of a horse, the plaintiff may show, that a similar banner had previously frightened horses. *Champlin v. Village of Penn Yan*, 34 Hun, 33, aff'g judg't for pl'ff.

Offer to show that others had fallen at the same spot where the plaintiff was injured was not sufficient. Proof that others had fallen under similar conditions should be shown. *Ster v. Tuety*, 45 Hun, 49, aff'g judg't for def't.

Distinguishing *Quinlan v. City of Utica*, 11 Hun, 217, affirmed 74 N. Y. 603; *District of Columbia v. Armes*, 107 U. S. R. 519, 525; *Pomfrey v. Village of Saratoga Springs*, 10 Eastern Rep. 357.

So that during previous month there had been several derailments of cars on same road. *Mobile R. Co. v. Ashcroft*, 48 Ala. 15.

The plaintiff fell over the railing of stairs. Previous, but not subsequent, accidents were proper to show that the defendant had learned by experience that the railing was insufficient. *Johnson v. M. R. Co.*, 52 Hun, 111, rev'g judg't for pl'ff.

Defendant cannot show that the plaintiff had made similar claims to those in suit against other persons for injuries not connected with the injury in suit, nor can the plaintiff be cross examined as to such claims without proof of facts tending to show that such claims were dishonest. *Hanse v. The Brooklyn Elevated R'd Co.*, 66 Hun, 384, aff'g judg't for pl'ff.

Evidence that the intestate, an engineer, upon frequent occasions ran his engine at a rate of speed greater than was permitted by the rules of the company; that some other engineers had done the same thing, and that warning had been given that they must not exceed the rate of speed prescribed by the rules of the company, as bearing upon the question whether the plaintiff's intestate was free from contributory negligence, considered. See *Sutherland v. The Troy and Boston Railroad Company*, 74 Hun, 162; s. c. rev'd, 125 N. Y. 737.

In an action by a wife to recover damages for the loss of her husband's society, affections and companionship proof of the acts of the husband and the defendants six months prior to the plaintiff's marriage is inadmissible in evidence. *Eldredge v. Eldredge*, 79 Hun, 511.

Prior accident was too remote where it occurred eight years before and under dissimilar conditions. *Cohn v. New York &c. R. Co.*, 6 App. Div. 196.

Other similar show case models had fallen from their position several times before. Held to show likelihood of their falling again. *Cavanagh v. O'Neill*, 27 App. Div. 48.

Defective condition of an elevator door had been complained of and had caused an accident. It was sufficient to charge proprietor with notice thereof. *Auld v. Manhattan L. Ins. Co.*, 34 App. Div. 491; aff'd, 165 N. Y. 610.

Servant may show master's knowledge of specific acts of incompetency of fellow servant in the past. *O'Donnell v. American Sugar Refining Co.*, 41 App. Div. 307.

Frequent previous breakages of a trolley wire may be shown. *Richmond &c. E. Co. v. Bowles*, 92 Va. 738.

Defendant may show that plaintiff had been warned sometime before the blast was set off, and that others had heard cries of danger shortly before. *Sullivan v. Dunham*, 10 App. Div. 438.

Prior physical condition from six months to two years before the accident may be shown. *Loudoun v. Eighth Ave. R. Co.*, 16 App. Div. 152.

Former acts and statements were allowed in following instances:

That the structure had sustained double the weight upon it of that which caused the accident.

(But this is not conclusive that it was safe or that the defendant had any knowledge of the defect.) *Murray v. Usher*, 46 Hun, 404.

That plaintiff stumbled over a pile of gas pipes in the cellar a few days before in a similar manner. *Mount v. Brooklyn Union Gas Co.*, 72 App. Div. 440.

That a defective covering of an opening in the sidewalk was repaired before the accident. *Sturnwald v. Schrieber*, 74 N. Y. Supp. 995.

Prior accidents to cash basket carriers, on issue of defects and notice. *Stock v. Le Boutillier*, 18 Misc. 349; s. c., aff'd, 19 id. 112.

That plaintiff came near having an accident at the same place only a short time before. *Southern R. Co. v. Posey*, (Ala.) 26 South. Rep. 914.

Shears similar to those in question in a factory had broken before, on issue of necessity for inspection. *Pacheco v. Judson Man. Co.*, 113 Cal. 541.

That there was a fire in a rubbish heap in the vicinity of the building on the day before, on issue of how a fire was set. *People v. Fournier*, (Cal.) 47 Pac. Rep. 1014.

That elevator door had previously gotten open, on issue of defectiveness. *Colorado &c. Co. v. Rees*, 21 Colo. 435.

That a locomotive was in a defective condition for two months previous to the accident and had received no repairs for three months thereafter. *Brown v. Benson*, 101 Ga. 753.

That plaintiff was never heard to complain as to her health before the accident. *West Chicago &c. R. Co. v. Kennelly*, 170 Ill. 508; aff'g s. c., 66 Ill. App. 244.

Prior escape of horses when left in a barn without halters. *Maxwell v. Durkin*, 185 Ill. 546; aff'g s. c., 86 Ill. App. 257.

Testimony that a press worked in the same way at the time of accident as it had the last time witness had used it, was sufficient evidence of continuance of the defective condition. *Pioneer Cooperage Co. v. Romanowicz*, 186 Ill. 9.

Unchanged condition of defective brake 3 days prior to accident. *St. Louis &c. R. Co. v. Dorsey*, 189 Ill. 251; aff'g s. c., 89 Ill. App. 555.

Prior unchanged condition of right of way fence for a year. *Chicago &c. R. Co. v. Chipman*, 87 Ill. App. 292.

Of a mine roof, for a year. *Island Coal Co. v. Neal*, 15 Ind. App. 15.

Of lumber projecting toward the track, for seven days. *Hopkins v. Boyd*, 18 Ind. App. 63.

Of a walk for a year. *Hunt v. Dubuque*, 96 Iowa, 314; *Wilberding v. Dubuque*, (Ia.) 82 N. W. Rep. 957, (for five months).

Similar accident in the same place. *Hudson v. Chicago &c. R. Co.*, 59 Iowa, 581.

Length of time a bill board had been in a dangerous condition, to show notice. *Cason v. Ottumwa*, 102 Iowa, 99.

That another part of the same railing had some time before the accident been missing. *Faulk v. Iowa County*, 103 Iowa, 442.

That another had tripped over the same board before. *Frohs v. Dubuque*, 109 Iowa, 219.

That former accident had happened from the same cause and in the same place. *Ind. v. Emmelman*, 108 Ind. 530; *Field v. Davis*, 27 Kas. 400.

That dentist was unskilful in operations two years before. *Green v. Roark*, 59 Pac. Rep. 655; rev'g s. c., 8 Kan. App. 390.

It was shown that the plaintiff had been on the railroad track before the injury and had been warned not to go thereon. *Fitzpatrick v. Fitchburg R. Co.*, 128 Mass. 13.

That in former years a railing had been maintained at the place in question. *Baltimore &c. R. Co. v. Hebb*, 88 Md. 132.

Evidence that an elevator man had talked with another about plaintiff's being in a place of danger was admissible to show his negligence in letting the car down while the former was in such position. *Ledwidge v. Hathaway*, 170 Mass. 348.

Prior unchanged defective condition of loaded car. *Austin v. Fitchburg R. Co.*, 172 Mass. 484.

Of sidewalk. *Dolphin v. Plumley*, 175 Mass. 304.

Of machine for two years. *Packer v. Thompson-Houston E. Co.*, (Mass.) 56 N. E. Rep. 704.

Of fence through which several times within a month colts had escaped. *Bowen v. Flint &c. R. Co.*, 110 Mich. 445.

Of sidewalk. *Canfield v. Jackson*, 112 Mich. 120.

Haynes v. Hillsdale, 113 Mich. 44; *Snyder v. Albion*, 113 id. 275; *Handy v. Meridan*, 114 id. 454.

Prior drunkenness, on issue of drunkenness on occasion in question. *Kingston v. Ft. Wayne &c. R. Co.*, 112 Mich. 40; *Herrick v. Wixom*, (Mich.) 81 N. W. Rep. 333.

Previous habit of throwing a mail bag so as to endanger the safety of passengers. *Shaw v. Chicago &c. R. Co.*, (Mich.) 82 N. W. Rep. 618.

That cars had missed the track at the same point before and after the accident there (but not that a switch was afterwards repaired). *Morse v. Indianapolis &c. R. Co.*, 30 Minn. 465.

Prior condition of injured limb. *Harvard v. Stiles*, 54 Neb. 26.

Similar accident on the highway short time before. *Dow v. Town of Weare*, 68 N. H. 345.

Prior firing of furnace, though under forced, instead of natural draft. *Proctor v. White Mountain Freezer Co.*, 70 N. H. 3.

That deceased was seen, about two minutes before the time he was alleged to have been knocked from a ledge, striking a drill on such ledge. *Bellerive Stone Co. v. Comben*, 61 N. J. L. 353; s. c. aff'd, 62 id. 449.

Similar previous scuffles between hackmen at a railway station, to show notice to company. *Exton v. Central R. Co.*, 62 N. J. L. 7.

Previous similar accident to another employé. *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387.

Similar injury to another employé at same machine. *Sopherstein v. Bertels*, 178 Pa. St. 401.

That the same engine set another fire the same day. *Thomas v. New York &c. R. Co.*, 182 Pa. St. 538.

That a gentle horse was frightened shortly before at the same obstacle, on issue of viciousness of plaintiff's horse. *Potter v. Natural Gas Co.*, 183 Pa. St. 575.

Prior careless use of gun by boy, on issue of notice to father. *Johnson v. Glidden*, 11 S. D. 237.

Defective condition of platform on day before the accident and notification to defendant. *Williams v. Gobble*, 106 Tenn. 367.

That there were defects in a railway in the vicinity of the accident. *Texas &c. R. Co. v. De Milley*, 60 Tex. 194.

Prior directions as to the forwarding of telegrams, on issue of carefulness. *Western U. Teleg. Co. v. Drake*, 14 Tex. Civ. App. 601.

That brakeman ordered plaintiff to hurry and get off, on issue of intention to leave. *International &c. R. Co. v. Satterwhite*, 15 Tex. Civ. App. 102.

Prior actions to show deceased had not been drinking. *San Antonio &c. R. Co. v. Renken*, 15 Tex. Civ. App. 229.

Previous violations of rule against carrying passengers on freight trains, on issue of abrogation of the rule. *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.) 40 S. W. Rep. 631; *Houston &c. R. Co. v. Norris*, 41 id. 708.

Previous emissions of sparks and consequent fires, to disprove defendant's assertion of diligence in regard to the condition of its engines and right of way. *International &c. R. Co. v. Newman*, (Tex. Civ. App.) 40 S. W. Rep. 854.

Facts tending to show unskillful construction of an elevator six months before the accident. *The Oriental v. Barclay*, 16 Tex. Civ. App. 193.

Prior acts of incompetency of servants. *Terrell v. Russell*, 16 Tex. Civ. App. 573.

That the hole was in the platform ten hours before the accident. *Texas &c. R. Co. v. Brown*, (Tex. Civ. App.) 58 S. W. Rep. 44.

That witness saw fire start upon the grass along the way as the train passed five or six months before the accident as against evidence that new spark arrester had been put in six to twelve months before. *Wilson v. Pecos &c. R. Co.*, (Tex. Civ. App.) 58 S. W. Rep. 183.

The manner of conducting business before and after receivership, on issue of how receiver conducted it. *Dupree v. Tamboirilla*, (Tex. Civ. App.) 66 S. W. Rep. 595.

That a fire broke out near the same place only a month before, on the question of negligence in allowing combustible material to accumulate on the right of way. *Texas &c. R. Co. v. Rutherford*, (Tex. Civ. App.) 68 S. W. Rep. 825.

Previous use of a pier and the number of accidents in the use of a draw. *St. Louis &c. Packet Co. v. Keokuk &c. Co.*, 31 Fed. Rep. 755.

Various acts, tending to show incompetency, during seven years past. *Stoll v. Daly Min. Co.*, 19 Utah, 271.

Prior recent fires on right of way, from locomotives. *New York &c. R. Co. v. Thomas*, 92 Va. 606.

So long as they be near the time of the one in question. *Kimball v. Borden*, 95 Va. 203.

Prior flooding of highway, on issue of notice. *Brown v. Swanton*, 69 Vt. 53.

Prior good disposition of dogs at other times, on issue of viciousness. *Dover v. Winchester*, 70 Vt. 418.

Defective condition of sidewalk several weeks before the accident, to show notice. *Elster v. Seattle*, 18 Wash. 304.

That health was good before the accident and bad thereafter. *Wilber v. Follansbee*, 97 Wis. 577.

Former acts and statements were not allowed in the following instances:

That a warehouseman, a day or two before the fire, procured an additional insurance on his own goods stored at the same place with the plaintiff's. *Seals v. Edmondson*, 71 Ala. 509.

Former unsafe condition of engine brake, in absence of evidence to charge employé with notice thereof. *Highland Ave. &c. R. Co. v. Miller*, 120 Ala. 535.

Previous shooting of another, in issue of bad character. *St. Louis &c. R. Co. v. Stroud*, 67 Ark. 112.

That shortly before the accident an unidentified engine had thrown out sparks so as to set fire to adjoining property. *Akins v. Georgia &c. R. Co.*, 111 Ga. 815.

That employer had erected shed to protect employés from falling material, on issue of assumption of risk, in absence of proof of knowledge by employé. *Pioneer &c. Constr. Co. v. Nansen*, 176 Ill. 100; aff'g s. c., 69 Ill. App. 659.

Prior instances of coal falling from other places in the roof of the mine at other times having no connection with the injury in question. *Sugar Creek Coal Min. Co. v. Petersen*, 177 Ill. 324; rev'g s. c., 75 Ill. App. 631.

That the construction of another road affected another piece of property four miles distant, eight years before. *Chicago &c. T. Co. v. Bugbee*, 184 Ill. 353.

Testimony that witness, after the accident, had told defendant's president a week before of the defect. *Fisher v. Nubian Iron Enamel Co.*, 60 Ill. App. 568.

Use of intoxicants on days prior to the accident. *Fitzpatrick v. Bloomington C. R. Co.*, 73 Ill. App. 516.

Defective condition of a bridge several years before, in absence of evidence as to cause of fall of bridge. *Elgin v. Nofs*, 96 Ill. App. 291.

That the safety catches of an elevator had on one occasion before been removed. *Diamond Block Coal Co. v. Edmonson*, 14 Ind. App. 594.

Value of a stallion, by a sale long before the injury. *Galliers v. Chicago &c. R. Co.*, (Iowa) 89 N. W. Rep. 1109.

That defendant's employes had previously invited the boy to ride on the car. *Louisville &c. R. Co. v. Webb*, 99 Ky. 332.

That several accidents had occurred before at the crossing, on the question of failure to blow signal. *Hutcherson v. St. Louis &c. R. Co.*, (Ky.) 52 S. W. Rep. 955.

That station agent's attention had been called to other holes in the platform. *Louisville &c. R. Co. v. Henry*, (Ky.) 44 S. W. Rep. 428.

Accident in the passageway of a business place. *Parker v. Portland &c. Co.*, 69 Me. 173.

Physical condition of the plaintiff many years before the accident. *Baltimore v. Rose*, 65 Md. 485.

That a defect in the highway, at the same place, had produced an injury a year before the happening of the injury in question. *Blair v. Pelham*, 118 Mass. 232.

That plaintiff had fallen on the stairs in the same manner before, without proof that the condition of the step was the same in both instances. *Dean v. Murphy*, 169 Mass. 413.

That a platform was greasy five months before the accident. *Newcomb v. New York &c. R. Co.*, Mo. 69 S. W. Rep. 348.

Accident to a driver. *Higby v. Gilmer*, 3 Mont. 90.

See, also, *Whitney v. Gross*, 140 Mass. 232.

Statement of highway commissioner at the time of putting in a railing four years before. *Emerson v. Lebanon*, 67 N. H. 579.

Former experience as a driver, in case of an electric shock to a horse, to prove the fact of the shock. *Trenton R. Co. v. Cooper*, 60 N. J. L. 219.

That an engine was in regular operation an hour before the accident, on issue of irregular operation at the time of accident. *Ouverson v. Grafton*, 5 N. D. 281.

Escape of sparks from other engines at times and places unless properly restricted. *Pennsylvania R. Co. v. Rossman*, 13 Oh. C. C. 111.

Accident to passenger. *Davis v. Oregon &c. R. Co.*, 8 Ore. 172.

Evidence of former negligence of a person was improper. *Mansfield &c. Co. v. McEnnery*, 91 Pa. St. 185.

Maguire v. Middlesex R. Co., 111 Mass. 240.

Distance at which a train was heard on a former occasion, not shown to have been subject to same conditions. *Texas &c. R. Co. v. Payne*, (Tex. Civ. App.) 35 S. W. Rep. 297.

Master's negligence toward servant at another time and place. *Snowden v. Pleasant Valley C. Co.*, 16 Utah, 366.

Prior similar escape of water at an uncertain date. *Spencer v. Chicago &c. R. Co.*, 105 Wis. 311.

Former similar non-connected acts of negligence are usually inadmissible. Whart. on Ev. sec. 40.

Citing *Louisville &c. R. Co. v. Fox*, 11 Bush. 493; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 279.

X. Subsequent Acts and Statements.

The evidence of the arrest of a driver of a car is not admissible, in an action for damages, for the act, for which he was arrested, and so the declaration of the driver immediately after the accident is not admissible. *Luby v. H. R. R. Co.*, 17 N. Y. 131, rev'g judg't for pl'ff.

Evidence was properly rejected, that after a passenger had slipped under a gangway rail of a boat and been drowned, the space was boarded up. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 296.

The statement of a conductor of a car made after the accident, that, if the driver had been looking, he would not have run over a child, is incompetent, although proven in contradiction of conductor. *Furst v. Second Ave. R. Co.*, 72 N. Y. 542, rev'g judg't for pl'ff.

The plaintiff's arm was on a window sill of a car and was hurt in passing through a bridge. A change of the arrangement of the bridge after the accident was improper. Such evidence may sometimes be given. *Dale v. D., L. & W. R. Co.*, 73 N. Y. 468; rev'g judg't for pl'ff.

Private parties built a bridge over a street, whereby the driver of a circus wagon was hurt. Evidence that the bridge was afterwards removed by defendant was competent to show control over it by the common council. *Sewell v. City of Syracuse*, 75 N. Y. 45, aff'g 11 Hun, 626, and judg't for pl'ff.

The fact that the highway commissioners erected railings at the place where the plaintiff was hurt, the day after the accident was competent to show the commissioners to be in funds and had control of the *locus in quo*. The statement of the court that "it was allowed and considered upon question of defendant's negligence" was meant only for the purpose above stated. *Morrell v. Peck*, 88 N. Y. 398; rev'g 24 Hun, 37, and aff'g judg't for pl'ff.

The plaintiff was injured by a board, placed across the aisle of a car,

on which the brakeman had stood to attend to the lamps. The brakeman was asked, on cross-examination, if he did not, after the accident, tell the plaintiff that he had forgotten to slide the board back, etc., which he denied. The plaintiff was recalled and contradicted him. The plaintiff was bound by the answer and the evidence of the plaintiff was improper. *Sherman v. D., L. & W. R. Co.*, 106 N. Y. 542; rev'g judg't for pl'ff.

Evidence that subsequent to the injury the defendant fenced the excavation causing the injury is improper. *Corcoran v. Village of Peekskill*, 108 N. Y. 151, rev'g judg't for pl'ff.

The plaintiff charged that fire arose from sparks from the defendant's engine, and showed that sparks several months thereafter were emitted from one of the defendant's engines, and the one from which it was claimed the fire arose, and the plan of construction of the spark arrester used on such engine would not admit of the issue of such sparks, therefore if they were emitted, it was by reason of the spark arrester being out of order. The evidence was improper without first showing that sparks of that size could be emitted through faults of construction or that the engine was in the same condition of repair as when the fire occurred. *Collins v. N. Y. C. & H. R. R. Co.*, 109 N. Y. 243; rev'g judg't for pl'ff.

In action for damages, for upsetting a wagon at an alleged defective crossing, the defendant offered to show that the wagon upset the next day in turning. It was excluded. Error. *Hoyt v. N. Y., L. E. & W. R. Co.*, 118 N. Y. 399, rev'g judg't for pl'ff.

Citing *Hill v. P. R. Co.*, 55 Me. 438; *Darling v. Westmoreland*, 52 N. H. 401; *Kent v. Lincoln*, 32 Vt. 591; *Smid v. Mayor*, 17 J. & S. 126.

The plaintiff alleged, that the defendant had negligently constructed its road, and thereby left a space between the platform of the station and its cars greater than was necessary for the operation of the road, whereby the plaintiff in alighting from the car, fell. The evidence of the happening of similar accidents at other stations upon said road, without giving evidence tending to show that the conditions were similar, was error. *Brady v. Manhattan R. Co.*, 127 N. Y. 46, rev'g judg't for pl'ff.

In an action for injuries received from an alleged defect in a bridge, it was error to permit the plaintiff to prove, that after the accident, guards, new abutments, etc., were erected by the defendant's commissioner of highways, and that he deemed them necessary. *Getty v. Town of Hamlin*, 127 N. Y. 636, rev'g judg't for pl'ff.

Baird v. Daly, 68 N. Y. 547.

The fact that the commissioner repaired the bridge several days after

the accident, was improperly received, for the purpose of showing that the commissioner had funds in his hands applicable to such repair and that he exercised control over the walk. *Clapper v. Town of Waterford*, 131 N. Y. 382, rev'g 62 Hun, 170, and judg't for pl'ff.

From opinion.—"When actions of this character were brought against the commissioner of highways personally, before the statute, it is possible that such testimony might have been held competent, (*Monell v. Peck*, 88 N. Y. 398); but now the action is against the town, and it is difficult to see how the acts of the commissioner subsequent to the accident can be admitted in such an action as proof to bind the town for any purpose. It has frequently been held that the declarations or admissions of a public officer cannot be given in evidence to bind a municipal corporation of which he is the agent, unless they are part of the *res gestæ*. (*Cortland County v. Herkimer County*, 44 N. Y. 22; *Luby v. H. R. R. Co.*, 17 id. 131; *Hamilton v. N. Y. C. R. Co.*, 51 id. 100, 295.) And if his declarations cannot be admitted, the same principle would exclude his acts subsequent to the event in controversy."

The injury to a wife was caused by the closing of the gate to the platform of defendant's car, as she entered the car. The wife testified to the injury, that the guard was looking another way, and that immediately after the injury she made an exclamation of pain. She was then permitted to testify to an insulting remark made by the guard in reply to her exclamation of pain. While, in such an action, proximity in time with the act causing the injury is essential to make what was said by a third person competent evidence as part of the *res gestæ*, that alone is insufficient; to make it competent what was said must be part of the principal fact, and so part of the act itself; that is, naturally accompanying the act, or calculated to unfold its character and quality. *Butler v. M. R. Co.*, 143 N. Y. 417; reversing 4 Misc. 401.

Evidence that switch was changed after accident, error. *Salters v. D. & H. C. Co.*, 3 Hun, 338, setting aside verdict for pl'ff.

After accident at crossing it was error to show that, shortly after the accident, defendant replaced planks at crossing. *Payne v. Troy & Boston R. Co.*, 9 Hun, 526. Declarations of deceased two hours after the accident even *in extremis* was not competent in civil action. Nor were such declarations receivable as a part of the *res gestæ*. They were made about two hours after the injuries were inflicted, and after the injured party had been removed from the place of the injury to the hospital; they were too remote and narrative. (*Trimmer v. Trimmer*, 13 Hun, 182; *Ins. Co. v. Mosley*, 8 Wall. 400; *Smith v. Webb*, 1 Barb. 230; *Matteson v. R. R. Co.*, 35 N. Y. 487.) *Waldele v. N. Y. C. & H. R. R. Co.*, 19 Hun, 69, rev'g nonsuit.

Deaf mute killed at a crossing. Before his death a brother arrived and had conversation with him, and the intestate described to him the manner of the accident and the brother related it on trial. *Held to be*

proper. *Waldele v. N. Y. C. & H. R. R. Co.*, 29 Hun, 35; s. c., reversed, 95 N. Y. 274 (see *post*, p. 1149.)

It was improperly shown that some months after the accident to plaintiff the defendant had put new oil cloth upon the staircase. It has been frequently held that such evidence is not admissible to show knowledge of dangerous condition at the time of the injury. (*Dougan v. The Champlain Transportation Co.*, 56 N. Y. 1, 8; *Baird v. Daly*, 68 id. 547; *Salters v. Delaware & Hudson Canal Co.*, 3 Hun, 338); *Morrell v. Peck*, 24 Hun, 37.

In an action for damages from a fire from defendant's locomotive, evidence that the defendant employed track-walkers thereafter was admissible on the question, whether too few or incompetent men had been employed before. Proof of dropping coals and sparks is not confined to occasion when injury is done nor to defects in a single engine of the company. *Westfall v. Erie R. Co.*, 5 Hun, 75.

In an action against a master for the death of his servant while driving a car on a city street, a policeman improperly testified for the plaintiff to certain declarations made by the decedent as to the circumstances of the accident, made in the presence of the driver in a drug store, where the injured person was taken. Such declarations were not a part of the *res gestæ*.

Statement made by the driver at the police station some little time afterwards, when a criminal complaint was made against him, were also improper. *Lahey v. Ottman & Co.*, 73 Hun, 61, rev'g judg't for pl'ff.

Where declarations were not made until after the accident had happened, and the plaintiff had been helped out of the place wherein he had fallen, they form no part of the *res gestæ*, and, when the question of the defendant's negligence is one of fact submitted to the jury, it cannot be determined that the admission of such evidence did no harm to the party against whom it was received, and the admission thereof requires the reversal of the judgment. *Kirkpatrick v. Briggs*, 78 Hun, 518.

On proof that the condition of the wires from the time of accident to that of examination, three days, had not changed, result of examination was admitted. *Harroun v. Brush Electric Light Co.*, 12 App. Div. 126.

On like qualification, the dimensions of a channel a year and a half after a flood was admitted. *Jones v. De Coursey*, 12 App. Div. 164.

The condition of a decayed walk a day after the accident was shown. *Teasdale v. Malone*, 17 App. Div. 185.

Evidence of the extent of the vertical and lateral oscillations of a trolley car about a month after the accident, without proof that the load and speed were similar, was excluded. *Schmidt v. Coney Island &c. R. Co.*, 26 App. Div. 391.

Diseased condition, a year and a half after the accident, which commonly arises from many causes, was excluded. *Anderson v. Brooklyn &c. R. Co.*, 32 App. Div. 266.

Subsequent acts and statement were allowed in the following instances:

Such as occur immediately after the accident and are part of the *res gestæ*. *Casey v. N. Y. C. &c R. Co.*, 78 N. Y. 518; 8 Daly, 220.

That after an accident from cinders several cinders were discharged, as bearing on practicability of contrivance to prevent them. *Searls v. Manhattan R. Co.*, 49 Supr. Ct. 425.

That plaintiff failed to secure a trunk after the lock was broken, on the question of value of contents. *Trumbull v. Chesapeake &c. R. Co.*, 18 Misc. 732.

See *Louisville v. Malone*, 109 Ala. 509.

That plaintiff heard the stock alarm and going immediately to the track found the animal near it injured and that before it had not been afraid of the cars, but thereafter it was, on issue of how injury occurred. *Little Rock &c. R. Co. v. Wilson*, 66 Ark. 414.

That a fire started near the track immediately after the train passed. *Burlington &c. R. Co. v. Burch*, (Colo. App.) 67 Pac. Rep. 6.

Ability to see a train at a crossing at a subsequent date, where the surroundings have not materially changed. *Martin v. Baltimore &c. R. Co.*, 2 Marv. (Del.) 123.

Statement of a child a few moments after it was hurt to person going to its aid. *Ferguson v. Columbus R. Co.*, 75 Ga. 637.

That a machine while in substantially the same condition and operated in a similar manner caused subsequent injuries. *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620.

In regard to the effect of injuries, physical condition before and after. *North Chicago &c. R. Co. v. Gillow*, 166 Ill. 444; aff'g s. c., 64 Ill. App. 516.

That draw bar was in a rusty condition two hours after the accident. *Chicago &c. R. Co. v. Gillison*, 173 Ill. 264; aff'g s. c., 72 Ill. App. 207.

That the same engine threw cinders on the same grade, ten days after the accident. *Baltimore &c. R. Co. v. Tripp*, 175 Ill. 251.

That milk examined while *en route* was in good condition, on issue of whether it was good when shipped. *St. Louis &c. R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619; s. c. aff'd, 175 Ill. 557.

St. Louis &c. R. Co. v. Dorsey, 189 Ill. 251; aff'g s. c., 89 Ill. App. 555.

On proof of no change, condition of cable an hour after it parted. *Falkenau v. Abrahamson*, 66 Ill. App. 352.

The results of tests of the safety appliances to an elevator while it was in the same condition as at the time of the accident. *Woefel Leather Co. v. Thomas*, 68 Ill. App. 374.

Condition of track immediately after derailment of a train. *Henderson v. Chicago &c. R. Co.*, 73 Ill. App. 57.

That a surgeon was subsequently dismissed from the hospital on account of his habits as to intoxication and sent to an asylum, on issue of notice. *Wabash R. Co. v. Kelly*, 153 Ind. 119.

A subsequent explosion in a gas pipe line resulting from a defect of such a nature as that from which the accident happened. *Alexandria &c. Co. v. Irish*, 6 Ind. App. 534.

Statement made by one fatally injured as to the cause of the injury. *Perigo v. Chicago &c. R. Co.*, 55 Iowa, 326; *Cleveland R. Co. v. Newell*, 104 Ind. 261.

Subsequent repair of sidewalk. *Jeffersonville v. McHenry*, 22 Ind. App. 10.

Other fires set out on the same day by the same engine. *Lake Erie &c. R. Co. v. Gould*, 18 Ind. App. 275.

See *Frohs v. Dubuque*, 109 Iowa, 219.

That horses were tractable some months after the accident. *Walrod v. Webster Co.*, (Iowa) 81 N. W. Rep. 598.

That the nut to the slipping of which the accident was due, was replaced and the bolt battered down to prevent its coming off again. *Champion Ice Man. Co. v. Carter*, (Ky.) 51 S. W. Rep. 16.

Position of lights on a steamboat dock 10 or 15 minutes after the accident. *Bacon v. Casco Bay S. S. Co.*, 90 Me. 46.

What was done after the accident, to show what could have been done at the time. *Willey v. Boston &c. L. Co.*, 168 Mass. 40.

The results of a test as to the operation of the machine while it remained in the same condition. *Roskee v. Mt. Tom &c. P. Co.*, 169 Mass. 528.

That the step in question had been in good condition during the two months following the accident. *Powers v. Boston &c. R. Co.*, (Mass.) 56 N. E. Rep. 710.

The condition of the place immediately after the accident in the absence of evidence of a change therein. *Foland v. Paine Furniture Co.*, (Mass.) 61 N. E. Rep. 52.

Statements of witness at the time of the accident or thereafter apart from the *res gestæ*, although not binding upon the defendant are admissible to increase the credibility of the witness. *Battishill v. Humphrey*, (Mich.) 7 W. 806; *Jamison v. Ill. R. Co.*, 63 Miss. 333.

Change of spark arrester after the accident. *Alpern v. Churchill*, 53 Mich. 607.

Condition of injured a year after injury, to show effect on nervous system. *Lammiman v. Detroit Citizens' S. R. Co.*, 112 Mich. 602.

Where conditions have changed, jury must be warned accordingly. *Benedict v. Port Huron*, 124 Mich. 600.

Condition of a walk the following morning, in absence of evidence of a change. *Lendly v. Detroit*, (Mich.) 90 N. W. Rep. 665.

That a hole in the pavement had since been filled up, on issue of defectiveness. *Christian v. Minneapolis*, 69 Minn. 530.

Subsequent condition of one of a team of horses, on issue of whether the death of the other came from overdriving. *McAllister v. Irvine*, 69 Mo. App. 442.

That ten weeks after the injury the boards of a walk were so rotten and the nails so decayed as to make it dangerous. *Richardson v. Marceline*, 73 Mo. App. 360.

The subsequent conduct of a river to show negligence in the construction of a bridge. *Omaha R. Co. v. Brown*, 16 Neb. 161.

The discharge of a driver whose negligence is the alleged cause of the accident. *Martin v. Towle*, 59 N. H. 31.

That posts were removed, to show that their presence could be dispensed with. *Dillon v. Raleigh*, 124 N. C. 184.

That the machine was defective at a subsequent period on proof of no change in condition. *Barbour v. Miles*, 14 Oh. C. C. 628.

Coller v. Cincinnati S. R. Co., 18 Oh. C. C., 382.

Subsequent repair of fence along the right of way. *Siglin v. Coos Bay &c. R. Co.*, 35 Or. 79.

Conditions subsequent to suit, where they have not been changed since its commencement. *Garigan v. Atlantic R. Co.*, 186 Pa. St. 604.

That a sidewalk was defective six weeks after the injury, where there has been no change. *McClosky v. Dubois*, 4 Pa. Super. Ct. 181.

That the premises were inspected the day after and no guard rail was found. *Rosenbaum v. Shoffner*, 98 Tenn. 624.

That plaintiff lost her breath while her deposition was being taken eight months later. *Gulf &c. R. Co. v. Ross*, 11 Tex. Civ. App. 201.

Subsequent violations of rule as to carrying passengers on freight trains, on issue of abrogation of rule. *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.) 40 S. W. Rep. 631; *Houston &c. R. Co. v. Norris*, 41 id. 708.

Subsequent emission of sparks and consequent fires. *International &c. R. Co. v. Newman*, (Tex. Civ. App.) 40 S. W. Rep. 854.

That an appliance was subsequently repaired. *Austin &c. R. Co. v. Flanagan*, (Tex. Civ. App.) 40 S. W. Rep. 1043.

Removal of an obstruction claimed to have caused an overflow of water. *Texas &c. R. Co. v. Anderson*, (Tex. Civ. App.) 61 S. W. Rep. 424.

Subsequent changes in a roof, on issue of necessity of a projection. *Gulf &c. R. Co. v. Darby*, (Tex. Civ. App.) 67 S. W. Rep. 446.

After an accident, experimental tests on a boiler similar to the one that had exploded were admissible on behalf of the defendant. *Bradley v. Hartford &c. Co.*, 19 Fed. Rep. 246.

Rotten condition of ladder four days after the accident. *Reese v. Morgan, &c. Min. Co.*, 17 Utah, 489.

Statement of person injured as to what he attributed his injury, may be shown by defendant; but plaintiff may show that he subsequently changed his mind. *Stowe v. Bishop*, 58 Vt. 498; *Dennison v. Miner*, (Pa.) 1 Cent. 297; *Grand Rapids R. Co. v. Diller*, 110 Ind. 223.

(But this does not bar a recovery.)

That dogs were not vicious at other times, subsequent to the time in question. *Dover v. Winchester*, 70 Vt. 418.

Statements of the injured person, deceased, as to the cause of the accident to contradict evidence of witnesses, etc., but not to show negligence of the deceased. *Fitzgerald v. Weston*, 52 Wis. 354.

Subsequent acts and statements were not allowed in the following instances:

A repair of a spark arrester which does not show its prior defective condition. *Louisville &c. R. Co. v. Malone*, 109 Ala. 509.

Declarations of engineer made five months after the accident. *Durkee v. Central R. Co.*, 69 Cal. 533.

That the defect in the machinery was remedied after the injury. *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598.

That several guards were stationed at the place of the accident thereafter. *Nilley v. Hart &c. Co.*, 51 Conn. 524.

That a ladder was subsequently furnished to put a belt on shafting instead of the employé's standing on stringers. *Chielinsky v. Hoopes &c. Co.*, 1 Marv. (Del.) 273.

Condition of building two years after the injury. *Huber v. Jackson &c. Co.*, 1 Marv. (Del.) 374.

That timbers lying in a dangerous position had been removed, in absence of proof that such condition contributed to the injury. *Western &c. R. Co. v. Rogers*, 104 Ga. 224.

Subsequent repair of a sidewalk by city. *Griffen v. Lewiston*, (Id.) 55 Pac. Rep. 545.

Other fires set by other locomotives. *First Nat. Bank v. Lake Erie &c. R. Co.*, 174 Ill. 36; aff'g s. c., 65 Ill. App. 21.

Repair in defect in machinery. *Hov v. Medoris*, 183 Ill. 288; rev'g s. c., 82 Ill. App. 515.

That a horse ran away at the sight of the same obstacle a week or so later. *Illinois C. R. Co. v. Griffin*, 184 Ill. 9; aff'g s. c., 84 Ill. App. 152.

Statements by the injured person after he had been removed from the scene of the accident. *Chicago &c. R. Co. v. Howard*, 6 Ill. App. 569.

Admission by foreman of fault in letting plaintiff go near a dangerous place. *Fisher v. Nutran Iron Enamel Co.*, 60 Ill. App. 568.

That a fence through which an animal broke was subsequently removed. *Leggett v. Illinois C. R. Co.*, 72 Ill. App. 577.

That cleats were subsequently nailed on an incline in a sidewalk. *Chicago &c. R. Co. v. Richardson*, 75 Ill. App. 198.

That a bridge was built after the accident. *Mt. Morris v. Kanode*, 98 Ill. App. 373.

Declarations of the deceased that he was injured in a dangerous labor. Action was by mother. *Pa. R. Co. v. Long*, 94 Ind. 250.

That an appliance to an elevator was changed after the accident. *Sievers v. Peters Box &c. Co.*, 151 Ind. 642, 662.

That the trench containing the wires over which deceased stumbled was subsequently covered over. *Chicago &c. R. Co. v. Lee*, 17 Ind. App. 215.

That crossing where the injury was received was thereafter repaired. *Hudson v. Chicago &c. R. Co.*, 59 Iowa, 581.

Declarations of a person fatally injured as to the circumstances of the accident. *Martin v. N. Y. &c. R. Co.*, 103 N. Y. 626; *Armil v. Chicago &c. R. Co.*, 70 Iowa, 130.

That a door was subsequently placed in the hack from which plaintiff was thrown. *Beard v. Guild*, 107 Iowa, 476; *Frohs v. Dubuque*, 109 id. 219.

On issue of the value of a part of a meadow destroyed in October, 1899, proof of value of that remaining in April, 1900, in the absence of proof that it continued in substantially the same condition. *Savanson v. Keokuk &c. R. Co.*, (Iowa) 89 N. W. Rep. 1088.

That the roof of the mine from which rock fell was repaired soon after the accident. *Cherokee &c. Co. v. Britton*, 3 Kan. App. 292.

That other precautions were taken after the accident. *Louisville &c. R. Co. v. Bowen*, (Ky.) 39 S. W. Rep. 31.

An action against express company for loss of plaintiff's trunk, admissions of defendant's agents or of a freight clerk to whom the agents referred plaintiff for information as to manner of loss, made in answer

to inquiries by plaintiff, are admissible. *Goot v. Dinsmore*, 11 Mass. 45.

What agent in charge of baggage room said upon application of passenger for her baggage, soon after her arrival, was competent for pl'ff.

Morse v. Conn. R. R. Co., 6 Gray, 450; *Lane v. Boston &c. R. Co.*, 112 Mass. 455; *Green v. Boston & L. R. Co.*, 128 id. 221; *Dilleber v. Knickerbocker Ins. Co.*, 76 N. Y. 567, 572; *Pierson v. Atlantic Nat. Bank*, 77 id. 304.

That the condition of the place was subsequently changed. *Whelton v. West End &c. R. Co.*, 172 Mass. 555.

Repairs to a sidewalk. *Zibbell v. City of Grand Rapids*, (Mich.) 89 N. W. Rep. 563; *Hammergreen v. St. Paul*, 67 Minn. 6.

Statement of superior that the employé was negligent. *McDermott v. Hannibal &c. R. Co.*, 73 Mo. 516.

That an embankment was altered after the accident thereon. *Ely v. St. Louis &c. R. Co.*, 77 Mo. 34.

Statement made by employé after the accident. *Smith v. St. Louis &c. R. Co.*, 91 Mo. 58.

That defects were found after a car was wrecked. *Oglesby v. Missouri &c. R. Co.*, 150 Mo. 137.

Intoxication at 3.45 p. m., to prove intoxication at 11 a. m. *Raynor v. Wilmington &c. R. Co.*, 129 N. C. 195.

Proper running of engine a few minutes after the accident, on issue of proper running at the time. *Ouverson v. Grafton*, 5 N. D. 281.

That the machine was defective several months after the accident, in the absence of proof that it was still in the same condition as at that time. *Henkel v. Stahl*, 9 Oh. C. D. 397.

Change made after the accident. *Toledo &c. R. Co. v. Beard*, 20 Oh. C. C. 681.

Subsequent precautions against further accident. *Baron v. Reading Iron Co.*, (Pa. St.) 51 Atl. Rep. 979.

That the grab iron of a car was in good condition six days later; in the absence of evidence that it was not repaired in the meantime. *Jones v. New York &c. R. Co.*, 20 R. I. 210.

Subsequent repairs at the place of the accident. *Illinois C. R. Co. v. Wyatt*, 104 Tenn. 432.

That a projecting screw on a shaft was subsequently protected. *Greenville &c. Co. v. Davenport*, (Tex. Civ. App.) 37 S. W. Rep. 624.

That cinders were found on the roof of a building adjoining the track several months after the fire and when the surrounding foliage conditions had become changed. *Gulf &c. R. Co. v. Johnson*, (Tex. Civ. App.) 67 S. W. Rep. 182.

Subsequent repair of machinery and change of method of business. *Motey v. Pickle Marble &c. Co.*, 74 Fed. Rep. 155.

That appliance was in good condition three days after the accident, in the absence of proof of no change. *The Edwin*, 87 Fed. Rep. 540.

See, also, *Green v. Ashland Water Co.*, 101 Wis. 258.

That a part of the fastenings of a mast were found broken after the fall of the mast, on issue of the cause of the fall. *The Miami*, 87 Fed. Rep. 757.

See, also, *Re Ramsay*, 95 Fed. Rep. 299.

Subsequent removal of a sunken box into which plaintiff fell. *Southern R. Co. v. Hall*, 100 Fed. Rep. 760.

That the hole in question was filled after the injury. *Carter v. Seattle*, 21 Wash. 585.

Subsequent precautions to prevent a repetition of the accident. *Green v. Ashland Water Co.*, 101 Wis. 258.

XI. Res Gestæ.

(See "Subsequent Acts and Statements," where many cases on this subject are collected.)

As applied to cases based on negligence the doctrine of *res gestæ* usually arises respecting evidence of statements, declarations and expressions made by the injured person, or by a servant of one of the parties, or by third persons standing by.

The rule broadly stated is, that the character, quality or cause of a tortious act may be explained by exclamations, declarations or statements co-incident with the injury, provided they be calculated to unfold the nature and quality of the acts which they are intended to explain. There must be a transaction of which they are considered a part; they must be concomitant with the principal action and so connected with it as to be regarded as the result and consequence of co-existing motives, and must not have been made as merely narrative of a past occurrence.*

Tilson v. Terwilliger, 56 N. Y. 273; *Waldele v. N. Y. C. &c. R. Co.*, 95 id. 274.

Dr. Wharton says (Wharton on Evidence, sec. 259), "The *res gestæ* may be therefore defined as those circumstances which are the undesigned incidents of

*NOTE.—The character of an injury may be explained by exclamations of pain and terror at the time the injury is received, and by declarations as to its cause. Wharton on Evidence, sec. 248.

Citing *Avenson v. Kinnaird*, 6 East. 188; *R. Co. v. Guttridge*, 9 C. & P. 472; *Green v. Bedell*, 48 N. H. 546; *Bacon v. Charlton*, 7 Cush. 581; *Hall v. Steamboat Co.*, 13 Conn. 319; *Spatz v. Lyons*, 55 Barb. 476; *Matteson v. R. Co.*, 62 id. 384; *Frink v. Coe*, 4 Greene (Iowa) 355; *Brownell v. R. Co.*, 47 Mo. 239; *Harriman v. Stowe*, 57 id. 93; *Entwhistle v. Feigner*, 60 id. 214.

a particular litigated act, and which are admissible when illustrative of such act."

In Wharton on Evidence, vol. 2, sec. 1174, it is said that statements are admissible "of the admissions of the servants of a common carrier during the period of carrying, if such admissions are not narratives of a past act, and are therefore the act itself talking, and not a talking about the act."

Mere co-incidence in time may be an important and essential but not a conclusive element in determining the admissibility of such evidence. Although the words sought to be proved accompany the performance of the principal act, yet unless they be explanatory thereof or show its purpose or intention, they are not competent. *Butler v. Manhattan R. Co.*, 143 N. Y. 417; *People v. Davis*, 56 id. 95.

"The incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander; they may comprise things left undone, as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself." Wharton on Evidence, sec. 259. "Declarations which are the immediate accompaniments of an act are admissible as part of the *res gesta*, remembering that immediateness is tested by closeness, not of time, but by causal relation." Wharton on Evidence, sec. 262.

This doctrine, as applied to this class of cases, is fully stated in the opinion of Earle, late chief justice of the court of appeals, in the case of *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274, of which the larger part is here given, together with annotations and digest of other decisions.

In the *Waldele* case the learned judge said: "He was familiar with the railroad at the place where he was injured; and was probably attempting to cross the railroad on his way home at the time he was struck by an engine and fatally injured. No one saw the accident, but the theory of the plaintiff, that as he approached the railroad tracks, a freight train came from the east, and he waited for that to pass, and then started to cross the track and was struck by an engine backing in the same direction at a distance of about fifty feet on the rear of the train. * * *

Shortly after the passage of the train and the engine, the groans of the intestate were heard, and he was found lying upon the southerly or outer track of the railroad, about fifteen feet from the sidewalk, badly bruised and mangled. He was soon removed to the sidewalk, and afterward to the hospital, where he died in about three hours. After he was removed to the sidewalk, his brother, also a deaf mute, was sent for; and about thirty minutes after the accident, he there obtained from him, by signs, the declarations the reception of which in evidence are complained of as error. He was produced by plaintiff as a witness and was asked, "what did he tell you?" and was allowed to answer under objec-

tion and exception. * * * The witness then answered: "John said he got hit. John said there was a long train, and he stood waiting for it to go, and an engine followed and struck him." * * *

The claim that the declarations can be treated as part of the *res gestæ* is not supported by authority in this state. The *res gestæ*, speaking generally, was the accident. These declarations were no part of that—were not made at the same time, or so nearly contemporaneous with it as to characterize it, or throw any light upon it. They are purely narrative, giving an account of a transaction not partly past, but wholly past and completed. They depended for their truth wholly upon the accuracy and reliability of the deceased, and the veracity of the witness who testified to them. Nothing was then transpiring or evident to any witness which could confirm the declarations or by which upon cross-examination of the witness testifying, or by the examination of other witnesses, the truth of the declarations could be tested.

It is not always easy to determine when declarations may be received as part of a *res gestæ*, and the cases upon this subject in this country and in England are not always in harmony. The case of *Commonwealth v. McPike*, (3 Cushing, 181), and *Insurance Company v. Mosley*, (8 Wall. 397) are extreme cases upon one side, and would justify the reception of these declarations. The case of *Regina v. Beddingfield*, (14 Cox's Cr. Cases, 341), is an extreme case upon the other side, and goes much further than would be needed to justify the exclusion of these declarations. That case was decided by Lord Chief Justice Cockburn, after consulting with Field and Manisty, JJ., and aroused much discussion and criticism in England. (*Belingsfield's Case*, 14 Am. Law Review, 817; 15 id. 71.)

The rule as to *res gestæ* laid down in *Commonwealth v. McPike*, has since been limited, and very properly applied in other cases in that state. In *Lund v. Tyngsborough*, (9 Cush. 36) in view of the frequent recurrence of questions in regard to the admission of declarations claimed to be part of some *res gestæ*, the court undertook to set forth and illustrate with some particularity the principles and tests by which such questions must be determined, and among other things said: 'When the act of a party may be given in evidence, his declarations made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible in evidence. The credit which the act or fact gives to the accompanying declarations as a part of the transaction, and the tendency of the contemporary declarations as a part of the transaction to explain the particular fact distinguish this class of cases from mere hearsay;' and further: 'Such a declaration derives credit and importance as forming a part of the transaction itself, and is included in the surrounding circumstances which may always be given in evidence to the jury with the principal fact. There must be a main or principal fact or transaction; and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it.' In *Commonwealth v. Hackett*, (2 Allen, 136) upon a trial for murder, a witness testified that, at the moment the fatal stabs were given, he heard the victim cry out, 'I am stabbed,' and he at once went to him and reached him within twenty seconds after that, and then heard him say, 'I am stabbed; I am gone; Dan Hackett has stabbed me.' This evidence was held competent as part of the *res gestæ*. Bigelow, Ch. J., speaking of this evidence, said: 'If it was a narrative statement, wholly unconnected with any transaction or principal fact,

it would be clearly inadmissible. But such was not its character. It was uttered immediately after the alleged homicidal act, in the hearing of a person who was present when the mortal stroke was given, who heard the first words uttered by the deceased, and who went to him after so brief an interval of time that the declarations or exclamations of the deceased may fairly be deemed a part of the same sentence as that which followed instantly, after the stab with the knife was inflicted. It was not, therefore, an abstract or narrative statement of a past occurrence, depending for its force and effect solely on the credit of the deceased, unsupported by any principal fact, and receiving no credit or significance from the accompanying circumstances. But it was an exclamation or statement contemporary with the same transaction, forming a natural and material part of it, and competent as being original evidence in the nature of *res gestæ*.' The learned judge also said that the rule which renders *res gestæ* competent has been often loosely administered by courts of justice so as to admit evidence of a dangerous and doubtful character; and that the tendency of recent decisions has been to restrict within the most narrow limits this species of testimony; and that that court was disposed to apply the rule strictly, and to exclude everything which did not clearly come within its just and proper limitations. In these cases, (the last two) I think the rule under consideration was correctly laid down and applied, and properly defined and limited. In *Rockwell v. Taylor*, (41 Conn. 55), the rule was laid down thus: 'To make declarations on this ground admissible, they must not have been mere narratives of past occurrences, but must have been made at the time of the act done which they are supposed to characterize, and have been well calculated to unfold the nature and quality of the acts they were intended to explain; and to so harmonize with them as to constitute a single transaction. In *Hanover Railroad Company v. Coyle*, (55 Pa. St. 396) the action was against a railroad company for injuring the plaintiff by negligence; and the trial court admitted declarations of the engineer by whose negligence the plaintiff was injured, made at the time of the injury, as part of the *res gestæ*; and it was held that they were properly admitted. Agnew, J., writing the opinion and speaking of the declaration of the engineer, said: 'It was made at the time of the accident, in view of goods strewn along the road by the breaking of the boxes, and seems to have grown directly out of and immediately after the happening of the fact. The negligence complained of being that of the engineer himself, we cannot say that his declarations, made upon the spot, at the time, and in view of the effects of his conduct, are not evidence against the company as a part of the very transaction itself.'

Without further calling attention to cases outside of the state, I will now refer to a few cases decided by this court in further illustration of this rule. In *Moore v. Meacham*, (10 N. Y. 207) the plaintiff sought to show his own declarations, while performing, or endeavoring to perform, his agreement, for the purpose of characterizing the agreement itself, and they were held incompetent. Gray, J., writing the opinion, said: 'The general rule is that declarations, to become a part of the *res gestæ*, must accompany the act which they are supposed to characterize, and must so harmonize as to be obviously one transaction.' In *Luby v. H. R. R. Co.*, (17 N. Y. 131) the action was for alleged negligence in running a railroad car, drawn by horses, against the plaintiff in one of the streets of the city of New York. Upon the trial he was allowed to prove that, immediately after the accident, a policeman arrested the driver of the car, and that upon arresting him, as he was getting off the car, and out of the crowd which sur-

rounded him, he asked why he did not stop the car; to which the driver replied that the brake was out of order. This evidence was objected to on the part of the defendant. The plaintiff recovered a judgment which was affirmed by the supreme court at general term. The defendant then appealed to this court, and the judgment was reversed on two grounds: 1. Because proof of the arrest was allowed; 2. Because the declaration of the driver was received. Upon the latter ground, Comstock, J., writing the opinion, said: 'The declarations of an agent or servant do not, in general, bind the principal. Where his acts will bind, his statements and admissions respecting the subject-matter of those acts will also bind the principal if made at the same time, and so that they constitute a part of the *res gestæ*. To be admissible they must be in the nature of original and not hearsay evidence. They must constitute the fact to be proved, and must not be the mere admission of some other fact. They must be made not only during the continuance of the agency, but in regard to a transaction depending at the very time;' and further: 'The declaration was no part of the driver's act, for which the defendants were sued. It was not made at the time of the act, so as to give it quality and character. The alleged wrong was complete, and the driver, when he made the statement, was only endeavoring to account for what he had done.' In *Hamilton v. N. Y. C. R. Co.*, (51 N. Y. 100) the plaintiff was ejected from the cars of the defendant on his way from Utica to Albany, at St. Johnsville, by the conductor, because he did not then have a ticket, and was unwilling to pay his fare. He then paid his fare under protest, and re-entered the car, and went to Albany. Shortly after reaching Albany he went to the conductor, and, with the assistance of the person who had acted as conductor west of Utica, satisfied him that he had paid his fare, whereupon the conductor refunded the fare to him; and he was allowed to prove, against the objection of the defendant, a conversation then had between him and the conductor, in which the latter applied to him very slanderous and abusive epithets, as a part of the *res gestæ*. The commission of appeals held that the evidence was erroneously received, and reversed the judgment and granted a new trial, holding that the conversation, although it took place at the time the conductor refunded the fare, was not part of the *res gestæ*, in a suit to recover damages for being ejected from the cars at St. Johnsville. In *Whitaker v. Eighth Ave. R. Co.*, (51 N. Y. 295) the action was brought to recover damages for an injury caused by the willful act of one of the defendant's car drivers in running one of its cars against the plaintiff, and throwing him into an excavation by the side of the track; and the plaintiff, in order to sustain his allegation of the driver's intention to do him injury, was permitted to prove by a witness that immediately after the car passed he heard the driver cursing and damning the plaintiff, saying, 'Let him fall in and be killed.' The trial judge held that the declaration was a part of the *res gestæ*, and, therefore, admissible. The evidence was objected to on the part of the defendant, and the commission of appeals decided that it was error to receive it; and for that and other reasons reversed the judgment and granted a new trial, holding that the declaration made by the driver after the car had passed, and the injury was done, was no part of the *res gestæ*. In *People v. Davis*, (56 N. Y. 95) upon an indictment under the statute against abortions, the woman upon whose person the abortion was attempted being dead, the district attorney was permitted to prove that she went away with the defendant in a buggy, and returned in the night, and what on her return she said to a witness had been done and said to her by the doctor who performed the operation upon the alleged

procurement of the defendant. This evidence was objected to on the part of the defendant, and the general term reversed the judgment of conviction by the over and terminer. The case was then brought into this court by writ of error on behalf of the people; and the decision at the general term was affirmed, this court holding that the declarations proved were simply a narrative of a past transaction, and not competent as part of the *res gestæ*. Grover, J., writing the opinion of the court, said: 'In this case the thing done, or *res gestæ*, was at the doctor's office in another town, and it is clear that its narration by the deceased was no part of that thing. *Anything said accompanying the performance of an act, explanatory thereof, or showing its purpose or intention, when material, is competent as a part of the act. But when the declarations offered are merely narratives of past occurrences they are incompetent.* That is precisely this case. The declarations given in evidence were a mere statement of what had been done at the doctor's office, and not any part of what was then done, and, therefore, no part of the *res gestæ*;' and speaking of the case of the Ins. Co. v. Mosely, *supra*, he said that the doctrine as to what may be regarded as a part of the *res gestæ* was certainly carried to its utmost limit in that case by the majority of the court. And he further very appropriately said: 'The length of time between the act and its subsequent narration by one of the actors I do not regard as material. The question is, did the proposed declaration accompany the act, or was it so connected therewith as to constitute a part of it? If so, it is a part of the *res gestæ* and competent; otherwise, not.'

In *Tilson v. Terwilliger*, 56 N. Y. 273, Folger, J., lays down the rule as to *res gestæ* declarations as follows: 'to be a part of the *res gestæ* they must be made at the time of the act done, which they are supposed to characterize; *they must be calculated to unfold the nature and quality of the acts which they are intended to explain; they must so harmonize with those facts as to form one transaction. There must be a transaction of which they are considered a part; they must be concomitant with the principal act, and so connected with it as to be regarded as the result and consequence of co-existing motives.*' In *Casey v. N. Y. C. & H. R. R. Co.*, 78 N. Y. 518, it was held, as stated in the head note that 'the testimony of a witness as to what occurred after the accident was competent as part of the *res gestæ*;' but it was so held for the reason that the occurrences there referred to constituted a part of the transaction. A child had been run over, and on the trial a police officer, who went to the place of the accident immediately after the child was killed, and found the child under the wheels of the car, was permitted, as a witness for the plaintiff, to state what the engineer in charge of the engine said and did in extricating the body of the child from under the wheels of the car. The evidence was clearly competent as a part of the *res gestæ*.

Distinguishing *Swift v. Mass. Mut. Life Ins. Co.*, 63 N. Y. 186; *Schnicker v. People*, 88 id. 192.

The plaintiff, a passenger, tripped and fell over a board which a brakeman had placed across the aisle of a car. The brakeman, a witness for the defendant, testified to the transaction and to his having cautioned the plaintiff to look out for the board, but, on cross-examination, denied that after the accident he stated to the plaintiff that he had forgotten to remove or slide back the board, and that it was his fault, that he was careless. The plaintiff, recalled, testified, subject to objection and excep-

tion, that such a conversation did take place. The evidence was no part of the *res gestæ* and was inadmissible. *Sherman v. D., L. & W. R. Co.*, 106 N. Y. 542.

The injury to the wife was caused by the closing of the gate to the platform of one of defendant's cars, as she was seeking to enter the car. The wife testified to the injury, that the guard was looking another way, and that immediately after the injury she made an exclamation of pain. She was then permitted to testify to an insulting remark made by the guard in reply to her exclamation of pain. Held, error.

While, in such an action, proximity in time with the act causing the injury is essential to make what was said by a third person competent evidence as part of the *res gestæ*, that alone is insufficient; to make it competent what was said must be part of the principal fact, and so part of the act itself; that is, naturally accompanying the act, or calculated to unfold its character and quality. *Butler v. M. R. Co.*, 143 N. Y. 417, rev'g judg't for pl'ff.

In *Fawcett v. Bigley*, 59 Pa. 411, the defendant's barges had broken from their moorings and ran into plaintiff's barges and destroyed one of them, with its cargo. The plaintiff offered to prove on the trial the declarations of the defendant's agent, who had charge of the barge, made immediately after the accident happened, in order to establish the negligence of the defendant, that there was a lack of ropes and tackle on the defendant's barge. This offer was excluded, and its exclusion was held not to be error.

Declarations of person dying from injury by railway, made immediately after the injury, are receivable. Wharton on Evidence, sec. 263.

Citing *Entwhistle v. Feigner*, 60 Mo. 214; *Harriman v. Stowe*, 57 id. 93; *Elkins v. McKean*, 79 Penn. St. 493.

"* * * such declarations, however, are inadmissible if so far prior to the act as to give opportunity for their concoction in way of preparation, or so far afterwards as to leave an interval of cooling time (to be measured by the circumstances of the case), in which excuse or explanation could be got up." Wharton on Evidence, sec. 265.

Remarks of bystanders about the accident after its occurrence were excluded. *Felska v. N. Y. &c. R. Co.*, 152 N. Y. 339.

Declarations of one looking from a window at the time, corroborative of his own testimony as to the cause, of the accident were excluded. *Ehrhard v. Metropolitan Street R. Co.*, 69 App. Div. 124.

Statements as to the condition of an instrument at the time of its use, made by an employé six days thereafter, were excluded. *Stevens v. Siegel-Cooper Co.*, 32 Misc. 250.

What held admissible as res gestæ:

Description of car furnishings and construction immediately after injury. *Southern R. Co. v. Crowder*, 130 Ala. 256.

Statements by one while he was still under the wheels. *Heckle v. Southern R. Co.*, 123 Cal. 441.

Exclamation of bystanders evoked by the impending danger. *Atlanta &c. R. Co. v. Bagwell*, 107 Ga. 157.

An affirmative answer to a question as to whether plaintiff was injured, immediately after injury. *Springfield &c. R. Co. v. Hoeffner*, 175 Ill. 634.

Exclamation in pain immediately after accident. *City of Salem v. Webster*, 192 Ill. 369.

By brakeman, within two minutes after the accident. *Fish v. Illinois C. R. Co.*, 96 Iowa, 702.

Declarations of trainmen during the delay are admissible, but not subsequent narratives made beyond the scope of their duties. *Atchison &c. R. Co. v. Consolidated Cattle Co.*, 59 Kan. 111.

Declaration by defendant's foreman at the time deceased fell. *O'Donnell v. Louisville &c. L. Co.*, (Ky.) 55 S. W. Rep. 202.

Exclamation by a bystander as to the condition of a plank which broke as men are walking over it. *Louisville &c. Packet Co. v. Samuels*, (Ky.) 59 S. W. Rep. 3.

What took place at the time, on issue as to the severity of the accident. *Louisville &c. R. Co. v. Carothers*, (Ky.) 65 S. W. Rep. 833.

Fact of outcries by other passengers at the time of collision. *Louisville &c. R. Co. v. Carothers*, (Ky.) 66 S. W. Rep. 385.

Spontaneous and unpremeditated statements at time of accident. *Keyes v. Cedar Falls*, 107 Iowa, 509.

Request, after accident from defective ventilation, "not to go yet, we are changing the air." *Mosgrove v. Zimbleman Coal Co.*, (Iowa) 81 N. W. Rep. 227.

Declaration of an engineer within a minute after the accident and after he had reached plaintiff. *Alsever v. Minneapolis &c. R. Co.*, (Iowa) 88 N. W. Rep. 841.

Of a telegraph agent as to the cause of delay; at the time of the delivery. *Western &c. Teleg. Co. v. Getto-McCling &c. Co.*, (Kan.) 61 Pac. Rep. 504.

While plaintiff was standing near the scene of accident and within a minute thereof. *Brown v. Louisville &c. R. Co.*, (Ky.) 53 S. W. Rep. 1041.

Subsequent complaints of suffering from the injury. *Gulf &c. R. Co.*

v. Bell, (Tex. Civ. App.) 58 S. W. Rep. 614; *St. Louis &c. R. Co. v. Gill*, 55 id. 386; *Wheeler v. Tyler &c. R. Co.*, 91 Tex. 356.

See, also, *Beath v. Rapid R. Co.*, 119 Mich. 512; *Heddle v. City R. Co.*, 112 Mich. 547.

Preparation of persons on the rear of a car to jump to avoid collision. *Holman v. Union S. R. Co.*, 114 Mich. 208.

See, also, *Louisville &c. R. Co. v. Shaw*, (Ky.) 53 S. W. Rep. 1048.

Statement by injured immediately after the explosion that it had put out his eye. *Herrick v. Wixom*, (Mich.) 80 N. W. Rep. 117; s. c., aff'd, 81 id. 333.

Conversations between parties before the accident referring to the acts of defendant's manager. *O'Brien v. Northwestern Imp. Co.*, (Minn.) 84 N. W. Rep. 735.

Statement made while the fire was still burning, though some time after it had been started. *Yazoo &c. R. Co. v. Jones*, 73 Miss. 229; *Mobile &c. R. Co. v. Stinson*, 74 Miss. 453.

Statement of a flagman, immediately after accident, that no one was to blame. *Southern R. Co. v. McLellan*, (Miss.) 32 South. Rep. 283.

Statements made immediately after being burned. *Meade v. Chicago &c. R. Co.*, 68 Mo. App. 92.

By plaintiff within a few feet of, and a few minutes after, the accident. *Stevens v. Walpole*, 76 Mo. App. 213.

By conductor, as to cause of delay, while the delay was still on. *Cunningham v. Wabash R. Co.*, 79 Mo. App. 524.

By engineer a few seconds after he had run over an inspector. *Union P. R. Co. v. Elliot*, 54 Neb. 294.

Words of a driver while trying to control his horse. *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219.

Declaration, concerning the collection of tickets made while performing a duty in respect thereto and in the course of which deceased was killed. *Means v. Carolina &c. R. Co.*, 124 N. C. 574.

Conversation between the drivers of the vehicles that collided, almost immediately after collision. *Baylies v. Diamond Street Omnibus Co.*, 173 Pa. St. 378.

Statements by motorman within two seconds after the accident. *Coll v. Easton Transit Co.*, 180 Pa. St. 618.

Testimony "that at the time of ejection there was confusion on the car, that his little girl and boy were both crying and that he thought the little girl would go into spasms." *O'Rourke v. Citizens' R. Co.*, 103 Tenn. 124.

Declarations as to present pain, but not a narrative of past events. *Wheeler v. Tyler &c. R. Co.*, 91 Tex. 356; *Missouri &c. R. Co. v. Zwiener*,

38 id. 375; *St. Louis &c. R. Co. v. Gill*, 55 id. 386; *Gulf &c. R. Co. v. Bell*, 58 id. 614; *Western Union Tel. Co. v. Davis*, 59 id. 46.

Statement that a collision would occur at the place in question just before it did occur. *Missouri &c. R. Co. v. Vance*, (Tex. Civ. App.) 41 S. W. Rep. 167.

Statement by engineer as to condition of appliance 20 minutes after the injury and while all parties were on the spot. *Missouri &c. R. Co. v. Vance*, (Tex. Civ. App.) 41 S. W. Rep. 167.

By conductor immediately after accident, as to what happened and what directions he gave plaintiff, but not what was the condition of the track. *Norris v. Houston &c. R. Co.*, (Tex. Civ. App.) 41 S. W. Rep. 708.

Declaration by injured man immediately after he had been carried 150 to 200 feet away. *Houston &c. R. Co. v. Weaver*, (Tex. Civ. App.) 41 S. W. Rep. 846.

Statements of injured man in response to inquiries a few minutes after injury. *Houston &c. R. Co. v. Loeffler*, (Tex. Civ. App.) 51 S. W. Rep. 536; *Gulf &c. R. Co. v. Wilner*, 66 id. 574.

Declaration by engineer shortly after the accident as to his managing appliances. *International &c. R. Co. v. Bryant*, (Tex. Civ. App.) 54 S. W. Rep. 364.

By brakeman five minutes after the accident. *Dewalt v. Houston &c. R. Co.*, 22 Tex. Civ. App. 403.

By injured man, though several hours after injury, where that was the first moment of consciousness after the accident. *Missouri &c. R. Co. v. Moore*, (Tex. Civ. App.) 59 S. W. Rep. 282.

Declarations as to the manner of accident made immediately after the fall and while deceased was still lying where he fell. *Galveston &c. R. Co. v. Davis*, (Tex. Civ. App.) 65 S. W. Rep. 217.

Statement as to the accident made by the engineer and fireman within six minutes thereafter. *San Antonio &c. R. Co. v. Gray*, 67 S. W. Rep. 763; rev'g s. c., 66 id. 229.

Language used by conductor in directing couplings during the entire trip. *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108.

Statement by plaintiff directly after the accident as to injury and pain, and while yet lying where he fell. *Hawks v. Chester*, 70 Vt. 271.

By conductor as he met injured employé immediately after latter had come from between the cars and had only walked six or seven car lengths toward the former. *Pierce v. Van Dusen*, 78 Fed. Rep. 693.

By an injured employé when the superintendent came to his assistance. *Cross Lake R. Co. v. Joyce*, 83 Fed. Rep. 989.

Declaration by one employed to remove an obstruction caused by a

landslide that there was danger of another landslide. *Slavens v. Northern R. Co.*, 97 Fed. Rep. 255.

Declarations of those assisting in removing plaintiff from the place immediately after the injury. *Westall v. Osborne*, 115 Fed. Rep. 282.

Conversation between injured traveler and switchman at the crossing immediately after the accident. *Wilson v. Southern P. R. Co.*, 13 Utah, 352.

Acts and declarations at the time of fall. *Piper v. Spokane*, (Wash.) 60 Pac. Rep. 138.

Declarations of motorman, while his car was on the child. *Sample v. Consolidated L. & C. Co.*, 50 W. Va. 472.

By conductor after allowing ejected passenger to return. *Robinson v. Superior & C. R. Co.*, 94 Wis. 345.

What is inadmissible as res gestæ:—

Statements of fact, as to which there is positive direct testimony. *Woodward Iron Co. v. Andrews*, 114 Ala. 243.

See, also, *Mills v. Gresselle*, 4 Oh. C. D. 161.

Exculpatory statement by motorman after injury and removal of plaintiff. *Little Rock & C. R. Co. v. Nelson*, 66 Ark. 494.

See, also, *Scott v. St. Louis & C. R. Co.*, (Iowa) 83 N. W. Rep. 818.

By elevator man after plaintiff had been removed. *Lissak v. Crocker & C. Co.*, 119 Cal. 442.

By captain, on examining the rope after the accident, as to its condition. *Silveria v. Iversen*, 128 Cal. 187.

By a child within five minutes after being bitten. *McCarrick v. Kealy*, 70 Conn. 642.

Statement made an hour after the accident. *Chielinsky v. Hoopes & C. Co.*, 1 Marv. (Del.) 273.

Declarations by defendant's representative while investigating cause of accident. *Electric R. Co. v. Carson*, 98 Ga. 652.

By an engineer some little time after running over mules. *Weinkle v. Brunswick & C. R. Co.*, 107 Ga. 367.

By brakeman though immediately after he had fallen. *Western & C. R. Co. v. Beason*, 112 Ga. 553.

By one injured, hours after the injury occurred. *Globe Accident Ins. Co. v. Gerisch*, 163 Ill. 625.

See, also, *Wabash R. Co. v. Farrell*, 79 Ill. App. 508.

Declarations an hour before boarding a train, that deceased intended to take passage. *Chicago & C. R. Co. v. Chancellor*, 165 Ill. 438; rev'g s. c., 60 Ill. App. 525.

By the injured after he had been removed from the place of injury. *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169.

By defendant's general Manager after the accident and while riding in the car from the place. *Momence Stone Co. v. Groves*, 197 Ill. 88; aff'g s. c., 100 Ill. App. 98.

Direction by master to repair from 15 minutes to one or two hours after the accident. *Alabaster Co. v. Lonergan*, 90 Ill. App. 353.

Admissions as to prior condition of a fence, made after the injury. *Norman v. Chicago &c. R. Co.*, (Iowa) 81 N. W. Rep. 597.

See, also, *Louisville &c. Co. v. Beauchamp*, (Ky.) 55 S. W. Rep. 716.

Statements some days after the accident. *Hall v. Cedar Rapids R. Co.*, (Iowa) 87 N. W. Rep. 739.

Statement by engineer two or three hours after the accident. *Walker v. O'Connell*, 59 Kan. 306.

By claim agent while seeking information as to the cause of occurrence. *Chesapeake &c. R. Co. v. Smith*, 101 Ky. 104.

Direction by defendant's secretary to remove the wire in question, after the injury. *East Tennessee Teleg. Co. v. Sims*, 99 Ky. 404.

By conductor 15 minutes after the accident concerning engineer's conduct. *Roseberry v. Newport News &c. R. Co.*, (Ky.) 39 S. W. Rep. 407.

After the train had run about a mile and a half and returned to place of accident. *Hughes v. Louisville &c. R. Co.*, (Ky.) 48 S. W. Rep. 671.

Conversation a half hour after the accident. *O'Donnell v. Louisville &c. R. Co.*, (Ky.) 55 S. W. Rep. 202.

Declaration of an engineer several hours after the accident though against himself. *Cincinnati &c. R. Co. v. Cook*, (Ky.) 67 S. W. Rep. 383.

Declarations made some time after the accident to one not responsible therefor, though in contemplation of death. *Marter v. Texas &c. R. Co.*, 52 La. Ann. 727.

By plaintiff's companion after they had gone considerable distance to secure treatment. *Baltimore v. Lobe*, 90 Md. 310.

Statements in the form of a narrative five minutes after the accident. *Eastman v. Boston &c. R. Co.*, 165 Mass. 342.

Declarations about a hammer with which plaintiff was injured, though made immediately after the injury. *Dompier v. Lewis*, (Mich.) 91 N. W. Rep. 152.

Statements to physicians several days after injury. *Webber v. St. Paul C. R. Co.*, 67 Minn. 155.

An exclamation may be coincident in time but inadmissible as not bearing on the question at all. *Reem v. St. Paul S. R. Co.*, (Minn.) 80 N. W. Rep. 638.

Statements by a boy ejected from a train after he had been picked up and placed on the train. *Farber v. Missouri R. Co.*, 139 Mo. 272.

By conductor after the car was stopped and he had come to plaintiff to assist her. *Blackman v. West Jersey &c. R. Co.*, (N. J. L.) 52 Atl. Rep. 370.

Conversations between employes in charge of the colliding cars shortly after collision. *Willis v. Atlantic &c. R. Co.*, 120 N. C. 508.

See, also, *Butler v. South Carolina &c. R. Co.*, 130 N. C. 15.

Narratives. *Circleville v. Throne*, 1 Oh. C. D. 200.

St. Louis &c. R. Co. v. Gill, (Tex. Civ. App.) 55 S. W. Rep. 386; *San Antonio &c. R. Co. v. Manning*, 20 Tex. Civ. App. 504.

Declarations of defendant's superintendent several days after the accident. *Gilbertson v. Patterson Mills Co.*, 174 Pa. St. 369.

Declarations made 15 to 20 minutes after a fall and after plaintiff had walked some distance. *Keefer v. Pacific &c. Ins. Co.*, 201 Pa. St. 448.

By injured man, shortly after collision, that it was due to his father's fault. *Saunders v. City &c. R. Co.*, 99 Tenn. 130.

By motorman 15 minutes after the injury, and after plaintiff had begun to relieve himself. *Citizens' &c. R. Co. v. Howard*, 102 Tenn. 474.

See, also, *Dewalt v. Houston &c. R. Co.*, 22 Tex. Civ. App. 403.

What brakeman said as to orders on ejecting plaintiff. *Lyons v. Texas &c. R. Co.*, (Tex. Civ. App.) 36 S. W. Rep. 1007.

Declarations of a telegraph operator several days after delivery of the telegram. *Western &c. Teleg. Co. v. Woffard*, (Tex. Civ. App.) 42 S. W. Rep. 119; *Southwestern Teleg. &c. Co. v. Gotcher*, 53 id. 686.

Exclamation of one as another attempted to raise deceased after the accident. *San Antonio &c. R. Co. v. Belt*, (Tex. Civ. App.) 46 S. W. Rep. 374.

Declarations of bystanders at the time. *Houston &c. R. Co. v. Wilson*, (Tex. Civ. App.) 50 S. W. Rep. 156.

Murray v. Salt Lake &c. R. Co., 16 Utah, 356.

Declarations of trainmen passing the place about 15 minutes after the accident. *Dennison &c. R. Co. v. Foster*, (Tex. Civ. App.) 68 S. W. Rep. 299.

By conductor an hour after the collision. *Norfolk &c. R. Co. v. Suffolk Lumber Co.*, 92 Va. 413.

Declarations three-quarters of an hour after an explosion in the mine and after being removed to the mouth of the shaft. *Gowen v. Bush*, 76 Fed. Rep. 349.

What was said by bystanders to plaintiff. *Murray v. Salt Lake City R. Co.*, 16 Utah, 356.

Declaration by injured man from half an hour to an hour after collision. *Steinhofel v. Chicago &c. R. Co.*, 92 Wis. 123.

XII. Liability—Admission of.

An offer to pay for injuries claimed to have been suffered through the defendant's negligence is competent and may be shown, unless in absence of evidence that the offer was made in compromise.

Defendant asked plaintiff what he was going to do about the matter; the latter replied that he did not know. Defendant thereupon said: "I'll give you \$5 a week and pay the doctor's bill." Plaintiff declined the offer. *Brice v. Bauer*, 108 N. Y. 428, aff'g judg't for pl'ff; citing *Wallace v. Small*, 1 Moosly & M. 446; *Thompson v. Austin*, 2 Daw. & Ry. 358.

Admission of liability for loss of defendant's goods was allowed on a counter claim. *Weussboun v. Solomon*, 54 App. Div. 554.

Admission not made within scope of servant's authority did not bind master. *Pfeffer v. Stein*, 26 App. Div. 535.

Admission of an agent of a corporation in regard to the operation of a car over which he had no control and on which he had no duty to perform, did not bind defendant. *Gortz v. Metropolitan Street R. Co.*, 54 App. Div. 365; *Nowack v. Metropolitan Street R. Co.*, id. 302; s. c. aff'd, 60 N. E. Rep. 32.

A party may introduce as an admission of liability:

Declarations of the town officers including the supervisor, after the injury, showing knowledge thereof, on question of notice to the town. *Vandewater v. Wappinger*, 69 App. Div. 325.

Letter of chief inspector of public works in the course of his duties showing knowledge of the defective sidewalk, on question of notice. *Denver v. Cochran*, (Colo. App.) 67 Pac. Rep. 23.

Mt. Morris v. Kanode, 98 Ill. App. 373, (admission trustees of village).

Refusal to afford opportunity for examination of injured person may be shown. *Freeport v. Isbell*, 93 Ill. 381.

Admission of a boy of six should be received with caution and given weight according to his age and understanding. *Chicago &c. R. Co. v. Tuohy*, 196 Ill. 410; aff'g s. c., 95 Ill. App. 314.

A statement of a superintendent in reply to a foreman's notification as to the dangerous condition of defendant's tracks. *Indiana &c. R. Co. v. Bundy*, 152 Ind. 590.

Declarations subsequent to the injury were binding against estate of deceased as admissions. *Walker v. Brautner*, 59 Kan. 117.

Statement of a co-defendant. *Boynton v. Hardin*, (Kan. App.) 58 Pac. Rep. 1007.

Admission in answer of duty to light and guard an excavation. *Baumeister v. Markham*, 101 Ky. 122.

See, also, *Buchel v. Gray*, 115 Cal. 421; *Littlejohn v. Richmond &c. R. Co.*, 45 S. C. 181.

Advice by an employer to an employé to sue him, as he, the former, was covered by insurance. *Ellis v. Pierce*, 172 Mass. 220.

Physician's report of the injuries at the time of service is a declaration within a statute, providing for admission of, though not under oath. *O'Driscoll v. Lynn, &c. R. Co.*, 180 Mass. 187.

Declaration of defendant's driver admitting negligence repeated in defendant's presence and undenied by him were held binding on him. *Smith v. Duncan*, (Mass.) 63 N. E. Rep. 938.

Admission of liability is an evidence of negligence, but does not create liability. *Swift El. Light Co. v. Grant*, (Mich.) 51 N. W. Rep. 539.

Statement of defendant that he would make it all right. *Whitson v. Ames*, 68 Minn. 23.

Declaration of defendant's conductor as to the time a train was due. *San Antonio &c. R. Co. v. Barnett*, (Tex. Civ. App.) 66 S. W. Rep. 474.

A party may not introduce as an admission of liability:

Admission by a servant of the defectiveness of the instrument in question six days after the injury. *Stevens v. Siegel-Cooper Co.*, 32 Misc. 250.

Statement by a captain that the rope which broke "looked pretty bad," though directly after the accident. *Silveira v. Iversen*, 128 Cal. 187.

Offer to settle, as a compromise and with express denial of liability. *Atchison &c. R. Co. v. Cahill*, 11 Colo. App. 245; *Chicago &c. R. Co. v. Roberts*, (Colo.) 57 Pac. Rep. 1076; rev'g s. c., 10 Colo. App. 87.

See, also, *Holy Cross &c. Co. v. O'Sullivan*, (Colo.) 60 Pac. Rep. 570.

Declarations of a shipping agent as to deliveries is beyond the scope of his authority. *Southern R. Co. v. Kinchen*, 103 Ga. 186.

So, of declarations of section foreman and depot agent as to an engineer's negligence. *Atchison &c. R. Co. v. Osborn*, 58 Kan. 768.

Admission in a letter of a corporation's secretary. *East Tennessee Teleg. Co. v. Simms*, 99 Ky. 404.

Statement of an employé that a previous delay in the delivery of a message was gross negligence, was held to be a mere expression of opinion. *Graddy v. Western &c. Teleg. Co.*, (Ky.) 43 S. W. Rep. 468.

By engineer that he saw plaintiff before he ran over him. *Cole v. New York &c. R. Co.*, 174 Mass. 537.

Statement of co-defendant. *Hoplan v. Boston Gaslight Co.*, 177 Mass. 15.

Admission of elevator man as to lack of repair of cable. *Hall v. Murdock*, 119 Mich. 389.

A statement by defendant's manager in a casual conversation after the accident. *Beunk v. Valley City Desk Co.*, (Mich.) 87 N. W. Rep. 793.

Statement by a claim agent where it did not appear that he was transacting any business of the company at the time. *Reem v. St. Paul C. R. Co.*, (Minn.) 80 N. W. Rep. 638.

By driver of a sprinkling wagon that he knew the plug was out of order. *Rice v. City of St. Louis*, 165 Mo. 636.

Statement of driver in absence of owner that "the horse had run away before and the boss knew it." *Gobrecht v. Sicking*, 18 Oh. C. C. 881.

By one who was formerly a councilman showing knowledge of defective conditions, made after leaving office. *Adkins v. Monmouth*, (Or.) 68 Pac. Rep. 737.

Settlement of other claims arising from the same collision. *Missouri &c. R. Co. v. Vance*, (Tex. Civ. App.) 41 S. W. Rep. 167.

Declaration of switchman immediately after the accident blaming the engineer, though admissible as *res gestae*. *Wilson v. Southern P. Co.*, 13 Utah, 352.

The furnishing of a nurse. *Sias v. Consolidated T. Co.*, 73 Vt. 35.

Admission of carelessness immediately after the injury is not conclusive. *Latham v. Missisquoi Pulp Co.*, (Vt.) 52 Atl. Rep. 526.

Reports made in the process of repairs of a boiler, which exploded not communicated to defendant, but to an engineer not shown to have any authority in the premises. *Hastings Lumber Co. v. Garland*, 115 Fed. Rep. 15.

XIII. Negative and Affirmative.

Although the engineer in charge of the train swore that there was a signal, the plaintiff testified that he listened, and did not hear any bell, or whistle or noise of the train. This presented a question of fact, and the case is not brought within the principle decided in *Culhane v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 133. *Dyer v. Erie R. Co.*, 11 id. 228, 237, rev'g judg't for pl'ff. (See *Culhane v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 133, digested *ante*, p. 1115.)

The disagreement was as to the facts, the majority holding that the evidence of plaintiff's witnesses simply amounted to statements that they did not hear, without having their attention called, at the time, to the facts; while on the other side were four witnesses who swore positively

to the ringing of the bell. *McKeever v. N. Y. C. & H. R. R. Co.*, 88 N. Y. 667, aff'g judg't for def't on nonsuit.

The evidence of a passenger on a train in a position to have heard, although it does not affirmatively appear that he was watching or listening, that he did not hear signals, is competent. *Greany v. L. I. R. Co.*, 101 N. Y. 419, aff'g judg't for pl'ff, citing *Culhane v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 133.

Omission to give evidence may be considered by jury where there was evidence tending to show that a scraper had been negligently left in the highway by the defendant's commissioner of highways. The jury were properly permitted to consider by way of corroboration the omission of the defendant to call him as a witness or to offer any evidence on the subject. *Whitney v. Town of Ticonderoga*, 127 N. Y. 40, 46.

A person thirty-five or forty rods from the railway, not noticing the train until it had passed the crossing, but unloading wood in a building, was not competent to state that he did not hear bell ring. *Chapman v. N. Y. C. & H. R. R. Co.*, 14 Hun, 484, rev'g judg't for pl'ff.

Against the affirmative evidence of credible witnesses that the signal was given at the crossing, the evidence of witnesses who were not listening for signals and gave no attention to the matter, that they did not hear it, should not be considered. *Tolman v. S. & B. & N. Y. R. Co.*, 27 Hun, 326, rev'g judg't for pl'ff; s. c., 31 id. 397, aff'g judg't for pl'ff.

And this is so although the affirmative evidence be given by the defendant's employés. *Hoffman v. Fitchburg R. Co.*, 67 Hun, 581.

Testimony of the witness that he did not hear a bell was of no value as against affirmative evidence to the contrary, where he was standing within three or four feet of the track, but his attention was not turned to the approaching train. *Rainey v. N. Y. C. & H. R. R. Co.*, 68 Hun, 495.

Where several witnesses testified that they did not hear the bell of a locomotive ring, approaching a crossing, and stated facts and circumstances explanatory of their opportunity for hearing it ring, and one stated that the bell did not ring, there was sufficient evidence for submitting the case to the jury, although several of defendant's witnesses testified that the bell was rung. Another person near deceased testified that bell was not rung. *Puff v. Lehigh Valley R. Co.*, 71 Hun, 577, aff'g judg't for pl'ff.

Where the witnesses for the plaintiff testified that they did not hear the bell of a certain locomotive rung or its whistle blown, but it did not appear that anything specially called their attention to the absence of such signals, and the defendant's witnesses swore positively that the bell was rung and the whistle blown, a jury should not find that the bell

was not rung nor the whistle blown. *Fowler v. N. Y. C. & H. R. R. Co.*, 74 Hun, 141.

While affirmative evidence of the fact that a signal was given at, and for some distance before reaching a street crossing, on the approach of a train, may seem more potent than the testimony of persons to the effect that they did not hear it or that no such signal was given, yet, when the evidence of the latter tends to prove that their attention at the time was directed or called to the fact, and the omission to give any signal was particularly observed by them, the question is one for the jury to determine.

Although the employes of a defendant railroad company, engaged in running an engine, who testify on behalf of the company that signals were given on approaching a crossing, have at least as good an opportunity as any other person can have to know whether such signal was given, their relation to the company is a circumstance which the jury is permitted to take into consideration in determining a disputed question of fact as to whether or not a signal was given. *Moore v. N. Y. C. & H. R. R. Co.*, 75 Hun, 381.

Where the evidence is equally consistent with the absence as with the existence of negligence, plaintiff cannot recover. *Cahn v. Manhattan R. Co.*, 76 N. Y. Supp. 893.

Reedy v. Metropolitan Street R. Co., 27 Misc. 527; *Newcomb v. Metropolitan Street R. Co.*, 34 Misc. 203; *Georgia &c. R. Co. v. Thompson*, 111 Ga. 731; *Lake Shore &c. R. Co. v. Andrews*, 58 Oh. St. 426; *St. Louis &c. R. Co. v. Adams*, 24 Tex. Civ. App. 231.

Positive evidence that lights were lit outweighs evidence that they were not seen. *Carswell v. Wilmington*, 2 Marv. (Del.) 360.

See, also, *Hambricht v. Western &c. R. Co.*, 112 Ga. 36; *Central &c. R. Co. v. Holmes*, 110 Ga. 282.

Positive testimony that an automatic bell rang, outweighs testimony that it was not heard. *Haecker v. Chicago &c. R. Co.*, 91 Ill. App. 570.

See *Haun v. Rio Grande R. Co.*, 22 Utah, 346.

See, also, "Crossings," *ante*, p. 733.

Evidence that a whistle was heard blowing at the time of the accident was of itself no proof of proper care. *Mobile &c. R. Co. v. Dale*, 61 Miss. 206.

Evidence of four witnesses that they did not hear a bell, and of one that no bell was rung is not negative evidence. *Smith v. Wabash &c. R. Co.*, 92 Mo. 359.

See Whart. on Neg., citing *Stitt v. Huidekopers*, 17 Wall. 384; *Loughlin v. People*, 18 Ill. 266; *Chic. &c. R. Co. v. Stumps*, 53 id. 367; *State v. Gates*, 20 Mo. 400; *Ralph v. R. R.*, 32 Wis. 177; *Johnson v. State*, 14 Ga. 55; *Todd v. Hardie*, 5 Ala. 698; *Pool v. Devers*, 30 id. 672; *Auld v. Walton*, 12 La. Ann. 129;

Coles v. Perry, 7 Tex. 109; Abel v. Fitch, 20 Conn. 90; Johnson v. Whidden, 32 Me. 230; Campbell v. Ins. Co., 98 Mass. 381; Greenville v. Henry, 78 Ill. 150; Reeves v. Poindexter, 8 Jones, (L.) N. C. 308; Rockford R. v. Hillmer, 72 Ill. 235.

Evidence that plaintiff looked and listened at a crossing, is not effective, where it is shown that if he had looked he must have seen the train. *Payne v. Chicago &c. R. Co.*, 136 Mo. 562.

Testimony that a bell was not rung or whistle sounded by those near the crossing and whose attention was directed to it is equal in weight to positive testimony that it was. *State v. Kansas City &c. R. Co.*, 70 Mo. App. 634.

Statement that no whistle was heard is positive where it is shown that attention was directed to the ascertainment of that fact. *Lake Shore &c. R. Co. v. Schade*, 15 Oh. C. C. 424.

That plaintiff listened and did not hear a whistle did not outweigh positive evidence that it was given. *Jones v. Lehigh &c. R. Co.*, 202 Pa. St. 81.

Testimony that train was going 60 miles an hour but without means of measuring it outweighed by the schedule and positive testimony of engineer. *Knox v. Philadelphia &c. R. Co.*, 202 Pa. St. 504.

XIV. Ordinance.

The violation of an ordinance is not evidence in behalf of the person injured. *Brown v. Buffalo & State Line R. Co.*, 22 N. Y. 191; rev'g judg't for pl'ff. (This holding is not usually followed.)

The ordinance of a city not covering *locus in quo* of accident is not admissible. One cannot rely on the fulfilment of an ordinance and omit proper care. *Calligan v. N. Y. C. & H. R. R. Co.*, 59 N. Y. 651; rev'g judg't for pl'ff.

A company operating its trains on another company's road is effected by an ordinance applying to such road equally with the owner. Such an ordinance was in the nature of law, and all persons within the city are bound to take notice of it as if it had been a law regularly enacted by the Legislature.

A violation or disregard of the ordinance, while not conclusive evidence of negligence is some evidence upon the question to be submitted to the jury, with all the other evidence. *McGrath v. N. Y. C. & H. R. R. Co.*, 63 N. Y. 522; rev'g judg't for def't.

See *Lane v. Atlantic Works*, 111 Mass. 136.

Whether the violation of the ordinance as to speed is evidence of negligence. *Quaere. Massoth v. D. & H. Canal Co.*, 64 N. Y. 524, aff'g 6 Hun, 314, and judg't for pl'ff.

From opinion.—“Whether a violation of this ordinance is necessarily an act of negligence, or such a wrongful act in violation of law as legally to charge the defendant with any injuries resulting from such act, may be regarded as an open question in this state. The decision in *Brown v. The Buffalo & State Line Railroad Company*, (22 N. Y. 191) that a city ordinance regulating the speed of railroad trains was not admissible in evidence, for any purpose, in an action against a railroad corporation for negligently causing death of an individual, was dissented from by Judges Seldon, Denio and Clerke, and has been overruled. *Jetter v. N. Y. & H. R. R. Co.*, 2 Abb. Ct. of App. 458; s. c., 2 Keyes, 154; *Beisegel v. N. Y. C. R. R. Co.*, 14 Abb. (N. S.) 29. The actual decisions in this state have, however, only gone to the extent of holding that city ordinances of this character are competent evidence upon the question of negligence of railroad corporations, and with proof of a greater rate of speed than prescribed, proper, with all the other evidence in the case, to be submitted to the jury for their consideration. It has not been necessary in any case, in which the question had arisen, for the courts to go farther. In *Jetter v. New York & Harlem Railroad Company*, *supra*, there is a plain intimation that a municipal ordinance passed by authority of the legislature, has the force of an express statute, and that every violator of it is a wrongdoer, and *ex necessitate*, negligent in the eye of the law, and that every innocent party injured by such violation is entitled to his civil remedy for such injury. * * *

In Maryland it is held that, if a railroad company does not conform to city ordinances, providing certain safeguards in the use of its engines, it is not in the lawful pursuit of its business, and is responsible for any injury which it may occasion if the party injured be not in fault. *Baltimore & Ohio Railroad v. The State*, 29 Md. 252.”

An ordinance regulating the use of stove pipes was admissible, provided the evidence was such as to permit an inference that its violation contributed to the injury, and a charge accordingly was correct. *Briggs v. N. Y. C. R. Co.*, 72 N. Y. 26, aff'g judg't for pl'ff.

The violation of an ordinance does not establish negligence *per se*. *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; rev'g 23 Hun 150, and judg't for pl'ff.

In an action against a municipality for an injury from the negligent condition of the sidewalk, an ordinance against the throwing of snow on the sidewalks is properly received, and the witness allowed to testify that he fell there before. *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459, aff'g 34 Hun, 607.

It is competent to show violation of an ordinance prohibiting car from stopping at intersection of tracks, whereby plaintiff was injured. *Cumming v. B. C. R. P. Co.*, 104 N. Y. 669, aff'g 38 Hun, 362, and judg't for pl'ff.

For violation of statutory duty to fence its roads a railroad company is liable. *Donnegan v. Erhardt*, 119 N. Y. 468.

To same effect *Jetter v. N. Y. C. & C. R. Co.*, 2 Abb. Ct. App. Dec. 458.
(See “Domestic Animals,” *ante*, p. 1031.)

Failure of boat to keep light out, pursuant to ordinance, is negligence, and custom to disregard ordinance cannot be shown. (*Case v. Perew*, 34 Hun, 130, rev'g judg't for pl'ff.

Ordinance forbidding speed greater than eight miles per hour does not exclude the jury from finding that less speed was negligence under the circumstances. *Finklestein v. N. Y. C. & H. R. R. Co.*, 41 Hun, 34, rev'g judg't for def't.

From opinion.—*Graham v. Prest. &c. D. & H. C. Co.*, 46 Hun, 386. "The cases are numerous which hold that the violation of a public statute is legal negligence, and the violation of a municipal ordinance is evidence of negligence. (*Van Norden v. Robinson*, 45 Hun, 567, and cases there cited.)

It was at one time contended that the only liability incurred by violating an ordinance was the penalty prescribed in it. (*Brown v. Buffalo & S. L. R. Co.*, 22 N. Y. 191.) But that doctrine did not long prevail. It was soon perceived that every person who violates an express statute is a wrong-doer, and as such is, *ex necessitate*, negligent: and if he has done the wrong with respect to an innocent person, the latter has his remedy for full indemnity. (*Jetter v. N. Y. & H. R. R. Co.*, 2 Keyes, 154, 162.)"

Proof of violation of statutory ordinance does not establish a cause of action, but is evidence, in an action for injury from leaving gates open at a crossing, that the injured person knew that the gates were not operated at the time of the accident, and he was not entitled to rely upon the operation of them. *Rainey v. N. Y. C. & H. R. R. Co.*, 68 Hun, 495.

An ordinance does not create a cause of action in favor of a person injured by disobedience thereof. *Fuchs v. Schmidt*, 8 Daly, 317.

Failure to comply with an ordinance may be shown. *Koster v. Newman*, 8 Daly, 231; *Crocker v. Schureman*, 7 Mo. App. 358; *Meet v. Pa. Co.*, 38 Oh. St. 632; *Pa. Co. v. Hensill*, 70 Ind. 569; *Western R. Co. v. Meigs*, 74 Ga. 857; *Seimers v. Eisen*, 54 Cal. 418; *Ga. R. Co. v. Williams*, 74 Ga. 723.

Horse was left in street without being securely tied contrary to an ordinance. It was evidence, though not conclusive, of negligence. *McCambly v. Staten Island &c. R. Co.*, 32 App. Div. 346.

Municipal ordinance not admissible where not proved to have been in force at the time. *Zimmerman v. Stahl*, 38 App. Div. 638.

A resolution of the city council as to the paving and repairing of a street was admitted on the question of negligence of defendant, where the passenger stepped into a hole in alighting from a car. *Welch v. Syracuse R. Co.*, 70 App. Div. 362.

Violation of ordinance is relevant to a question of negligence. *Sturnwald v. Srieber*, 74 N. Y. Supp. 995.

Selma &c. R. Co. v. Owen, (Ala.) 31 South. Rep. 598.

Violation of ordinance as to the moving of vehicles on a street is evidence of negligence. *Harrison v. Sutter S. R. Co.*, 116 Cal. 156.

Ordinance regulating speed of certain classes of vehicles held not admissible as standard by which the jury might judge of the reasonableness of the speed of others. *Maxwell v. Wilmington C. R. Co.*, 1 Marv. (Del.) 199.

Ordinance as to registration of dog was inadmissible on the question of the owner's liability for its bite. *Barclay v. Hartman*, 2 Marv. (Del.) 351.

Ordinance regulating speed of "trains and engines," does not include street cars. *Hill v. Rome &c. R. Co.*, 101 Ga. 66.

Ordinance limiting railroad speed to six miles is admissible under an allegation as the violation thereof by running fifteen. *Atlanta Consol. S. R. Co. v. Foster*, 108 Ga. 223.

Ordinance as to speed is admissible where there is evidence that it was exceeded, on the question of ordinary care. *Brink's &c. Ex. Co. v. Kinare*, 168 Ill. 643; aff'g s. c., 67 Ill. App. 498.

See, also, *East St. Louis Connecting R. Co. v. Eggman*, 170 Ill. 538; aff'g 71 Ill. App. 32.

Ordinance against backing trains without lights is admissible where one is killed by the failure to comply therewith. *Chicago &c. R. Co. v. O'Neil*, 172 Ill. 527; aff'g s. c., 64 Ill. App. 623.

Ordinance requiring car to stop upon the appearance of danger cannot be introduced to show what degree of care in regard thereto would constitute negligence. *Rockford C. R. Co. v. Blake*, 173 Ill. 354; aff'g s. c., 74 Ill. App. 175.

Ordinance as to the speed of "trains" includes locomotives. *East St. Louis C. R. Co. v. Reames*, 75 Ill. App. 28; s. c., aff'd, 173 Ill. 582.

Ordinance requiring street railway to keep a portion of the street in repair is admissible in an action for failing to do so. *West Chicago &c. R. Co. v. Dooley*, 76 Ill. App. 424.

Ordinance may be admitted as being in force without proof of publication as required by statute, where no objection is made thereto. *Lake Erie &c. R. Co. v. Brafford*, 15 Ind. App. 655.

Ordinance as to covering over blasts, is admissible in an action for negligence in blasting. *Mahoney v. Dankwart*, 108 Iowa, 321.

Ordinance as to construction of sidewalk may be admitted to show improper construction. *Shumway v. Burlington*, 108 Iowa, 424.

See, also, *Troho v. City of Dubuque*, 109 Iowa, 219.

Ordinance as to the erection of gates not pleaded was excluded in an action for negligent management of the train. *Atchison &c. R. Co. v. Shaw*, 56 Kan. 519.

Ordinance as to speed is admissible where the excessive speed causes the engine to emit sparks. *Louisville &c. R. Co. v. Dallon*, (Ky.) 43 S. W. Rep. 431.

Failure to comply with an ordinance is not conclusive evidence of negligence. *Hanton v. South Boston &c. R. Co.*, 129 Mass. 310; *Phila. &c. R. Co. v. Stebbing*, 62 Md. 504.

No liability attaches to railroad company for running over a child where the only proof of its negligence was the fact that train was passing at a speed greater than ordinance allowed. *Cumberland &c. R. Co. v. State*, 73 Md. 74.

If plaintiff's failure to comply with the ordinance contributes to an injury he cannot recover therefor. *Newcomb v. Boston Productive Department*, 46 Mass. 596.

Disobedience of an ordinance may give action to third person. *Osborne v. McMasters*, 40 Minn. 103.

An unlawful structure burned but owner was not liable for the fire communicated to other premises. *Mathiason v. Mayer*, 90 Mo. 585.

Disobedience of an ordinance as to speed may impute negligence although the grade of the road rendered compliance impracticable. *Neier v. Mo. &c. R. Co.*, 12 Mo. App. 25.

Ordinance as to speed of trains need not be pleaded. *Judd v. Wabash R. Co.* (Mo. App.) 5 W. 67; *Nuttir v. Chicago &c. R. Co.*, id. 72.

See *L. S. R. Co. v. O'Conner*, 315 Ill. 254.

Resolution of city council providing for a sidewalk shows knowledge of its condition. *Grattan v. Williamston*, 116 Mich. 462.

Ordinance as to vehicles turning to the right held inapplicable in case of collision with a cable car. *Culbertson v. Metropolitan Street R. Co.*, 140 Mo. 35.

Ordinance as to the operation of street cars cannot bind a company in the absence of its assent so as to be admissible in an action for injuries. *Byington v. St. Louis &c. R. Co.*, 147 Mo. 613.

Ordinance as to speed was admissible in an action for death caused by a train while violating it. *Jackson v. Kansas &c. R. Co.*, 157 Mo. 621.

Ordinance as to maintenance of gates at a crossing is not admissible in an action for other negligent acts thereat. *West Jersey R. Co. v. Paulding*, 58 N. J. L. 178.

Ordinance requiring a street to be kept in repair is admissible on a question of negligence in failing to do so. *Filders v. North Jersey &c. R. Co.*, (N. J. L.) 50 Atl. Rep. 533.

Ordinance as to speed over bridges does not apply in approaching them. *Ulrich v. Toledo Consol. S. R. Co.*, 10 Oh. C. C. 635.

Ordinance as to the giving of notice in backing trains over a crossing

is admissible on the question of negligence in failing to do so. *O'Grady v. Baltimore &c. R. Co.*, 28 Pittsb. L. J. (N. S.) 110.

Ordinance rate is admissible on the question of negligent speed. *International &c. R. Co. v. Lee*, (Tex. Civ. App.) 34 S. W. Rep. 160.

Ordinance as to speed at street crossing is applicable to an accident at a street crossing, *Washington S. R. Co. v. Lacey*, 94 Va. 460; inapplicable in case of injury received in the company's yards. *Blankenship v. Chesapeake &c. R. Co.*, 94 Va. 449.

(a). STATUTES.

The Court of Appeals has said (*Jetter v. N. Y. &c. R. Co.*, 2 Abbott's Ct. Appeals, sec. 458), "*it is an axiomatic truth that every person, while violating an express statute, is a wrongdoer, and as such, is ex necessitate negligent in the eye of the law; and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to civil redress for such injury, notwithstanding any redress the public may also have.*" Same Principle, *Johnson v. Brown*, 61 Penn. St. 58; *Willey v. Mulledy*, 78 N. Y. 310.

Non-compliance with an act of Congress imputes negligence, but compliance therewith is not conclusive of lack of negligence. Such act was intended as an additional safeguard. *Caldwell v. N. J. S. Co.*, 47 N. Y. 282, aff'g judg't for pl'ff.

Non-compliance with statutory or other regulations made by competent authority intended to prevent a collision is *prima facie* evidence of negligence, contributing to the disaster. *Lambert v. S. I. R. Co.*, 70 N. Y. 104, aff'g judg't for pl'ff.

But was not conclusive evidence of contributory negligence. *Hoffman v. Union Ferry Co.*, 47 N. Y. 176; but furnishes a reasonable presumption that it was the cause, if not the sole cause of the disaster. *The Pennsylvania*, 19 Wall. 136; *The Ship Chancellor*, 4 Benedict, 158.

Evidence of statute forbidding a minor child to be on the front platform of a car is not conclusive evidence of contributory negligence of a child who got on the car, not a passenger, but temporarily there by invitation of the conductor, in favor of a third person. Child was injured by a team negligently colliding with the car. It might constitute a defense for the passenger's own carrier. (*Clark v. Eighth Ave. R. Co.*, 36 N. Y. 135.) *Connelly v. Knickerbocker Ice Co.*, 114 N. Y. 104, aff'g judg't for pl'ff.

From opinion.—"While the violation of such statute may be proved as a fact for the consideration of the jury, such violation does not for all purposes necessarily establish negligence. *Knuffle v. Knickerbocker Ice Co.*, 84 N. Y. 488. The getting upon the car was not the immediate cause of the plaintiff's injury, and

assuming that the plaintiff violated the statute, he was not for that reason denied the right to assert the defendant's negligence as the cause of the injury and charge it with liability as the consequence. *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126; *Platz v. City of Cohoes*, 89 id. 220."

The omission of an owner of a building in the city of New York used for business purposes, in which there is a hoisting elevator, to comply with the requirement of the statute of 1874, (chap. 547, Laws of 1874), requiring that the openings in each floor shall be protected by such a substantial railing, and trap-doors to close the same, as shall be approved by the superintendent of buildings, and that such trap-doors shall be closed at all times, except when in actual use, is *prima facie* evidence of negligence, in an action by one lawfully upon the premises who has sustained injury in consequence of a failure to comply with the statute. *McRickard v. Flint*, 114 N. Y. 222, aff'g judg't for pl'ff.

See, "Private Premises, Injuries Thereon."

See *Johnson v. Brewer*, 61 Penn. St. 58; *Saulsbury v. Hirschenrader*, 106 Mass. 458; *Bartlett v. Roach*, 68 Ill. 174; *Carroll v. B. C. & R. Co.*, 38 Iowa, 120; *Devlin v. Gallagher*, 6 Daly, 494; *Ryan v. Thomson*, 38 Superior Ct. 135; *Shepard v. B. R. Co.*, 35 N. Y. 641; *Wilson v. S. T. Co.*, 21 Barb. 68; Whart. on Neg. sec. 443.

Disobedience of a statute is *per se* negligence. *Ind., &c. R. Co. v. Bomhart*, (Ind.) 13 W. 431.

A statute prohibiting an act by an individual renders him liable to another injured by disobedience of such statute. *Morton v. Smith*, 48 Wis. 265.

See *Crocker v. Schuman*, 7 Mo. App. 456.

Statutory notice of value held not evidence of value. *Grand Island &c. R. Co. v. Swimbank*, 51 Neb. 521.

Defendant cannot say that it was not negligent under the circumstances to set a fire; when in specific terms it is prohibited by statute. *Kelley v. Anderson*, 15 S. D. 107.

(b). OFFICIAL CERTIFICATES AND PUBLIC RECORDS.

The certificate of a boiler inspector, under the laws of Congress, was evidence, but not conclusive, of due care on the part of the defendant. *Swarthout v. N. J. S. Co.*, 48 N. Y. 209, aff'g 46 Barb. 222, and judg't for pl'ff.

Willy v. Mulledy, 78 N. Y. 310, aff'g judm't for pl'ff.

From opinion.—"Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in the case of a fire. For a breach of this duty, causing damage, it cannot be doubted that the tenants have a remedy. It is a general rule, that whenever

one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty, causing damage, gives a cause of action. Duty and right are correlative; and where a duty is imposed, there must be a right to have it performed. Where a statute imposes a duty upon a public officer it is well settled that any person having a special interest in the performance thereof may sue for a breach thereof causing him damage, and the same is true of a duty imposed by statute upon any citizen. *Cooley on Torts*, 654; *Hover v. Barkhoff*, 44 N. Y. 113; *Jetter v. N. Y. C. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *Heeney v. Sprague*, 11 R. I. 456; *Couch v. Steele*, 3 Ell. & Bl. 402. In *Comyn's Digest*, *Action upon statute* (F.), it is laid down as the rule that, 'in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.'

(See "Landlord and Tenant, Fire Escapes," *post*, 1362.)

Depositions read at coroner's inquests are not admissible in civil action for negligence. *Pittsburg &c. R. Co. v. McGrath*, 115 Ill. 172.

Record of a yard clerk claimed to be a full and complete one, was inadmissible. *Cleveland &c. R. Co. v. Coffman*, (Ind. App.) 64 N. E. 233.

Record of inspection of an engine as to its sufficiency to prevent the emission of sparks not being a public record, is inadmissible without the introduction of the party making it. *Illinois C. R. Co. v. Barret*, (Ky.) 66 S. W. Rep. 9.

Reports of accidents by officers of the railroads, required by statute, are not admissible in suits on account of such accidents. *Cleveland &c. R. Co. v. Ullom*, 20 Oh. C. C. 512.

Hospital record cannot be introduced to test the truth of the remarks made by the attending nurse. *Baird v. Reilly*, 92 Fed. Rep. 884.

XV. Pain—Expression Of.

(See Subsequent Acts and Statements, p. 1138; *Res Gestæ*, p. 1148.)

In an action by a husband for injury to his wife, complaints and expressions of pain made by her to a physician while under physical examination were admissible; also declarations as to her health made to a neighbor some days after the injury, especially when evidence of the same was called out on cross-examination of the plaintiff. *Matteson v. N. Y. C. R. Co.*, 35 N. Y. 487; aff'd judg't for pl'ff.

From opinion.—As to complaints and expressions of pain to physician court said: "This is the case, notwithstanding the examinations referred to were made by the physicians after the suit was commenced, and with a view to their testifying therein as to the result of their examinations. It does not appear that the patient knew that such was their object, and if she did know it, the jury were

to judge whether her representations were false, or her testimony collusive. 28 N. Y. 344; 32 id. 600."

Where the injuries were claimed to have resulted in a permanent disability of the plaintiff to perform mental or physical labor, the defendants proved that, several months after the injury, the plaintiff had performed such labor. The evidence of the plaintiff in his own behalf that, at the time this labor was being performed, he declared to a person casually present, and with whom he had no business relation, that he then felt ill, was inadmissible, either to controvert the defendant's proof or to show statements of his own out of court consistent with his testimony. *Reed v. New York Cent. R. Co.*, 45 N. Y. 574.

Evidence of expressions of pain at the time of an injury are competent, although the injured person be a witness. The evidence was that "she screamed, and the foot was so sore that even the sheet could not touch it, and it was very much swollen." *Hagenlocher v. C. I. & B. R. Co.*, 99 N. Y. 136; aff'g judg't for pl'ff.

Statement made some days after the injury, that the injured person was suffering pain not made to a physician for the purpose of medical interview, was incompetent.* Evidence of declarations, groans and screams indicative of pain is proper. *Roche v. B. C. & N. R. Co.*, 105 N. Y. 294; rev'g judg't for pl'ff.

Distinguishing *Reed v. N. Y. C. R. Co.*, 45 N. Y. 574.

From opinion.—"Prior to the time when parties were allowed to be witnesses the rule in this class of cases permitted evidence of this nature. *Caldwell v. Murphy*, 11 N. Y. 416; *Werely v. Persons*, 28 id. 344. * * *

(See cases cited in 11 N. Y.) In Massachusetts, too, the same rule was applied, *Bacon v. Charlton*, 7 Cush. 581; cited and approved in *Roosa v. Boston Loan Co.*, 132 Mass. 439. After the adoption of the amendment to the Code permitting parties to be witnesses, the question under discussion was somewhat mooted in *Reed v. N. Y. C. R. Co.*, 45 N. Y. 574, by Allen, J., in the course of his opinion, although the precise point was not before the court. The question there under discussion was as to the correctness of permitting the plaintiff to prove his declarations made at the time when he was doing some work, to a third person, as to the state of his health. That is not exactly like the case of complaints made, not as to a state of health, but as to a then present existing pain at the very spot alleged to have sustained injury and proved so by other evidence; still, the remarks of Judge Allen, on this kind of evidence in general, bear strictly upon the matter therein discussed. He reviewed in his opinion some of the above cases and others, and claimed that the courts had admitted the evidence from the necessity of the case as being the only method by which the condition of the party could be shown fully and completely, not only as to appearances but also as to suffering. But there was no agreement by the court upon that branch of the case, the judgment going upon another ground.

The case of *Hagenlocher v. C. I. & B. R. Co.*, 99 N. Y. 136, decides that even since the Code, evidence of exclamations indicative of pain made by the party

injured is admissible. The case does not confine proof of these exclamations to the time of the injury."

Complaints, not a part of the *res gestæ*, and uttered to others, than the attending physician are not competent. Hence evidence of sister as to complaints shortly after the injury and the next morning was erroneous. *Kennedy v. R. C. & B. R. Co.*, 130 N. Y. 654; rev'g 54 Hun, 183, and judg't for pl'ff.

From opinion.—"The questions complained of and the answers thereto are as follows: Q. 'State, when she came home, did she complain at all? A. Yes, sir. Q. State what she complained of. A. Complained of her side and head. Pain in her head and side, and didn't get much sleep all night, and then the next morning when she got up she thought she would be able to go to work.' Again the witness was interrogated with reference to the plaintiff's appearance during her illness, and after testifying that she was pale around the mouth and eyes, she was asked: Q. 'Did you notice those? A. Yes, sir; I noticed her eyes; they were dark, and she always complained of a numbness right up her side, and she had kind of a prickling sharp pain, and then she suffered considerable pain in her back.'

Defendant's counsel moved to strike out the evidence that she said she had numbness and prickling pain in her side, as incompetent. Q. 'Did she say that when you observed evidences of distress; what was her condition when she made that remark; did she appear to be in distress? A. Yes, sir.' Motion to strike out denied and objection overruled and exception.

While evidence of the character of that under consideration was admissible prior to the statute allowing parties to be witnesses, it is now definitely settled that a party cannot support his own testimony by proof of declarations to the same effect made to persons other than a physician, who is at the time in attendance professionally. *Roche v. Brooklyn City & Newtown R. Co.*, 105 N. Y. 294. Evidence of exclamations which are natural concomitants and manifestations of pain and suffering are still admissible, because regarded as involuntary and natural expressions which a witness may describe for the same reason that he may the appearance of the party. *Hagenlocher v. C. I. & B. R. Co.*, 99 N. Y. 136. Here, as in *Roche's* case, the witness testified, not to the involuntary exclamations indicating pain, but to answers given to questions asked. But it is urged in *Roche's* case the objectionable evidence related to conversation occurring several weeks after the injury, while here they occurred within a few hours.

There is no imaginary line somewhere between a few hours and a few days, or a few weeks, on one side of which declarations in favor of a party are admissible in evidence, while on the other they are inadmissible.

Unless such complaints form a part of the *res gestæ* they cannot be admitted. And if they are so far detached from the occurrence as to admit of the deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as a part of the *res gestæ*.

Now, in this case, between the time of the accident and the declarations of pain, plaintiff had walked in a direction opposite to her home to the street car barns and listened to the conversation which her sister had with the superintendent; then she walked up State street several blocks along which cars were passing every few minutes to 'the four corners,' where she took a car to Hubbell park, and then walked two blocks home. Certainly it cannot be asserted that

this conversation was an incident of the injury in the sense that it emanated immediately from it, or that it stood in any immediate causal relation to the act of falling and its first effects, or that it was not so far separated from the occurrence as to admit of the formation of a plan to strengthen plaintiff's case against the defendant."

Declarations made after convalescence, or when there has been an opportunity to think over the matter in reference to a projected litigation, are inadmissible. Wharton on Neg. § 268. Citing *Kennard v. Burton*, 25 Me. 39; *Bacon v. Charlton*, 7 Cush. 581; *Hunt v. People*, 3 Parker C. R. 569; *Spatz v. Lyons*, 55 Barb. 476; *Gray v. McLaughlin*, 26 Iowa, 279; *Lush v. McDaniel*, 13 Ind. L. 488.

But see, *Barber v. Merriam*, 11 Allen, 322; *Rogers v. Crain*, 30 Tex. 289; *Filer v. R.*, 49 N. Y. 42; *Rowell v. Lowell*, 11 Gray, 420; *Moody v. Sabin*, 9 Cush. 505.

A girl who slept with the plaintiff, testified that three months after the accident the plaintiff would sit on the edge of the bed and complain of pain in her arm, &c. No error. *Nichols v. Brooklyn City R. Co.*, 30 Hun, 437, aff'g judg't for pl'ff.

Complaints and writhings under examination by physician made eight months after the injury were inadmissible. *Mosher v. Russell*, 44 Hun, 12, rev'g judg't for pl'ff.

A grocer, whose store was in the immediate vicinity of the place where plaintiff was hurt, testified that the plaintiff was picked up from the spot where he received the injury, and that the plaintiff then came into his store and the witness noticed the condition of his clothes, and that his left leg seemed to be swelling; that the plaintiff at that time, complained of pain and said that he had pains in his leg. Properly admitted. *Lewke v. Dry Dock &c. R. Co.*, 46 Hun, 283.

The plaintiff's mother stated that the plaintiff complained many times that his leg hurt him so, that he did not know that he could live through it. This evidence was error as it related to a statement made long after the accident. *Ryan v. Porter Man'g Co.*, 57 Hun, 253, rev'g judg't for pl'ff.

Complaints of wife, injured on the defendant's road, the day after the accident, of dizziness and roaring in head and pain in back were given in evidence by the husband; error. *Olp v. Gardner*, 48 Hun, 169, rev'g judg't for pl'ff.

The admission in evidence of statements of the plaintiff as to his condition, made after the accident, if not competent as being mere exclamation of pain, is a harmless error when it appears that the condition of the plaintiff after the accident, and his pain and suffering, were clearly proved by other witnesses, who were not contradicted. *Wood v. Town of Gilboa*, 76 Hun, 175.

Complaints of pain, made subsequent to the injury were not received. *Donohue v. Brooklyn &c. R. Co.*, 53 App. Div. 348.

A physician testified that the plaintiff had expressed to him his

physical anguish long after the accident and during the progress of the trial. The evidence was improperly admitted. *Schuler v. Third Ave. Co.*, 1 Misc. 351, aff'g judg't for pl'ff.

From opinion.—"Such expressions on the part of the person injured, whether vocal or emotional only, are admissible in evidence if made at, or immediately after, the time the injuries were sustained, as constituting a part of the *res gestæ* (*Smith v. Dittman*, 34 N. Y. St. Repr. 303; *Kennedy v. Rochester City & C. R. Co.*, 130 N. Y. 654, 656); and they are of necessity equally admissible when made to, or in the presence of, the physician who is at the time in professional attendance upon the person injured, or called in to ascertain the probable extent of the injuries. *Werely v. Persons*, 28 N. Y. 344; *Brown v. N. Y. Cent. R.*, 32 id. 600; *Matteson v. N. Y. Cent. R. Co.*, 35 id. 487; and see cases collated in 1 *Rice on Evidence*, 377-380. *Roche v. Brooklyn City & Newton R. Co.*, 105 N. Y. 294, cited by appellant's counsel, is to the effect only that expressions of physical suffering, when not a part of the *res gestæ*, are not admissible to corroborate the person injured, if made to persons other than the attending physician, or the medical examiner or surgeon called as an expert to the injuries sustained. The distinction is not only reasonable, but necessary."

Exclamations of pain and terror at the time of injury, and declarations as to the cause of it may be received. *Wharton on Neg. sec. 268*. Citing *Green v. Bedell*, 48 N. H. 546; *Bacon v. Charlton*, 7 Cush. 581; *Hall v. Steamboat Co.*, 13 Conn. 319; *Mattison v. R. Co.*, 62 Barb. 364; *Frank v. Coe*, 4 Greene (Iowa) 555; *Brownell v. R. R. Co.*, 47 Mo. 239; *Harriman v. Stowe*, 57 id. 93; *Entwhistle v. Feigner*, 60 id. 214.

A physician who had examined the plaintiff—not for the purpose of treatment, but after the suit had been brought and some time after the accident—was allowed to testify to her statements of pain. This testimony was held inadmissible. *Grand Rapids & C. R. Co. v. Huntley*, 38 Mich. 537.

From opinion.—"Exclamations of suffering may be, and, if honest, are, parts of the occurrence itself. It is difficult to lay down any very clear line of admission or exclusion where the exclamation refers to the feeling of the moment. But we think it would not be safe to receive such testimony in any case where it is not the natural and ordinary expression of pain, called out without purpose, or in the course of medical treatment. The unstudied expressions of daily life, or the statements on which a medical adviser is expected to act, and which, if feigned, should have skill enough to subject to some test of truth, stand on a footing which removes them in general from suspicion. But we cannot think it safe to receive such statements which are made for the very purpose of getting up testimony, and not under ordinary circumstances. The physicians here were not called in to aid or give medical treatment. The case had been relinquished long before, as requiring no further attendance. They were sent for merely to enable the plaintiff below to prove her case. The whole course of the plaintiff was taken to no other end. She had in her mind just what expressions her cause required. They were, therefore, made under a strong temptation to feign suffering, if dishonest, and a hardly less strong tendency, if honest, to imagine or exaggerate it. The purpose of the examination removed the ordinary safeguards which furnish the only reason for receiving declarations which bear in a party's

own favor. The general rule in regard to other classes of hearsay evidence and statements admitted upon the same principle is that they must have been made *ante litem motam*, which is interpreted to mean not merely before suit brought, but before the controversy exists upon the facts. *Stockton v. Williams*, Walk. Ch. 120; 1 Dou (Mich.) 546 (citing the Berkeley Peerage case, 4 Campb. 401); *Richards v. Bassett*, 10 Barn. & C. 657; *Doe d. Tilman v. Tarver*, R & M. 141; *Monkton v. Attorney-General*, 2 Russ. & Myl. 160; *Whitelock v. Baker*, 13 Ves. 514. The language of Lord Eldon in *Whitelock v. Baker* has met with general acquiescence. He says: 'All are admitted upon the principle that they are the natural effusions of a party' who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth' (page 514). It is not necessary to consider whether there may not be properly received in some cases the natural and usual expressions of pain, made under circumstances free from suspicion, even *post litem motam*. The case must at least be a very plain one which will permit this. The present controversy presents no such difficulty. The physicians were called in, not to give medical aid, but to make up medical testimony; and the declarations were made to them while engaged in that work. It would be difficult to find a case more plainly within the mischief of the excluding rule."

The declarations must, however, refer to present conditions not past symptoms. *People v. Fogelson*, 116 Mich. 556.

And must not be to one intending to be a witness. *Mott v. Detroit &c. R. Co.*, 120 Mich. 127.

Declarations as to present pain, held admissible. *Edlund v. St. Paul C. R. Co.*, 78 Minn. 434.

Conditions indicating pain at a date subsequent to injury may be shown but not declarations in respect thereto. *Wilkins v. Wilmington*, 2 Marv. (Del.) 132.

Plaintiff may show her physical condition before and after the injury while describing the effect thereof. *North Chicago Street R. Co. v. Gil- low*, 166 Ill. 444; aff'g s. c., 64 Ill. App. 516.

Exclamations of pain are admissible, but statements in reference to it are not. *Green v. Pacific Lumber Co.*, 130 Cal. 435; *Alexandria v. Young*, 20 Ind. App. 672; *Pierce v. Jones*, 22 id. 163; *Treschman v. Treschman*, 28 id. 206; *Keyes v. Cedar Falls*, 107 Iowa, 509; *Crippen v. Des Moines*, (Iowa) 78 N. W. Rep. 688; *Yeager v. Spirit Lake*, 115 Iowa, 593; *Atchison R. Co. v. Johns*, 36 Kas. 769; *St. Louis &c. R. Co. v. Burrows*, 62 id. 89; *Missouri &c. R. Co. v. Johnson*, 67 S. W. Rep. 768; *Texas State Fair v. Marte*, (Tex. Civ. App.) 69 S. W. Rep. 432.

Though the pain occurs some time after the accident. *Huntington v. Burke*, 21 Ind. App. 655; *Beath v. Rapid R. Co.*, 119 Mich. 512.

And it is elsewhere than at the point of injury. *Well v. Mendon*, 108 Mich. 251.

Omaha S. N. R. Co. v. Emminger, 57 Neb. 240.

Complaints of pain and weakness, admissible on question of condition of arm. *Missouri &c. R. Co. v. Zwiener*, (Tex. Civ. App.) 38 S. W. Rep. 375.

Statement that witness saw plaintiff limping several days after the accident was admitted. *City R. Co. v. Wiggins*, (Tex. Civ. App.) 52 S. W. Rep. 577.

That exclamations are made subsequent to the pain is immaterial. *Jackson v. Missouri &c. R. Co.*, 23 Tex. Civ. App. 319; *St. Louis &c. R. Co. v. Gill*, 55 S. W. Rep. 386.

Evidence of exclamations in one's sleep that the dog was biting was excluded. *Plemmer v. Ricker*, 71 Vt. 114.

On examination, at defendant's request, expressions of pain were properly proven. *Quaife v. Chicago &c. R. Co.*, 48 Wis. 513.

Complaints and exclamations made immediately after the injury and on the following day to a physician are admissible. *Bridge v. Oshkosh*, 67 Wis. 195; *Cleveland R. Co. v. Newell*, 104 Ind. 261.

Wharton on Neg. sec. 268, citing *Roberts v. Graham*, 5 Wall. 578; *Ins. Co. v. Mosley*, 8 id. 397; *Howe v. Plainfield*, 41 N. H. 135; *Towle v. Blake*, 48 id. 92; *Taylor v. R. R.* id. 304; *Stiles v. Danville*, 42 Vt. 282; *Earl v. Topper*, 45 id. 275; *Johnson v. McKee*, 27 Mich. 47; *Ill. R. Co. v. Sutton*, 42 Ill. 438; *Brown v. R. Co.*, 66 Mo. 538.

Stewart v. Everts, 76 Wis. 35.

From opinion.—"The counsel for the plaintiffs in error took exception to the statements made by the expert witness, Dr. Clevenger. The doctor was consulted by the plaintiff after this action was commenced, for the purpose of being a witness on the trial of this action on the part of the plaintiff, and not for the purpose of medical advice or treatment. Against the objection of the defendants, this witness was permitted to detail all the statements made to him by the plaintiff of his symptoms, pains, feelings, and his condition, from time to time, from the date of his injury down to the time of his consulting with him.

That this evidence was improperly received is clearly shown by the following authorities: *Illinois Central R. Co. v. Sutton*, 42 Ill. 441; *Roosa v. Boston Loan Co.*, 132 Mass. 439; *Railroad Co. v. Huntley*, 38 Mich. 543; *Heald v. Thing*, 45 Me. 392; *Quaife v. C. & N. W. R. Co.*, 48 Wis. 513, 526; *Kreuziger v. C. & N. W. R. Co.*, 73 Wis. 158, 164.

Whatever may be the rule as to the admissibility of the statements made by a party when consulting a physician or surgeon for the purpose of obtaining advice or treatment for his disease or injury, we are clear that, when such statements are made by the party after action commenced, to an expert, for the sole purpose of calling such expert as a witness for himself on the trial of the action to give an opinion as to the nature of his complaint or injury and its connection with certain alleged causes, such statements are inadmissible in his own behalf."

XVI. Pecuniary Condition.

It is not error to show that children of persons *killed* by negligence were poor, and one of them sick and unable to work. *Lockwood v. N. Y., L. E. & W. R. Co.*, 98 N. Y. 523; aff'g judg't for pl'ff. This seems, from the cases cited, to have been allowed on account of the difficulty of proving pecuniary damages in case of death, and of the necessity of showing the relation of the deceased to those entitled.

Evidence that the parents were unable to hire any servant or person to aid the mother in looking after the child, is not competent to rebut proof of negligence on her part. *Cumming v. Brooklyn City R. Co.*, 104 N. Y. 669.

The plaintiff may not show dependence on his earnings, unless the question of proper care be involved, when he may show that he got the best care that he could afford. *Alberti v. N. Y., L. E. & W. R. Co.*, 118 N. Y. 77; rev'g 43 Hun, 421, and judg't for pl'ff; limiting *Caldwell v. Murphy*, 11 N. Y. 416.

From opinion.—"In the case of *Myers v. Malcolm*, 6 Hill 292, Nelson, Ch. J., in delivering the opinion of the court, says: 'A new trial must be granted in this case, for the error of the judge in admitting evidence of the wealth of one of the defendants. This was clearly inadmissible, and it is impossible to say what effect it may have had upon the verdict.'

In the case of *Moody v. Osgood*, 50 Barb. 628, Barnard, P. J., says: 'Damages in these cases are not to be estimated by or proportioned to the wealth of the defendant. Indirect proof of the wealth of the defendant is just as admissible as direct proof, and for the same reasons.'

To the same effect are the decisions of the Supreme Court of the United States, and the courts of other states. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 459; *Shaw v. A. & W. R. Co.*, 8 Gray 45; *C. & N. R. Co. v. Bayfield*, 37 Mich. 205; *Stockton v. Fry*, 4 Gill. 406; 2 *Thomp. on Neg.* 1263; *Abb. Tr. Ev.* 601; *Wood on Railway Law*, 1242. * * *

We are aware that in the case of *Caldwell v. Murphy*, 11 N. Y. 416, the court there sustained this character of testimony upon the theory that having a family dependent upon him for support, and being without means of support, except his labor and the charity of his friends, his omission to employ himself had a bearing upon the extent to which he had been disabled. But we regard that case as carrying the rule to the outside limit, and do not feel justified in following it in this case."

In action by parent for injury to child, the amount of loss is not affected by pecuniary condition of parent. *Barnes v. Keene*, 132 N. Y. 13.

The deceased, of age, had contributed to his mother's support and hence the mother's pecuniary condition was proper as showing probability of son's continuing aid. *Erwin v. Neversink Steamboat Co.*, 23 Hun, 573, 577; *Harlinger v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 66. *Waldele v. N. Y. C. & H. R. R. Co.*, 29 Hun, 35.

Murtaugh v. N. Y. C. & H. R. R. Co., 49 Hun, 456, rev'g judg't for pl'ff.

From opinion.—"In *Caldwell v. Murphy* (1 Duer 233), it was held that 'in an action for an injury to the person, the circumstances, condition in life and pursuits of the plaintiff may properly be given in evidence, in order to enable the jury to determine the extent of his actual damages (and also held that), an inquiry made into the probable consequence of the injury, as transitory or permanent, is eminently proper.'"

Evidence of father's wages, not admissible in an action for death of his child. *Terhune &c. R. Co. v. Joseph W. Cody Co.*, 76 N. Y. Supp. 255.

Widow allowed to state the size of family left. *Louisville &c. R. Co. v. Banks*, 132 Ala. 471.

The measure of damages does not depend upon the needs of the family. *Central R. Co. v. Rouse*, 77 Ga. 393; 80 id. 342.

Pecuniary condition of person injured or of his widow and next of kin cannot be shown. *Chicago &c. R. Co. v. Moranda*, 93 Ill. 302; *Cinn. R. Co. v. Roy*, 102 U. S. 451; *Heyer v. Salsbury*, 7 Ill. App. 93; *Chicago &c. R. Co. v. Heuey*, id. 322; *International &c. R. Co. v. Kindred*, 57 Tex. 491.

Pecuniary condition of defendant cannot be shown. *Eagle &c. R. Co. v. Defries*, 94 Ill. 598.

Nor the number or ages of plaintiff's children. *Beems v. Chicago &c. R. Co.*, 58 Iowa, 150.

Evidence that the plaintiff's sole means of support was the practice which was prevented by the injury was admissible. *Stafford v. Oskaloosa*, 64 Iowa, 251.

Except where exemplary damages are recoverable. *Morgan v. Durfee*, 64 Mo. 469.

In an action for death defendant cannot show the value of the estate of deceased. *Chicago &c. R. Co. v. Hambel*, (Neb.) 89 N. W. Rep. 643.

An injured passenger being entitled only to compensatory damages, evidence as to his poverty, or the number and ages of his children, is irrelevant. *Pennsylvania Company v. Roy*, 102 U. S. 451.

.. But see *Johnson v. Chicago &c. R. Co.*, 64 Wis. 425; *McKeigue v. City of Janesville*, 68 id. 50.

So, the number of children dependent on the widow for support, when the widow was entitled to damages. *Mulcairns v. Janesville*, 67 Wis. 24.

Widow could only show that her deceased husband furnished her sole support. *Annas v. Milwaukee R. Co.*, 67 Wis. 46; *Beard v. Skelvin*, 13 Ill. App. 54; *Ill. Cent. R. Co. v. Crudup*, 63 Miss. 291; *Little Rock &c. R. Co. v. Laveret*, 38 Kas. 333; *Mayhew v. Burns*, 103 Ind. 328.

Evidence of poverty of plaintiff's beneficiaries is inadmissible. *Tiffany's Death by Wrongful Act*, sec. 173.

XVII. Privileged Communications.

The New York Code of Procedure provides as follows:

Sec. 834. "Physicians not to disclose professional information. A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity."

This section applies to any examination of a person as a witness, unless the provisions thereof be expressly waived upon the trial or examination by the person confessing, the patient or the client. N. Y. Code of Procedure, sec. 836.

Object of statute is to compel secrecy as to any information acquired by physician from his patient in manner described in statute. *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 28.

Statute should be liberally construed. *Buffalo &c. Co. v. Knights &c. Ass'n*, 126 N. Y. 450, affirming 56 Hun, 303.

Burden is on person seeking to exclude the evidence to show that the witness is shielded by the statute. *People v. Schuyler*, 106 N. Y. 289; 43 Hun, 88.

Prohibition only extends to person "duly authorized to practice physic or surgery" and not to unlicensed person. *Wiel v. Cowles*, 45 Hun, 307.

Presumption is that medical attendant was licensed. *Record v. Village of Saratoga*, 46 Hun, 448.

The provision of the Revised Statutes, (2 R. S. 406, sec. 73) prohibiting a physician from disclosing any information received by him necessary to enable him to prescribe for a patient includes not only information from statements of the patient, but such knowledge as the physician may acquire from the patient, from statements of others present at the time, or from his own observation of the patient's symptoms and appearance. *It will be presumed, from the relationship of the parties that information so imparted was given or obtained for the purpose of enabling the physician to prescribe for the patient, and so, that it was material.*

In an action upon a policy of life insurance, an offer, upon the part of defendant to prove by a physician, who had been consulted professionally by the assured, that prior to the application he was afflicted with certain diseases for which the witness treated him, was properly excluded, although the testimony *was expressly limited to what the witness knew, independent of any information given or statements made by the assured.* *Edington v. Mut. Life Ins. Co.*, 67 N. Y. 185, rev'g judg't for pl'ff.

For the purpose of showing the falsity of representations of the insured as to the cause of death of his mother, defendant called a physician who

testified that he attended her in her last illness; it did not appear that he ever visited or saw her at any other time or in any other than a professional capacity. The witness was then asked if he knew or was able to state the cause of her death; if he observed the symptoms she exhibited in her sickness; if the symptoms were such as might have been discovered by observation and physician's examination, without the aid of any specific statement from the patient, or without their being confidentially disclosed by her, or any friend or attendant, or through any private examination; and also if the statement of the insurer as to the cause of the death was true. Held, (Earl, J., dissenting) that the questions, so far as material, were properly excluded.

The statute prohibiting a physician from disclosing any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to prescribe, (2 R. S. 406, sec. 73; Code of Civil Procedure, sec. 834) includes *information received through the sense of sight as well as that communicated through the ear*. It needs not that an examination of a patient should be private to exclude information so derived; nor is it required that *it should be shown in the first instance by formal proof that the information was necessary to enable the physician to prescribe*.

The statute includes all knowledge acquired from the patient himself, from the *statements of others surrounding him*, and from observation of his appearance and symptoms.

The death of the patient does not remove the prohibition and the physician cannot testify to the cause of death learned by him while attending the patient in a professional capacity.

A witness, not a physician, who saw the mother of the insured in her last sickness, was asked to state his conclusion in reference to the character of her disease. This was objected to and excluded. Held, no error. *Grattan v. Met. Life Ins. Co.*, 80 N. Y. 281, aff'g judg't for pl'ff; distinguishing *Edington v. Ætna Ins. Co.*, 77 N. Y. 564; *Pjerson v. People*, 79 id. 424.

Under the provisions of the Code of Civil Procedure, (secs. 834, 836) prohibiting a physician or surgeon from disclosing information acquired by him while attending a patient, and declaring that the prohibition shall apply to every examination of a person as a witness unless expressly waived by the patient, any party to an action can object to evidence coming within the prohibition, and the objection can only be waived by the patient himself.

Upon his death, therefore, the privilege of waiver ceases; his executor or administrator may not exercise it.

It seems that the same rule applies to the other classes of privileged

communications; *i. e.*, as to confessions made to a minister, or communication made by a client to his attorney.

In an action upon a policy of life insurance, which contained a clause avoiding it in case the insured committed suicide or died by his own hand, it appeared that the insured hanged himself. The plaintiff claimed that he was insane at the time. A physician who attended the deceased a short time before his death was asked by plaintiff as a witness, "How did you find him?" This was objected to by defendant as within the prohibition of the code. The court overruled the objection. Held, error. *Westover v. Aetna Life Ins. Co.*, 99 N. Y. 56.

Where, upon the trial of an indictment for abortion, a physician who after the commission of the alleged crime attended upon the female upon whose person it was alleged to have been committed, was allowed to give as a witness for the prosecution, his opinion as medical expert, that the crime had been committed, founded upon what he observed as to the physical condition of the woman and upon her narrative of the facts, and it appeared that she was alive at the time of the trial. Held, error.

Also, held, the fact that the physician was selected and sent by the public prosecutor to attend upon the female did not affect the question; that as she accepted his services in his professional character the relation of physician and patient was established between them.

Also, held, that although she was a party to the crime, her declarations which were simply a narrative of a past transaction and constituting no part of the *res gestæ* were not admissible. *The People v. Murphy*, 101 N. Y. 126, rev'g judg't for pl'ff, distinguishing *Pierson v. People*, 79 id. 424.

Upon the trial Dr. Curtis was called to give evidence as to the mental condition of Eliza Fisher at or about the time when she executed the deed. It appears that he had attended and prescribed for her professionally, and that he had also seen her at various times when he was not in attendance upon her for the purpose of treating her professionally. He was asked various questions as to her mental condition, excluding from his mind in answering the questions any knowledge or information which he had obtained as to her condition while acting as her medical attendant, and confining his answers to such knowledge and information as he had obtained of her by seeing her when she was not his patient. Counsel for the plaintiff objected to the competency of the witness under section 834 of the Code. The court overruled the objection and the witness was permitted to answer, and he gave material evidence as to the mental condition of Eliza Fisher. In this there was clearly no error. (*Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564; *People v. Schuyler*, 106 id. 304; *Hoyt v. Hoyt*, 112 id. 515.) The prohibition of that section

applies only to information the physician acquired in attending the patient in a professional capacity, and it does not apply to information obtained by him in any other way. *Fisher v. Fisher*, 129 N. Y. 654, rev'g judg't for def't.

It seems the provisions of Code of Civil Procedure (sec. 834), prohibiting a physician from disclosing any information acquired by him while attending a patient in a professional capacity, which was necessary to enable him to act in that capacity does not render it incompetent for a physician to testify that he attended the person in a professional capacity, and that the patient was sick, or from giving the dates and number of times of attendance. Defendant, an assessment company, issued a policy upon the life of "P." It was provided therein that a failure to comply with the rules of the association as to the payment of assessments would render the policy void. "P." failed to pay the assessment, and for the purpose of being re-instated executed a certificate that he was in good health at the time but died within a month thereafter. In an action upon the policy for the purpose of proving the falsity of the certificate defendant offered to prove by a physician that he attended upon "P." as a patient during his last illness and that he was sick, and also the date when he was first consulted. This was objected to and excluded but not on the ground that the testimony was incompetent under said provision of the code. Error. *Patten v. The United Life and Accident Assurance Ass'n*, 133 N. Y. 450.

A physician who merely makes a casual prescription for a friend when meeting him on the street, cannot be called a medical attendant, who is properly a person to whom the care of a sick person had been intrusted.

In an action brought to recover upon a policy of insurance, the insurance company offered to prove, by physicians, that the assured was affected with numerous diseases, from knowledge thereof which they had obtained by their attendance on him as physicians, and not from any information received from him. The evidence was excluded. Held (1) that the objection that the evidence was admissible because it did not appear that the information excluded was necessary to enable the physicians to prescribe, not having been made at the trial, would not be entertained on appeal; (2) that the objection that the statute (2 R. S. 406, sec. 73) did not prohibit the disclosure of knowledge acquired otherwise than by communications made by the patient, was not well taken, as the word *information* comprehends the knowledge which the physicians acquire in any way while attending the patient, whether by their own insight, or from statements made by the patient or others, given to the physician in aid of his duty. *Edington v. Mut. Life Ins. Co.*, 5 Hun, 1, ordering judg't for pl'ff.

It is urged that the court improperly excluded the following question from being put to Dr. Mereness: "What opinion did you form, based on *the general sight of the man*, before you made an examination, or before you had any conversation with him?" Evidence inadmissible. *Grattan v. Met. Life Ins. Co.*, 28 Hun, 430, aff'g judg't for pl'ff.

Statute covers information derived either from conversation, physical examination or *observation*. *Matter of Freeman*, 46 Hun, 458.

Upon the trial of an action for injuries sustained by the plaintiff while crossing the tracks of the defendant's road in a village street, a physician, who attended the plaintiff professionally immediately after the injury, was examined as a witness for the defendant and testified that he visited the plaintiff professionally three times. The defendant then offered to show by the witness that on the third visit the plaintiff stated to the witness that when coming down the hill which led to the railroad crossing, he heard persons hallooing to him and saw a man swing his hat, but did not think where he was until the train was right on him.

The court erred in excluding the evidence, as inadmissible under section 834 of the Code of Civil Procedure, as the information called for, although acquired while attending the patient in a professional capacity, was not "*necessary to enable him to act in that capacity*." *Brown v. R., W. & O. R. Co.*, 45 Hun, 439, following *Hewitt v. Prince*, 21 Wend. 79; *Edington v. Aetna Life Insurance Co.*, 77 N. Y. 564; *Pierson v. The People*, 79 id. 424; *Renihan v. Bennin*, 103 id. 573.

See *People v. Schuyler*, 43 Hun, 88, aff'd 106 N. Y. 298; *Grossman v. Supreme Lodge*, 25 State R. 843; *In re Lowenstein's Estate*, 2 Misc. R. 323; *Hoyt v. Hoyt*, 9 State R. 731, aff'd 112 N. Y. 493.

On the day a will was executed, the witnesses, two physicians, were each called to see the testatrix, and did so call and examine the testatrix professionally as to her mental condition on that day; the will was read by request by one of them; neither of them had seen her before during her last sickness; neither of them had, at any time prior thereto, acted as her family physician nor treated her; after signing the will the testatrix declared that the writing was her last will and testament, and requested each of the witnesses to execute the same as witnesses thereto. These witnesses were the only persons sworn upon the trial before the surrogate.

Their testimony was properly received. Williams, J., dissenting.

The relation of physician and patient did not exist as the testatrix, who was conscious and capable of acting, did not accept the services of the witnesses as physicians, nor were they employed to attend her in a professional capacity, and the information acquired by them was **not** information acquired while attending a patient in a professional capacity,

which was necessary to enable him to act in that capacity. Per Learned, P. J.

That the testatrix, by expressly requesting the physician to be subscribing witnesses, in legal effect, expressly requested them to testify, at the proper time before the proper court, to the whole truth within their knowledge touching the matters material to be inquired of, in order to establish the probate of the will, and thereby expressly waived her privilege, if she had any, to prevent their giving such testimony. Per Landon, J. *Matter of Will of Susan W. Freeman*, 46 Hun, 458.

Upon the hearing before a surrogate, upon an application to admit to probate the will of Catharine Darragh, deceased, objections were raised upon the ground of a want of testamentary capacity upon the part of the testatrix. The physician, who had at one time attended the deceased in a professional capacity, had thereafter for a considerable period visited her as a friend, and not in a professional capacity, and the evidence showed that the impressions which he gained upon those friendly visits necessarily related back to, and were influenced by, the knowledge which he had acquired during the time that he was attending her professionally.

Held, that it was not necessary to establish that the knowledge which he had acquired in respect to his patient, while he was attending her professionally, was necessary to enable him to prescribe for her; that it was only necessary, in order to preclude him from testifying, to show that he had obtained the information during the course of his professional visits.

The intention of the prohibition was to protect all communications made by a patient to her physician, which the patient supposed, or had reason to believe, were protected by the provisions of the law.

A physician who has been employed by and rendered services to the deceased prior to her death, which occurred in November, 1886, paid two visits to her in January, 1886, which, it was claimed, were not professional visits.

He was then asked, and allowed to answer, against the objections of the contestant, this question: "Now, as the result of what you saw and heard on these two occasions, in January, and subsequently in the year 1886, would you say that Mrs. Darragh was in a condition to understand the nature of a will or the disposition of property, or had the ability to make a contract intelligently?"

The question was not restricted to the interviews which took place in January, but embraced all the time subsequent thereto up to the time of her death, and during the subsequent time, the physician was undoubtedly attending the testatrix in a professional capacity, hence it was error to

receive his testimony. *Matter of Will of Catharine Darragh*, 52 Hun, 591.

A physician, not his family physician, attended Winn, decedent, once. He was asked by defendant whether upon that day Winn was conscious or unconscious. Before answering he was asked whether the information he obtained on that day was necessary to enable him to prescribe professionally. This question was excluded, and finally the physician's testimony was stricken out.

The latter question was proper within section 834 of the Code of Civil Procedure.

This was so whether it ultimately appeared that the witness was or was not shown to be competent to testify to Winn's physical condition on that day. *Herrington v. Winn*, 60 Hun, 235, rev'g judg't for pl'ff.

Where a person is called in professionally as consulting physician, what is said in consultation in the presence of the patient is inadmissible in evidence. The fact that the physician in attendance did not agree upon the patient's disease does not permit the confidential statements between physician and patient to be disclosed. *Morris v. N. Y., O. & W. R. Co.*, 73 Hun, 560, aff'g judg't for pl'ff; rev'd 148 N. Y. 88.

When a physician simply examined a person at the request of another physician and did not attend nor prescribe nor advise he was a competent witness. *Henry v. N. Y. Cent. R. Co.*, 57 Hun, 76.

In an action brought on a policy of life insurance, any statement as to the cause of the death of the insured, contained in the certificate of the physician of the insured filed with the insurer by the beneficiary as part of the proof of the death of the insured, and put in evidence on the trial, is not proper evidence against the plaintiff upon such trial of any fact, knowledge of which was acquired by the doctor by reason of his relation as a physician to the insured, if objected to under section 834 of the Code of Civil Procedure, but it is competent evidence as an admission by the plaintiff of the cause of the death of the insured; beyond that it does not bind the plaintiff as an admission.

It is proper upon the trial of an action brought to recover the amount of a life insurance policy, to exclude, under the provisions of section 834 of the code of Civil Procedure, the testimony of the physician of the insured as to what he was treating her for when he testifies that his information upon that subject was such as was necessary to enable him to treat the insured professionally. *Redmond v. The Industrial Benefit Association*, 78 Hun, 104, aff'g judg't for pl'ff.

Plaintiff's explanation to his surgeon of how the accident happened did not receive the protection of the statutory privilege. *Green v. Metropolitan Street R. Co.*, 171 N. Y. 201; rev'g s. c., 65 App. Div. 54.

See, also, *Griebel v. Brooklyn Heights R. Co.*, 68 App. Div. 204; *Devoy v. New York &c. Co.*, 26 App. Div. 538.

Burden is on the plaintiff claiming the privilege to show that it comes within the code provision in relation thereto. See *Griffiths v. Metropolitan Street R. Co.*, 171 N. Y. 106; rev'g s. c., 63 App. Div. 86.

Physician sent by defendant to ascertain injured person's condition, may testify to statements plaintiff made to him. *Heath v. Broadway &c. R. Co.*, 25 J. & S. (57 Supr. Ct.) 496.

The privilege covers information gained from observation as well as conversation. *Colorado &c. R. Co. v. Cummings*, 8 Colo. App. 541.

The privilege extends to information acquired by the company's physician, in respect to injuries to an employé. *Keist v. Chicago &c. R. Co.*, 110 Iowa, 32.

See, also, *Colorado Fuel Co. v. Cummings*, 8 Colo. App. 541.

A physician is precluded from testifying to information obtained by the patient's disclosure to his co-partner at their place of business. *Ætna &c. Co. v. Deming*, 123 Ind. 384.

When the relation of physician and patient exists, the former cannot testify to answers to his questions to the latter, as to matters concerning which he has no professional interest and which were made to qualify him as a witness, so far as they relate to the patient's injury or former condition. *Penn. Co. v. Marion*, 123 Ind. 415.

Description of the accident by the injured person, subsequently dying, after his removal to his home, as inadmissible. *N. Y. C. &c. R. Co. v. Mushrush*, (Ind. App.) 37 N. E. Rep. 954.

The privilege extends to information acquired while attending the patient for other ailments than the injuries in question. *Finnegan v. Sioux Falls*, 112 Iowa, 232.

Lammiman v. Detroit S. R. Co., 112 Mich. 602.

Statutory privilege of physician cannot be infringed though consulted solely with the object of making him a witness at the trial. *Doran v. Cedar Rapids &c. R. Co.*, (Iowa) 90 N. W. Rep. 815.

Physician may testify that he is the family physician, attending a patient professionally, and the number of visits. *Breisenmeister v. Supreme Lodge*, 81 Mich. 525.

Physician may testify to the mere fact of attendance upon but not to the condition of patient; but may testify that plaintiff told witness that she had sued defendant and would want him as a witness. *Cooley v. Foltz*, 85 Mich. 47.

In dispute between devisees and heirs at law over will, either party may call the decedent's physician. *Thompson v. Ish*, 99 Mo. 160.

An attending physician cannot testify respecting his patient's sobriety. *Kling v. Kansas City*, 27 Mo. App. 231.

When a physician attended an injured person he was excluded from testifying to information obtained to enable him to attend her, although he went and attended her in the interest of the alleged wrongdoer, provided the patient was ignorant of his relation to the wrongdoer. *Weitz v. Mound City R. Co.*, 53 Mo. App. 39.

So when, after first attending her at defendant's request, he afterwards attended her as her physician. *Freel v. Market St. R. Co.*, 97 Cal. 40.

That physician was paid for his services by other parties than plaintiff, does not affect the privilege. *Noble v. Kansas City*, (Mo. App.) 68 S. W. Rep. 969.

Declarations to permit physician to testify in a contemplated suit inadmissible. *Consolidated Traction Co. v. Lambertson*, 60 N. J. L. 452; aff'g s. c., 59 id. 297.

See *Marter v. Texas &c. R. Co.*, 52 La. Ann. 727.

(a). WAIVER.

Edington v. Aetna Insurance Company, 77 N. Y. 564.

From opinion.—"It will not do to extend the rule of exclusion so far as to embarrass the administration of justice. It is not even all information which comes within the letter of the statute which is to be excluded. The exclusion is aimed at confidential communications of a patient to his physician, and also such information as a physician may acquire of secret ailments by an examination of the person of his patient. The policy of the statute is to enable a patient, without danger of exposure, to disclose to his physician all information necessary to his treatment. Its purpose is to invite confidence, and to prevent a breach thereof. Suppose a patient has a fever or a fractured leg or skull, or is a raving maniac, and these ailments are obvious to all about him, may not the physician who is called to attend him, testify to these matters? In doing so there would be no breach of confidence, and the policy of the statute would not be invaded. These and other cases which might be supposed, while perhaps within the letter of the statute, could not be within the reason thereof. *Cessante ratione legis, cessat ipsa lex.*"

After the death of a patient the prohibition against physician disclosing information acquired from him in his professional capacity cannot be waived by anyone. *Lader v. Whilpley*, 111 N. Y. 239.

McKinney v. Grand St. R. Co., 104 N. Y. 354.

From opinion.—"The intent of the statute, in making such information privileged, is to inspire confidence between patient and physician, and to enable the latter to prescribe for and advise the former most advantageously and remove from the patient's mind any fear that she may be exposed to civil or criminal prosecution or shame and disgrace by reason of any disclosures thus made.

* * * The patient cannot use this privilege both as a sword and a shield, to waive when it inures to her advantage and wield when it does not. After its

publication no further injury can be inflicted upon the rights and interests which the statute was intended to protect, and there is no further reason for its enforcement. The nature of the information is of such a character that when it is once divulged in legal proceedings it cannot again be hidden or concealed. It is then open to the consideration of the entire public, and the privilege of forbidding the repetition is not conferred by the statute. The consent having been once given and acted upon cannot be recalled, and the patient can never be restored to the condition which the statute for the maintenance of public policy has sought to protect." In this case the physician had been called, and testified upon a previous trial at the instance of the plaintiff, and on this trial had been called by the defendant, and his evidence excluded. The court invoked the doctrine that when the object of the statute had been voluntarily defeated by the party for whose benefit it was enacted there could be no reason for its continued enforcement.

People v. Schuyler, 106 N. Y. 306.

From opinion.—"The object of the section referred to was to prevent the disclosure by the physician of his patient's ailments and infirmities, and it may be queried whether it makes him incompetent to testify that his patient was free from disease of any kind; was not Dr. Bassett, therefore, competent under any view of a case to testify that the defendant was not insane but sane? And when the defendant called experts who had examined him to testify as to his mental condition and to show that he was insane, did he not waive his privilege under the section referred to and throw open the inquiry as to his mental condition? In other words, can a party himself open a trial and expose his ailments and make them a subject of inquiry, and then object that his physician shall tell anything he knows about them? We do not deem it important to answer these questions at this time, and leave them to be solved when the exigencies of some future case may require it." The defendant in this case had called five physicians, four experts and one who gave his opinion from a professional knowledge of the defendant's condition, and the question arose after the admission of the evidence of a physician who attended the defendant in jail, and who was called by the people.

"The act of the testator in requesting his attorney who drew his will to become a witness to it is clearly indicative of the intention to waive the statutory prohibition and so leave the witness free to perform his duties of office assigned to him." In the matter of the will of William Coleman, deceased, 111 N. Y. 220.

The plaintiff's physician was asked whether he had conferred with plaintiff about her injuries and if he had made an examination of her, and this proposed evidence was excluded because it was privileged. *Feeney v. L. I. R. Co.*, 116 N. Y. 330.

The plaintiff had three physicians, each at a different time. Upon trial she called one of them, and he gave testimony as to the extent and character of her injuries. The defendant called the other two, but their testimony was rejected and the ruling sustained. *Hope v. Troy &c. R. Co.*, 40 Hun, 438; *aff'd*, 110 N. Y. 643.

The plaintiff herself was sworn and examined as to the extent of her injuries, as was Dr. Hall and on cross-examination gave the same testi-

mony as to the consultation between Dr. Hall and Dr. Grant; she rested her case upon the testimony of Dr. Hall and herself. The defense then offered Dr. Grant as a witness upon the subject of the extent of her injuries and to controvert the state of things proved by the plaintiff and Dr. Hall. His evidence was objected to as inadmissible, under sections 824 and 836 of the Code, and the objection was sustained. This ruling was affirmed. *Record v. Village of Saratoga Springs*, 46 Hun, 448.*

From opinion.—"Possibly the Legislature did not contemplate the case where the patient had already disclosed it (her physical condition) herself, in an action to recover for injuries to her person, and had produced another physician, who had, with her consent, fully entered into the description of her physical and mental condition;" but what the Legislature contemplated was the very essence of the statute, and if the court thought that such a case was not within the contemplation of the statute, that is, the will of the Legislature as expressed, then it should have so determined. The opinion states also as follows: "Reasoning from first principles it would be difficult to give a good reason for the exclusion of Dr. Grant's testimony; it could certainly work no injustice to the plaintiff; it might prevent injustice * * *." But the court concluded that the statute in its letter allowed her to employ several physicians and call to her aid the testimony of any one of them, and to exclude that of the other.

It appeared that in an action brought to recover damages for injuries sustained by the defendant, the plaintiff testified that he visited the doctor two or three times to consult him about the injury; that the doctor did not examine him, asked him no questions, and finally on the third visit told him to get examined by a doctor. The doctor thus visited by the plaintiff was then called as a witness for the defendant with a view to showing that the plaintiff had not stated what took place between himself and the doctor. Objection was taken to such testimony, which was excluded. Held that the doctor was not prevented, by section 834 of the Code, from testifying to what took place between the plaintiff and himself; that the plaintiff by his own testimony as to what had taken place between himself and the doctor, had waived his right to object to the examination of the latter in relation thereto. The plaintiff, on his own behalf, testified that he had visited Dr. Knapp two or three times to consult with him about his eye; that Dr. Knapp did not examine him; that he merely looked at his eyes; asked him no question—did not ask him a word; and that he told him nothing, and upon the third visit Dr. Knapp told the plaintiff to get examined by a doctor. *Marx v. M. R. Co.*, 56 Hun, 575.

Van Brunt, C. J., said: "It has been well settled that this express waiver may be inferred from circumstances." Citing *In re Coleman*, 111 N. Y. 220; *McKinney v. Grand St. R. Co.*, 104 id. 352.

"The plaintiff, upon his direct examination in the case at bar, had pretended

* NOTE—Aff'd, 129 N. Y. 646; and see *Grattan v. Mut. L. Ins. Co.*, 92 N. Y. 287.

to give all that took place between himself and Dr. Knapp. Had opened the door of the consultation room to the jury, and had pretended to give them a statement of what had occurred between himself and Dr. Knapp. Can it be that, having done this, when Dr. Knapp is called to give his version of what took place, that his mouth is shut and the truth cannot be laid before the jury? Can it be that a patient can distort the features of a consultation with a physician so as to do the physician the greatest of injury, and the physician be prohibited from defending himself? Clearly not. The patient may keep the door of the consultation room closed, but he cannot be permitted to open it so as to give an imperfect and erroneous view of what has taken place there, and then close the door when the actual facts are about to be disclosed. This would be allowing a plaintiff to manufacture evidence for himself in cases of this description, and prevent the defendant from resorting to the only means to elicit the truth.

The legislation in question was not intended to be the means of such injustice; and it may be claimed with great force that as the section in question was intended to prevent the disclosure by a physician of his patient's condition, either physical or mental, when such condition comes in question, and physicians are examined at the instance of the plaintiff in respect thereto, the privilege is waived and the opposite party has a right to resort to the same class of evidence."

When suing for negligence, a party who testifies minutely to the effects of injury upon her health and comfort, thereby waives the privilege conferred by the New York Code of Civil Procedure, sec. 834, forbidding a physician from disclosing any information which may have been obtained in attending a patient, and her attending physician may be called to prove that she suffered from no such injuries as she represented. *Treanor v. M. R. Co.*, 41 N. Y. St. Repr. 614; 28 Abb. N. Cases, 47; 16 N. Y. Sup. 536, disapproved 148 N. Y. 93.

Waiver of a party's privilege to object to the disclosure by a physician, does not arise from her disclosures made upon cross examination of the facts to which the physician is called to testify. *Butler v. Manhattan R. Co.*, 3 Misc. 453; aff'd, 143 N. Y. 630; 30 Abb. N. Cas. 78.

Physician not precluded from testifying to services of nurse to his patient. *Re McQueen's Estate*, 13 N. Y. St. Rep. 602.

Physician must testify when privilege is waived. *Zimmer v. Third Ave. R. Co.*, 36 App. Div. 265.

If rights of third parties are not involved. *Corey v. Bolton*, 30 Misc. 836.

Plaintiff waives it by testifying to his condition and the treatment received. *Rauh v. Deutscher Verein*, 29 App. Div. 483.

Eliciting testimony from one of two consulting physicians waived the privilege as to the other. *Morris v. New York &c. R. Co.*, 148 N. Y. 88; rev'g s. c., 73 Hun, 560.

See *Barker v. Cunard S. S. Co.*, 91 Hun, 495.

Merely calling a physician whose testimony is excluded is not a waiver. *Holcomb v. Harris*, 42 App. Div. 363.

The privilege cannot be waived by legal representatives. It does not cover information gained through an autopsy. *Harrison v. Sutter &c. R. Co.*, 116 Cal. 156.

Baxter v. Cedar Rapids, 103 Iowa, 599.

The privileges waived by failing to object to the introduction of the testimony. *Lissak v. Crocker Estate Co.*, 119 Cal. 442.

A patient who makes public, in a court of justice, the occurrences of a sick room for the purpose of obtaining damages against his physician, cannot exclude the testimony of the physician himself or that of a consulting physician, as to such occurrences. *Lane v. Boycourt*, (Ind. App.) 27 N. E. Rep. 1111.

Party, a witness, cannot be asked whether he is willing to waive his privilege to exclude the testimony of his attending physician.

Plaintiff, by testifying to her own ailments, does not waive her right to preclude the evidence of her physician called to contradict her. *McConnell v. Osage*, 80 Iowa, 293.

The consent of a child seven years of age, to a physician's testimony, as to matters learned in his professional capacity, may be given by either of her parents, and may be implied by bringing an action for injuries to the child and testifying fully concerning them. *State v. De Poister* (Nev.) 25 Pac. Rep. 1000.

In *Hunt v. Blackburn*, 128 U. S. 464, it was held proper for an attorney to testify as to an interview between himself and his client, after the client had himself waived his privilege by making that interview a material fact, as bearing upon an issue voluntarily brought into the case by him. Mr. Chief Justice Fuller, after stating the rule, said: "But the privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney. When Mrs. Blackburn entered upon a line of defense which involved what transpired between herself and Mr. Weatherford, and respecting which she testified, she waived her right to object to his giving his account of the matter."

XVIII. Refreshing Recollection.

The witness was asked, whether his recollection, as to the removal of the lamp from the excavation on a certain morning was refreshed by any accident then happening. The question was improperly excluded.

While a party cannot cross-examine his own witness, and is in gen-

eral bound by the answers made, it is not objectionable after a witness has given an ambiguous answer to inquire as to any circumstances or fact tending to enable him to recollect the fact sought to be proved more clearly or certainly. *Hogan v. Dillon*, 76 N. Y. 170; rev'g judg't for pl'ff.

General passenger agent was allowed to refresh his recollection as to one ticket from another. *Howard v. Chesapeake &c. R. Co.*, 11 App. D. C. 300.

Witness may use a diagram of the place, where it is shown to be correct. *Tankard v. Roanoke &c. R. Co.*, 117 N. C. 558.

Memory may be refreshed from memorandum made at the time and the next day copied and signed. *Edwards v. Simbel*, 202 Pa. St. 30.

Shipper not allowed to use commission merchant's memoranda of sales to refresh his memory. *Gulf &c. R. Co. v. Frost*, (Tex. Civ. App.) 34 S. W. Rep. 167.

Shipper may refresh his recollection from a memorandum; he can swear he knows of his own knowledge to be correct, though made by another. *Pacific Coast S. S. Co. v. Bancroft, Whitney Co.*, 94 Fed. Rep. 180.

Springs v. South Bound R. Co., 46 S. C. 104.

XIX. Rules.

Rules of other companies as to safety appliances may be considered by jury upon the propriety of defendant adopting a similar rule. *Abel v. Pres't &c.*, 128 N. Y. 662.

Defendant's rules as to speed to be used in rounding curves cannot be used to bind plaintiff. *O'Keefe v. Eighth Ave. R. Co.*, 33 App. Div. 324.

Rules of board of underwriters not conclusive as to negligence in wiring. *Dechert v. Municipal &c. Co.*, 39 App. Div. 490.

Rule of company permitting fireman to operate engine in certain contingencies was admissible on the question of his authority to do so. *Louisville &c. R. Co. v. Morgan*, 114 Ala. 449.

Cautionary rules, making their violation a breach of duty were admitted as against an employé injured while acting in contravention to them. *Shorter v. Southern R. Co.*, 121 Ala. 158.

In an action for injuries caused by the backing of a train, rules of the company requiring certain duties of the employés in such a case are admissible. *Georgia R. v. Williams*, 74 Ga. 723.

Rule of company requiring motorman to keep cars under control when approaching others, admitted. *Atlanta Consol. R. Co. v. Bates*, 103 Ga. 333.

Precautionary rules to prevent derailment, admitted on issue of negligence. *Chicago &c. R. Co. v. Eaton*, 194 Ill. 441; aff'g s. c., 96 Ill. 570.

Government rule as to immediate security of mails introduced to explain deceased's conduct in exposing himself to danger. *Chicago &c. R. Co. v. Kelly*, 75 Ill. App. 490.

Notice of rules to employes is necessary to qualify them for admission in evidence against them. *Indiana &c. R. Co. v. Bundy*, 152 Ind. 590.

Special rule takes precedence of a general rule. *Laird v. Chicago &c. R. Co.*, 100 Iowa, 336.

A rule of a railroad company, forbidding "running switches," is admissible in an action for injury caused by cars running without engine attached. *Baltimore v. Kean*, 65 Md. 394.

Rules of company for the guidance of employes only, and not known to passenger, not admissible in action by latter. *Ponda v. St. Paul C. R. Co.*, 71 Minn. 438.

Disobedience of rules by employes is evidence of negligence. *Smithson v. Chicago &c. R. Co.*, 71 Minn. 216.

A company's rule as to the control of street cars by motorman not admitted in action by travelers. *Isaackson v. Duluth &c. R. Co.*, 75 Minn. 27.

Rules concerning inspection and defining what shall be considered a defect, is admissible where those questions are involved in the issues. *Union Stockyards v. Goodwin*, 57 Neb. 138.

Rules of a company as to speed were admitted where there was a fair inference that, had they been followed, injury would not have resulted. *Davis v. Concord &c. R. Co.*, 68 N. H. 247.

See, also, *Cincinnati S. R. Co. v. Atlemeier*, 60 Oh. St. 10.

Defendant introduced its rules forbidding employes to permit others to ride on its hand cars, where plaintiff was old enough to comprehend the danger. *Missouri &c. R. Co. v. Rodgers*, 89 Tex. 675.

Plaintiff need not show what rules should have been sufficient because he charges defendant with failure to maintain sufficient ones. *Texas &c. R. Co. v. Cumpston*, 15 Tex. Civ. App. 493.

Rules of other roads as to ringing of bells not admitted on the issue of negligence. *St. Louis &c. R. Co. v. Nelson*, 20 Tex. Civ. App. 536.

Defendant introduced its time table to substantiate a violation of a rule in stopping at a station. Plaintiff was allowed to show frequent stoppage. *Texas &c. R. Co. v. Elliott*, 22 Tex. Civ. App. 31.

See, also, *San Antonio &c. R. Co. v. Lynch*, (Tex. Civ. App.) 40 S. W. Rep. 631; *Houston &c. R. Co. v. Norris*, 41 id. 708.

XX. Impeaching Evidence.

A party may contradict his own witness as to a fact material in the case, although the effect of the proof may be to discredit him; but he cannot impeach him, although subsequently called as a witness for the adverse party, either by general evidence or by proof of contradictory statements out of court. *Coulter v. The American Merchants' Union Ex. Co.*, 56 N. Y. 585.

Citing *People v. Safford*, 5 Denio, 112; *Thompson v. Blanchard*, 4 N. Y. 303, 311.

From opinion.—"Showing that a witness has made statements out of court variant from and conflicting with what he testifies in court, on a point material to the issue, is admissible when the witness has been preliminarily interrogated upon the point and does not admit making such statement. *Patchin v. Astor M. Ins. Co.*, 13 N. Y. 268; 1 Greenleaf's Ev. sec. 449. But the rule thus stated is applicable to the witness of the opposing party. The object of such testimony is to impeach the credit of the witness. *People v. Vane*, 12 Wend. 81."

Evidence of hostility must be direct and pointed.

Defendant offered to show that one of plaintiff's witnesses had, prior to the accident as to which he testified, applied for a position upon its road, and had been refused. Held, that the rejection thereof was not error.

The court laid down the rule as to defendant's duty as above, citing *Cott v. L. R. R. Co.*, 36 N. Y. 214; *People v. N. Y. C. & H. R. R. Co.*, 74 id. 302.

Gale v. N. Y. C. & H. R. Co., 76 N. Y. 594; citing *Starks v. People*, 5 Denio, 108; *Beardsley v. Wildman*, 41 Conn. 515; *Higham v. Gault*, 15 Hun, 383; *Day v. Stickney*, 14 Allen, 255; *Stephens v. People*, 4 Park. Cr. R. 397; *Newton v. Harris*, 6 N. Y. 345; *Wottrich v. Freeman*, 71 id. 601.

See *Schultz v. The Third Ave. R. Co.*, 89 N. Y. 242, rev'g 14 J. & S. 211, and judg't for pl'ff.

Upon the cross-examination of "S.," a witness for plaintiff, who had given material testimony for him, and who had been in defendant's employ, he was asked if he was discharged for inefficiency and drunkenness; if he was discharged at all; and if "O.," his "immediate boss," did not assign those reasons for discharging him, to all of which he answered, "no." "O." was called by defendant's counsel, who offered to prove by him, that he became aware that "S." was in the habit of being intoxicated, and neglected his duty, and that he was discharged for that reason. This was excluded. Held, no error; that the fact of his discharge was immaterial; that if the discharge was for inefficiency and drunkenness, this could not be proved by way of impeachment, and was matter collateral to the issue, as to which the answers of "S." were conclusive; that if such grounds for the discharge were communicated to

“S.,” it might lay the foundation of an inquiry as to his feelings toward defendant; but as defendant did not offer to show this, and as it was not disclosed on the trial that the offer was to show hostile feeling, the question could not be presented here. *Kirkpatrick v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 240, aff’g judg’t for pl’ff.

Where the repairer of an engine had been injured, by falling into a hole near it, in a cellar, it was proper to ask a witness of the defendant, whose evidence tended to show absence of danger, on cross-examination, whether he had warned the defendant that it was a bad trap, and unless guarded some one would fall in, and upon his denying, to prove same by other witnesses. *Homer v. Everett*, 91 N. Y. 641, aff’g judg’t for pl’ff.

It seems the rule prohibiting a party from impeaching his own witness applies only to prevent. *First.* The calling of witnesses to impeach the general character of the witness. *Second.* Proof of prior contradictory statements by him. *Third.* A contradiction of the witness by another when the only effect is to impeach and not to give material evidence upon any issue in the case. *Becker v. Koch*, 104 N. Y. 394.

From opinion.—“The general rule prohibiting the impeachment or discrediting of a witness by the party calling him was extended too far in this case. Here was an issue of fraud in the making of an assignment by the assignor, and the defendant, in order to prove its existence, called the very man as a witness whom he alleged was guilty of the fraud. He might well be regarded, therefore, as an adverse witness, whom the party by the exigencies of his case was obliged to call.

With regard to such witnesses it is well settled that all the rules applicable to the examination of other witnesses do not in their strictness apply. An adverse witness may be cross-examined, and leading questions may be put to him by the party calling him, for the very sensible and sufficient reason that he is adverse and that the danger arising from such a mode of examination by the party calling a friendly or unbiased witness does not exist.

What favorable facts the party calling him obtains from such a witness may be justly regarded as wrung from a reluctant and unwilling man, while those which are unfavorable may be treated by the jury with just the degree of belief which they may think they deserve, considering their nature and the other circumstances of the case.

Starkie, one of the ablest and most philosophical of English writers on this branch of law, in speaking of a reluctant or adverse witness, uses almost the precise language above stated, and which has been substantially quoted from him. *Starkie on Ev.* (9th ed.) m. p. 248. Sometimes rather loose language has been indulged in to the general effect that a party cannot impeach his own witness, but when an examination is made as to the limits of the rule the result will be found to be that it only prohibits this impeachment in three cases, viz.: (1) The calling of witnesses to impeach the general character of the witness; (2) The proof of prior contradictory statements by him; (3) A contradiction of the witness by another where the only effect is to impeach and not to give any material evidence upon any issue in the case.”

Lawrence v. Barker, 5 Wend. 301-305; People v. Safford, 5 Denio 112; Thompson v. Blanchard, 4 N. Y. 303-311; Coulter v. Express Co., 56 N. Y. 585; 2 Starkie on Ev. (9 Am. ed.) m. p. 244-250; 2 Phil. on Ev. (C. & H. & Ed. notes), m. p. 981, 982, 983 and note 602; 1 Green, on Ev. sec. 442.

Witness was called, sworn and interrogated but no material questions were asked before he was excused. It was held that he had not been made a witness by the party so calling him, within the rule precluding one from contradicting the statements of his own witnesses. *Fall Brook Coal Co. v. Hewson*, 158 N. Y. 150; aff'g s. c., 92 Hun, 607.

That a party cannot impeach his own witness does not prevent his showing that the evidence itself is untrue by other material testimony. *First National Bank v. Weston*, 24 App. Div. 230; Thorp v. Liebrecht, 56 N. J. Eq. 499; Town of Waterbury v. Waterbury R. Co., 74 Conn. 152; Campbell v. McCaskill, 88 Mo. App. 44; Kumberger v. Miller, 36 Misc. 204; Swift & Co. v. Short, 92 Fed. Rep. 567.

The rule against impeaching one's own witnesses does not apply to such as are adverse. *Hard v. December*, 28 App. Div. 365.

A contradictory statement cannot be impeached without giving the witness a chance to explain. *Vaughn Mach. Co. v. Quintard*, 37 App. Div. 368; Louisville &c. R. Co. v. Alumbaugh, (Ky.) 51 S. W. Rep. 18.

And denial that any statement had ever been made is sufficient to allow impeaching evidence. *Garzo v. McManus*, (Tex. Civ. App.) 44 S. W. Rep. 704.

That the creditability of one's own witnesses may be incidentally impeached thereby, does not prevent a party from proving a fact by other competent testimony. *Grau v. Brooklyn Heights R. Co.*, 76 N. Y. Supp. 20.

Plaintiff cannot by calling defendant's witness to prove a given fact be prevented from contradicting him. *Polykranas v. Krausz*, 77 N. Y. Supp. 46.

Impeachment does not extend to immaterial issues. *McNeil v. Metropolitan S. R. Co.*, 20 Misc. 426.

Fowle v. Shirer, 70 Minn. 312; Bunzel v. Maas, 116 Ala. 68; Chielinsky, v. Hoopes, &c. Co., 1 Marv. (Del.) 273; East Dubuque v. Burbute, 173 Ill. 553; aff'g s. c., 74 Ill. App. 99; Texas &c. R. Co. v. Phillips, 91 Tex. 278; rev'g s. c., 40 S. W. Rep. 344; Trabing v. California &c. Co., 121 Cal. 137; Beall v. Folmar, (Ala.) 26 South. Rep. 1; Erie v. Rubenstein, 72 Mo. App. 337; Pape v. Lathrop, 18 Ind. App. 633; Brown v. Ream, 15 Ind. App. 51; Schneider Brew. Co. v. American Ice Mach. Co., 77 Fed. Rep. 138; Buckley v. Silverberg, 113 Cal. 673; Butler v. Cooper, 3 Kan. App. 145.

A party does not by drawing out evidence from an opposing witness, preclude himself from impeaching him. *Mack v. Austin*, 26 Misc. 198.

A party is concluded with the reply to his question, as to whether a

witness had not been guilty at one time of a certain act, under Cal. Co. Civ. Proc. *Steen v. Santa Clara Mill &c. Co.*, 134 Cal. 355.

By putting in a deposition taken by the adverse party one makes the witness his own. *McCormick &c. Mach. Co. v. Laster*, 81 Ill. App. 316.

See further as to what makes one a witness of the party calling him within the rule. *Johnson v. Spencer*, 51 Neb. 198.

Where a witness is asked and compelled to answer against objection in respect to a former statement as to defendant's liability, his denial cannot be contradicted. *Northern Melting Co. v. Mackey*, 99 Ill. App. 57.

Testimony permitted to be contradicted by statute in Indiana as a surprise, is only such as is prejudicial, and not merely disappointing. *Old Father v. Zant*, 21 Ind. App. 307.

A witness called by both parties may be contradicted by one only after cross examination by the other. *Hall v. Manson*, 99 Iowa, 698.

Former deposition for the purpose of contradiction may be excluded, where it does not relate to matter in issue. *Pearl v. Omaha &c. R. Co.*, (Iowa) 88 N. W. Rep. 1078.

It is not necessary to give an opposing witness a chance to explain contradictory statements. *Allin v. Whittmore*, 171 Mass. 259.

Plaintiff may be questioned as to testimony given on an appearance before the city council, without introducing all the testimony then taken. *Zibbel v. City of Grand Rapids*, (Mich.) 89 N. W. Rep. 563.

Where one party has not intentionally misled the other into making the former's witness the latter's, the latter becomes bound by what such witness says. *Feary v. O'Neill*, 149 Mo. 467.

Questions cannot be asked which only tend to impeach a party's own witnesses. *Nathan v. Sands*, 52 Neb. 660; *Ontario v. Union Bank*, 21 Misc. 770.

Proper foundation for impeachment must be laid by interrogating witness as to the contradictory statement. *Wylar v. Rothschild*, 53 Neb. 566; *Trabing v. California &c. Co.*, 121 Cal. 137.

See, also, *Plass v. Plass*, 122 Cal. 3; *De Forrest v. United States*, 11 App. D. C. 458; *Times Pub. Co. v. Carlisle*, 94 Fed. Rep. 762. And so impeaching testimony must be confined thereto. *Rooler v. Kling*, 150 Ind. 159.

Where particular inconsistencies in former statements are shown, the entire testimony on such occasions may be given. *Rudy v. Neyton*, 19 Pa. Super. Ct. 312.

All a party can do when surprised by his own witness is to ask if he did not make a former inconsistent statement, being concluded by his reply. *Record v. Chicasaw Cooperage Co.*, (Tenn.) 69 S. W. Rep. 334.

A party does not, by drawing out evidence from an opposing witness,

preclude himself from impeaching him. *Cook v. Carroll*, (Tex. Civ. App.) 39 S. W. Rep. 1006.

One witness may not be contradicted by another on irrelevant matters. *Denison &c. R. Co. v. Foster*, (Tex. Civ. App.) 68 S. W. Rep. 299.

A petition cannot be used to contradict plaintiff until it is shown that he has knowledge of its contents. *Denison &c. R. Co. v. Foster*, (Tex. Civ. App.) 68 S. W. Rep. 299.

It may be shown that the testimony on the former trial was taken under such circumstances as to embarrass the witness and otherwise affect its value. *Laflan v. Missisquoi Pulp Co.*, (Vt.) 52 Atl. Rep. 526.

Though one's own witness may not be impeached, he may refer to the contradictory statement to refresh his memory in respect to it. *Collins v. Hoehle*, 99 Wis. 639; *Sloan v. Pelzer*, 54 S. C. 314; *Spaulding v. Chicago &c. R. Co.*, 98 Iowa, 205.

XXI. Failure to Produce Evidence Within a Party's Power.

The guilt of a prisoner depending upon the credibility of evidence given by an accomplice, it is no error to charge the jury that they might take into consideration the omission of the prisoner to contradict the accomplice upon a statement in respect to which, if false, contradictory evidence was apparently within the prisoner's power. *People v. Dyle*, 21 N. Y. 578.

A prisoner pressed by the force of accumulated circumstances may not unfrequently find himself in the position where he is required to account for his whereabouts on a given day, or to show how he became possessed of a given sum of money or article of personal property. The omission to produce such evidence has never been regarded as absolute and conclusive evidence of the fact in dispute. Neither the elementary writers nor the adjudicated cases furnish any such rule of evidence. The absence of such evidence, especially when it appears to be in the power of the prisoner to furnish it, creates a strong presumption of his guilt, a strong inference against him, and is a circumstance greatly corroborative of the truth of the evidence given upon the other side. In a doubtful case it would justify the jury in resolving the doubt against him. *Gordon v. The People*, 33 N. Y. 501.

To this effect are the cases of *The People v. McWhorter*, 4 Barb. S. C. 438; *The People v. Bodine*, 1 Denio 281; *The People v. Dyle*, 21 N. Y. 578; *vide* also 2 Stark. 6th Am. ed. 685; 3 Black. Com. 371; *Braithwaite v. Coleman*, 4 Nev. & Man. 654. See *Reynolds v. Leveester*, 15 Gray 78; *J. Russell Man'f Co. v. N. H. Steamboat Co.*, 50 N. Y. 127.

It may properly be assumed, until the contrary appear, that the employes on a street car at the time of the injury were known to the proper agency of the defendant and might have been produced in its behalf as witnesses, and an omission to produce them, or some one of them, was a subject that might be considered by the jury. *Clark v. N. Y. &c. R. Co.*, 40 Hun, 605.

Citing *The People v. Dyle*, 21 N. Y. 578; *Gordon v. People*, 33 id. 501; *Bleecker v. Johnston*, 69 id. 301; rev'g 51 How. 386; *Reynolds v. Sweetser*, 16 Gray 78.

Omission to call the motorman in charge of the car at the time of the accident was a consideration for the jury. *Poulsen v. Nassau Electric R. Co.*, 30 App. Div. 246.

Failure to call a former employé raised no presumption that his testimony would be unfavorable. *Ward v. St. Vincent's Hospital*, 65 App. Div. 64.

Nor did failure to call a physician entitled to a privilege. *Pronk v. Brooklyn &c. R. Co.*, 68 App. Div. 390.

In an action to recover for the work done with knowledge and approval of wife and materials furnished in making such repairs, the failure to call the defendant's wife as a witness, unexplained, creates a presumption that her testimony, if produced, would have been unfavorable to defendant. *Wennerstrom v. Kelly*, 7 Misc. 173.

Failure to call all the employés on the train did not justify an adverse inference. *Weinkle v. Brunswick &c. R. Co.*, 107 Ga. 367.

See, also, *Ray v. Camp*, 110 Ga. 818; *Hope v. West Chicago &c. R. Co.*, 82 Ill. App. 311.

Failure to produce the driver in charge justified adverse inference. *Mans v. Broderick*, 51 La. Ann. 1153.

Jury may consider the failure to produce the physician who examined plaintiff shortly after the injury. *Vergin v. Saginaw*, 125 Mich. 499.

Failure of the plaintiff to call the physician consulted by her may be considered by the jury. *Bullard v. Boston R. Co.*, 68 N. H. 27.

Proof that the witness destroyed a ladder admitted to discredit his testimony that it was sound. *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. L. 647.

Testimony of one eye witness, discredited by failure to produce another eye witness, though in court. *Crawleigh v. Galveston &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 140.

XXII. Probative Force of Evidence.

A jury may disbelieve the evidence of a canal gate-keeper that he left the gates in good condition, where, through improper condition, injury occurs. He was charged in a criminal prosecution with the omission in question. *Sipple v. State*, 99 N. Y. 284, rev'g judg't for pl'ff.

Citing *Wohlfahrt v. Beckert*, 92 N. Y. 490; *Elwood v. W. U. Tel. Co.*, 45 id. 549.

Effect of interest of a party, see *Nostrand v. Hubbard*, 35 App. Div. 201, *Gardner v. Baer*, 26 Misc. 181.

Where the defendant, by evidence which clearly outweighed the plain-

tiff's, showed that the driver of a car did not commit any one of the acts which the plaintiff sought to establish as a ground of recovery, a new trial was granted after a verdict for the plaintiff. *Trotcky v. Forty-second Street &c. R. Co.*, 73 Hun, 26, rev'g judg't for pl'ff.

The opinion of a plaintiff as to whether a certain act was malicious, and not performed in the service of the defendant, is not binding upon the jury although it renders a verdict in his favor. *Van Inwegen v. N. Y., L. E. & W. R. Co.*, 76 Hun, 53.

Verdict was not set aside, although five witnesses gave evidence contrary to that given by the plaintiff. *Brooks v. Kings County El. R. Co.*, 4 Misc. 288, aff'g judg't for pl'ff.

In an action for the death of a boy ten years old, alleged to have been caused by his being pushed from one of defendant's cars by the conductor, whereby he was thrown down and run over by a cart, the plaintiff produced only two witnesses to the accident, one of whom was a girl of about thirteen, who had frequently called with plaintiff at the office of the attorney for the latter. The testimony of these two witnesses was confused and contradictory as to various particulars. On the other hand, the conductor and three disinterested witnesses testified that the conductor was in the car and did not touch the boy, and that the boy dropped or threw himself from the car when he saw the conductor approaching. Held, that a verdict in favor of the plaintiff was against the weight of evidence, and should be set aside.

Where the only proof as to the pecuniary damage resulting to the next of kin is that the boy, a lad of ten years, although attending school, at times did errands for his mother, a verdict of \$1,500 is excessive. *Heusner v. Houston, West Street & Pavonia Ferry R. Co.*, 7 Misc. 48.

Where the plaintiff and two witnesses testify that he was injured by the sudden starting of a car while he was getting on the rear platform, while the conductor of the car and three witnesses testify that plaintiff fell while attempting to board the front platform while the car was in motion, a question for the determination of the jury is presented, and their verdict in favor of the plaintiff will not be disturbed as against the weight of evidence. *Commerford v. Atlantic Ave. R. Co.*, 8 Misc. 599.

In an action against a street railroad company for personal injuries, the plaintiff called seven witnesses, three of whom testified that they were present at the accident, while defendant called nineteen, fifteen of whom were present at that time. Of these latter witnesses seven were, or had been, employes of the defendant; some were impeached by contrary statements and some testified that they paid no attention to the matter until after the accident had taken place. For jury. *Small v. Brooklyn City & Newtown R. Co.*, 10 Misc. 266.

A verdict against a railroad company will not be set aside as against the weight of evidence, although the number of witnesses on the part of the defendant preponderated, where it appears that several of such witnesses were employes of the defendant, and the testimony is not free from contradictions and discrepancies in important particulars. *Kitchell v. Brooklyn H. R. Co.*, 10 Misc. 277.

Preponderance of evidence does not depend on the number of witnesses. *North Chicago &c. R. Co. v. Anderson*, 176 Ill. 635; aff'g s. c., 70 Ill. App. 336.

Chicago &c. R. Co. v. Maloney, 99 Ill. App. 623.

Testimony that deceased signed an instrument outweighs opinions that the signature is not a genuine one. *Wilson v. Keeling*, (Ky.) 50 S. W. Rep. 539.

Salary is persuasive but not conclusive on the question of earning power. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

Testimony of single witness is not sufficient as against an inherent improbability. *Lee v. Chicago &c. R. Co.*, 101 Wis. 352.

Evidence of those making measurements is of greater weight than those making casual estimates. *Keopke v. Milwaukee*, 112 Wis. 475.

XXIII. Non-Expert Opinion.

An opinion whether a person is apparently in better or worse health does not require any medical skill or training, but the competency thus to characterize another's condition is gained by ordinary experience and observation. *King v. Second Ave. R. Co.*, 75 Hun, 17.

It is an error to receive in evidence declarations of the plaintiff as to headache, made several months after the occurrence of an injury, and to permit non-expert witnesses to testify as to the mental condition and impaired memory of the plaintiff after the accident. *Grant v. The Village of Groton*, 77 Hun, 497.

Opinions of witnesses not experts are ordinarily inadmissible, and such rule applies to all questions where the facts are susceptible of actual statement; where they are not, and resort must be had to opinions, such opinions can only be received in evidence when given by experts.

The rate of speed at which a motor car was traveling, which is not actually measured, can be given only by the opinions of witnesses and such opinions are only allowable when given by persons peculiarly skilled on the question upon which they are called to give evidence. *Francisco v. Troy & Lansingburgh R. Co.*, 78 Hun, 13.

Expert evidence will not be allowed upon the trial of an action where the facts can be stated and described to the jury in such a manner as to

enable it to form a correct judgment in regard to them, but where it is impossible to so state the facts that the jury can comprehend them, and no better evidence is obtainable than the actual observation of a witness, then expert evidence becomes admissible. *Reich v. The Union Railway Company of New York City*, 78 Hun, 417.

The rate of speed of a railroad train is not purely within the knowledge of experts, and is not, therefore, the subject of expert testimony, and while a witness to give testimony upon that subject must have some knowledge of experience upon the subject, he is not required to have the degree of knowledge peculiar to experts, called upon to testify where expert testimony is required, and to give opinions based upon hypothetical questions. *Scully v. The New York, Lake Erie & Western Railroad Company*, 80 Hun, 197.

Witness allowed to state that plaintiff, after the accident, "acted differently in every way," "was very nervous," and "was not feeling well." *Webb v. Yonkers R. Co.*, 51 App. Div. 194.

A theatrical manager allowed to testify as to his observations concerning the health of plaintiff, a member of his family. *Farrell v. Metropolitan Street R. Co.*, 51 App. Div. 456.

Any one at all conversant with wood is a sufficient expert to know whether it is rotten or not. *Reynolds v. Van Beuren*, 10 Misc. 703.

The following questions have been held subjects for non-expert opinion:

That a person was sick, but not what the disease was. *Dominick v. Randolph*, 124 Ala. 557.

Distance a train ran before it stopped. *St. Louis &c. R. Co. v. Brown*, 62 Ark. 254.

As to facts within the experience of a man of common education. *Shafter v. Evans*, 53 Cal. 32.

One used to riding on cars, that it was going very fast, unusually so. *Johnson v. Oakland &c. R. Co.*, 127 Cal. 608.

That a sick person made complaints of pain and suffering. *Green v. Pacific Lumber Co.*, 130 Cal. 435.

Whether there was light enough in a hallway to see, if the elevator was standing in the shaft. *Colorado &c. R. Co. v. Rees*, 21 Colo. 435.

Opinion as to the speed of horse on a highway based on the sounds made. *Nesbitt v. Crosby*, (Conn.) 51 Atl. Rep. 550.

That witness has observed the shaking of a floor, and that it was dangerous. *Huber v. Jackson &c. Co.*, 1 Marv. (Del.) 374.

That a crossing was dangerous when approached from a certain direction. *Martin v. Baltimore &c. R. Co.*, 2 Marv. (Del.) 123.

By an ordinary brakeman, that a drawhead was unsafe because it

moved when struck by another car. *Baltimore &c. R. Co. v. Elliot*, 9 App. D. C. 341.

That cars running at usual speed have been stopped within 20 feet. *Chicago &c. R. Co. v. Taylor*, 170 Ill. 49; aff'g s. c., 68 Ill. App. 613.

That a train was running "fast;" though unable to state how fast. *Illinois C. R. Co. v. Ashline*, 171 Ill. 313; aff'g s. c., 70 Ill. App. 613; *Chicago &c. R. Co. v. Gunderson*, 174 Ill. 495; aff'g s. c., 74 Ill. App. 356; *Overtoom v. Chicago &c. R. Co.*, 80 Ill. App. 515.

Whether a person is better or worse than he was. *Salem v. Webster*, 192 Ill. 369; aff'g s. c., 95 Ill. App. 120.

That deceased was of good health and able to perform hard labor. *Ashley Wire Co. v. McFadden*, 66 Ill. App. 26.

Whether a wind would blow a certain gate open. *Chicago &c. R. Co. v. Truitt*, 68 Ill. App. 76.

Opinion of speed of trains judged by sound is not admissible. *Van Horn v. Burlington R. Co.*, 59 Iowa, 33.

That a person could scarcely walk, "looked bad," lifted his foot tenderly. *Bailey v. Centerville*, 168 Iowa, 20.

That a stream polluted by a sewer is sticky, nasty and filthy. *Hollanbeck v. Marion*, (Iowa) 89 N. W. Rep. 210.

Plaintiff's appearance was described and declarations as to pain stated. *Atchison v. Atchison*, 9 Kan. App. 248.

The time in which a train may be stopped, if founded on specific data. *Vanarsdell v. Louisville &c. R. Co.*, (Ky.) 65 S. W. Rep. 858.

That plaintiff had no memory and had to be retold things. *Lapante v. Warren Cotton Mills*, 165 Mass. 487.

That plaintiff looked sick, was a broken invalid, and a very nervous woman. *O'Neil v. Hanscom*, 175 Mass. 313.

Speed of trains. *Grand Trunk R. Co. v. Huntley*, 38 Mich. 537; *Pa. Co. v. Conlan*, 101 Ill. 93; *Nutter v. Boston R. Co.*, 60 N. H. 483.

That the coming together of the cars in the case in question was the hardest witness had ever seen. *Moore v. Saginaw &c. R. Co.*, 115 Mich. 103.

Speed of a street car based on comparison with speed on other occasions. *Mertz v. Detroit E. R. Co.*, 125 Mich. 11.

Conditions of a walk, but not its safety. *Brown v. Owosso*, (Mich.) 89 N. W. Rep. 568.

As to injury from actual examination of the party. *Squires v. Chilli-cothe*, 89 Mo. 226.

Speed of a train at a crossing. *Covell v. Wabash R. Co.*, 82 Mo. App. 180.

Muth v. St. Louis &c. R. Co., 87 Mo. App. 422.

Competent to testify that a horse was well and sound or otherwise, by one specially acquainted. *Spear v. Richardson*, 34 N. H. 428; *Johnson v. State*, 37 Ala. 457; *Sydleman v. Beckwith*, 43 Conn. 9; that a walk was properly constructed, *Alexander v. Sterling*, 71 Ill. 366.

Results of experiments with similar contrivances under similar conditions. *Arrowood v. South Carolina &c. R. Co.*, 126 N. C. 629.

Rate of speed of a train. *Galveston &c. R. Co. v. Sullivan*, (Tex. Civ. App.) 42 S. W. Rep. 568; *Galveston &c. R. Co. v. Huebner*, 42 id. 1021; *Texas &c. R. Co. v. Crockett*, (Tex. Civ. App.) 66 S. W. Rep. 114; *Robinson v. Louisville &c. R. Co.*, 112 Fed. Rep. 484; *Norfolk &c. R. Co. v. Tanner* (Va.) 41 S. E. Rep. 721.

That guard rails along street car track make it easier to cross them. *Houston &c. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621.

Width of cars, in question. *Missouri &c. R. Co. v. St. Clair*, 21 Tex. Civ. App. 345.

As to boy's discretion. *St. Louis &c. R. Co. v. Shifflet*, (Tex. Civ. App.) 56 S. W. Rep. 697.

Impairment of ability to see, hear and turn the head. *Chicago &c. R. Co. v. Long*, (Tex. Civ. App.) 65 S. W. Rep. 882.

As to whether conductor was courteous in refusing a ticket, or otherwise. *Rutherford v. St. Louis &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 161.

After giving symptoms, witness may state that the disease is commonly called "Texas fever." *Grayson v. Lynch*, 163 U. S. 468.

That plaintiff before the accident was strong and healthy; but since, was pale, thin and quiet, and tending to deafness. *Peterson v. Seattle Traction Co.*, 23 Wash. 615.

As to whether one appeared in good or bad health. *Keller v. Gilman*, 93 Wis. 9.

Or to be suffering pain. *Werner v. Chicago &c. R. Co.*, 105 Wis. 300.

The manner in which another walked after injury. *Collins v. Janesville*, 111 Wis. 348.

The following questions have been held not subjects for non-expert opinion:

Incompetency or negligence of physician. *Heintz v. Cooper*, (Cal.) 47 Pac. Rep. 360.

Safety of a platform. *Chamberlain v. Platt*, 68 Conn. 126.

Proper or improper execution of work assigned. *Brush Electric &c. Co. v. Wells*, 103 Ga. 512.

What the "Straw boss" in a mine should have done upon notification of danger. *Muddy Valley Min. Co. v. Parrish*, 74 Ill. App. 559.

That an electric car was "going as fast as it could." *Pfeiffer v. Chicago City R. Co.*, 96 Ill. App. 10.

Whether, after a few trials of a machine one would know of its dangers. *National &c. Co. v. Suscombe*, 9 Oh. C. C. 680.

As to contributory negligence of a traveler on a highway. *Beardslee v. Columbia*, 188 Pa. St. 496.

As to whether from what witness had seen and heard he should judge plaintiff's nervousness was caused by the accident. *Easler v. Southern R. Co.*, 59 S. C. 311.

Speed of train estimated on the distance plaintiff was thrown, in the dark, and the force of the blow. *Northern P. R. Co. v. Hayes*, 87 Fed. Rep. 129.

Whether it is negligence to leave an awning down in a storm in front of a plate glass window. *Miles v. Stanke*, (Wis.) 89 N. W. Rep. 833.

XXIV. Expert Evidence.*

(a). OPINION WHETHER A STRUCTURE, METHOD, ACT, &C., WAS SAFE, ADEQUATE, OR THE CAUSE OR EFFECT OF KNOWN CONDITIONS OR RESULT.

The question "Did the plaintiff, in your opinion, as canal boatman, do or omit anything he might have done to save his boat?" was excluded properly, but the witness may state whether certain acts were seamanlike and proper. *Carpenter v. East. Trans. Co.*, 71 N. Y. 574, aff'g judg't for pl'ff.

When a civil engineer testified that it was not customary to have gates at the draw of a drawbridge and that they were an additional precaution it was not proper on cross-examination, to ask him whether it was safe to have gates. *Hart v. H. R. Bridge Co.*, 84 N. Y. 56, aff'g judg't for def't.

*NOTE TO TITLE.—Judge Taylor in his work on Evidence, says: "Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses; these gentlemen are usually required to speak, not to facts but to opinions; and when this is the case, it is often quite surprising to see with what facility and to what an extent, their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, willfully misrepresent what they think; but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of expressing a candid opinion. Being zealous partisans, their belief becomes synonymous with faith as defined by the Apostle, and is too often but 'the substance of things hoped for, the evidence of things not seen.' To adopt the language of Lord Campbell, 'skilled witnesses come with such a bias in their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence.'" 1 Taylor on Ev., 49, 6th ed., citing 11-Hebrews 1; Tracy Peer., 10 Cl. & Fin. 191.

And in a case in the court of appeals (*Roberts v. N. Y. El. R. Co.*, 128 N. Y. 457, at 464), the unreliability of expert evidence is declared in very plain language, Judge Peckham saying: "Expert evidence, so-called, or in other words, evidence of the mere opinion of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion by both courts and juries, and the fact has become very plain that in any case where opinion evidence is admissible, the particular kind of an opinion desired by any party to an investigation can be readily procured by paying the market price therefor."

The opinions of experts may not be received in evidence where the inquiry is as to a subject which does not require any peculiar habits or study in order to qualify a man to understand it.

It is not sufficient to authorize such testimony that the witness may know more of, and may better comprehend, the subject than the jury, but it must relate to some trade, profession, science or art, in which persons instructed by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence.

Where the facts can be placed before a jury, and, they are of such a nature that jurors generally are just as competent to form an opinion in reference to, and to draw inferences from, them as witnesses, the opinions of witnesses are not competent.

It seems that such evidence should be received only in cases of necessity. *Ferguson v. Hubbell*, 97 N. Y. 507, reversing 20 Hun. 450 and judg't for def't.

See *Wakeman v. Wheeler & Wilson Man. Co.*, 101 N. Y. 217.

From opinion.—"A long time ago in *Tracey Peerage*, 10 Cl. & Fin. 154, 191, Lord Campbell said, that skilled witnesses came with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence. Without indorsing this strong language which is, however, countenanced by the utterances of other judges and some text writers, and believing that opinion evidence is in many cases absolutely essential in the administration of justice, yet we think it should not be much encouraged and should be received only in cases of necessity. Better results will generally be reached by taking the impartial, unbiased judgments of twelve jurors of common sense and common experience than can be obtained by taking the opinions of experts, if not generally hired, at least friendly, whose opinions cannot fail generally to be warped by a desire to promote the cause in which they are enlisted. * * *

In *Fraser v. Tupper*, 29 Vt. 409, in an action like this, a question entirely similar to this was held to be inadmissible. There the defendant offered to prove by farmers who were acquainted with the clearing of land by burning the same, and who were upon the land the day the fires were set, and who described to the jury, as well as they could, the position of the fires and the force and direction of the wind, that in their opinion it was a suitable and proper and safe day for setting the piles on fire with reference to the position of the piles in respect to the plaintiff's coal, and the force and direction of the wind.

* * * In the opinion of the court it is said: 'There could be no difficulty in this case in the witnesses stating to the jury the position of the fires which were set by the defendant, their number and magnitude, the direction and course of the wind, the position, distance and character of plaintiff's property and its exposure to injury from that source. The jurors, upon the question whether the defendant exercised proper care, could form as definite opinion, from the fact stated by the witnesses, as the witnesses themselves. The subject matter is not one of science or skill, but is susceptible of direct proof, and in most cases the triers themselves are qualified from experience in the ordinary affairs of life, duly to appreciate the material facts when found. If there is any materiality

attached to the force of the wind on that day, we do not see any difficulty of conveying a true idea of it, sufficient at least, for all practical purposes.'

In *Higgins v. Dewey*, 107 Mass. 494, the action was also like this, and the defendant offered to prove by a surveyor and civil engineer of many years' experience in clearing land by fire, and had been upon the land where the defendant set his fire and made a plan of it and was acquainted with the surrounding country, that there was no probability that a fire set under the circumstances in the case, as described by the witnesses, would be communicated to the plaintiff's land; but the judge excluded the evidence, and his ruling was held to be proper, on the ground that the evidence offered related to a subject within the common knowledge of the jury. In *Luce v. Dorchester Mutual Life Ins. Co.*, 105 Mass. 297, the action was to recover for a loss on a policy of insurance against fire upon a dwelling-house which the plaintiff had left unoccupied at the time of the loss, and for some time before; and the opinions of witnesses that leaving a dwelling-house unoccupied, for a considerable length of time, increased its liability to be destroyed or injured by fire, was held to be inadmissible, on the ground that the subject was within common knowledge. In *Sowers v. Dukes*, 8 Minn. 23, the action was to recover for a breach of contract in neglecting to build and keep in repair a fence around a certain field whereby plaintiff's crops were injured. Upon the trial the plaintiff, a witness in his own behalf, was asked this question: 'Was the fence a proper fence to turn stock, and could they easily put their heads through between the fence and rider?' This question was objected to, on the ground that the jurors were the proper judges as to whether the fence was sufficient after it had been described. The objection was overruled and the witness was permitted to answer; and the question was held to be incompetent; and the judgment was reversed for that reason. It was held that the witness should have stated the facts; that the jury should have based their judgment upon the facts, and that it was not a proper subject for opinion evidence. In *Enright v. S. F. & S. J. R. Co.*, 33 Cal. 230, in a suit against the defendant for injury to plaintiff's cattle caused by an insufficient fence, it was held that the evidence of farmers that the fence was sufficient to turn cattle was improper. In *Bills v. City of Ottumwa*, 35 Iowa 109, the defendant was sued for injuries to the plaintiff alleged to have been sustained, in consequence of the bad condition of the street which caused him to be thrown from a wagon loaded with hay; and it was held that the opinion of a farmer, that a wagon loaded in the manner in which the one was upon which the plaintiff was riding was not safe for riding upon over ordinary roads, was inadmissible. In *Concord R. R. v. Greely*, 23 N. H. 237, in a proceeding to assess damages for a right of way for a railroad, it was held that the opinion of a farmer, as to the effect upon a farm of a railroad passing through it, was inadmissible. In *Paige v. Hazard*, 5 Hill 603; in an action for negligence in injuring and sinking a canal boat, the plaintiff, after proving the cause of action as alleged, called a witness who testified that he was a boatman and knew the boat in question previous to her being injured; that he had raised sunken boats and caused them to be repaired, and he was then asked the following question: 'From the description of the situation of the boat, as given by the witnesses, what would the damage be?' and it was held improper and that the witness' answer was inadmissible. In *Teal v. Barton*, 40 Barb. 137, the action was brought to recover damages caused by fire communicated by a steam dredge, and it was held that a question put to a witness, who had had experience, as to whether he considered it dangerous to

use a steam dredge without a spark catcher, was properly overruled, it not being a question of science or skill, and not falling within the rule relating to evidence by experts. In *McGregor v. Brown*, 10 N. Y. 114, the action was by a landlord against his tenant for waste; and it was held that the opinions of witnesses, that the acts complained of were not injurious to the inheritance, and therefore, not waste, were inadmissible."

This action was brought to recover damages to certain flat lands along the Mohawk river, alleged to have been caused by an embankment constructed in the river by defendant. *Moyer v. N. Y. C. & H. R. R. Co.*, 98 N. Y. 645, aff'g judg't for pl'ff.

From opinion.—"A witness was examined on the part of the defendant, who appeared to be an engineer of skill and experience, and who had studied the river, and tested its flow at the points of alleged obstruction and injury. He was cross-examined at some length on the part of the plaintiff, and then re-examined by the defendant, and was asked, among other things relating to the scouring of the water upon plaintiff's land, the following question: 'Are there any adequate causes, in your judgment, for this?' The plaintiff objected to the inquiry 'as calling for speculative opinion.' Question was proper."

The opinion of the witnesses upon the precise question determinable by the jury is only competent when, from the nature of the case, facts cannot be stated or described to the jury in such a manner as to enable them to have a correct judgment thereon, and no better evidence than such opinions is attainable. To render the opinions of witnesses competent the subject must be one of science or skill or one of which observation and experience have given particular means and knowledge, rather than descriptive facts, and therefore cannot be intelligently communicated to others not familiar with the subject, so as to possess them with the full understanding of it. Where the question was whether certain driven wells had drawn water from a creek, the expert who constructed the wells in question described the manner of their construction and the depth from which they drew the water, the depth of the wells, etc., and was then asked "was it possible for you to take in those pipes any water out of Spring creek?" It was held by a divided court that this evidence was proper. *Van Wycklen v. City of Brooklyn*, 118 N. Y. 424, rev'g 41 Hun 418, and aff'g judg't for pl'ff.

Distinguishing *Commonwealth v. Choate*, 105 Mass. 456; *Buffum v. Harris*, 5 R. I. 243; *Detweiler v. Graff*, 10 Penn. St. 377; *Phillips v. Terry*, 3 Abb. Ct. App. Dec. 607.

From opinion.—"While it is no longer a valid objection to the expression of an opinion by a witness, that it is upon the precise question which the jury are to determine (*Transportation Line v. Hope*, 95 U. S. 297; *Bellinger v. N. Y. C. R. Co.*, 23 id. 42; *Cornish v. F. B. F. Ins. Co.*, 74 id. 296), evidence of that character is only allowed when, from the nature of the case, the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable. *Ferguson v. Hubbell*, 97 N. Y. 507; *Schwander v. Birge*, 46 Hun, 66; *Greenl. on Ev.* vol. 1, sec. 440, and note.

Familiar examples of the admission of evidence of this character, are cases involving questions of medical practice and skill, and cases involving genuineness of handwriting. Within the same principle the question whether a vessel was unseaworthy was held admissible, because it involved the result of an examina-

tion which could not be fully communicated to a jury. *Baird v. Daly*, 68 N. Y. 547.

It was also held competent to ask a pilot 'whether it would be safe for a tug-boat on Chesapeake bay or any other wide water to tug three boats abreast with a high wind' (*Transportation Line v. Hope*, 95 U. S. 297); to ask of an engineer familiar with the locality and structure whether an embankment and bridges were skillfully constructed with reference to the creek (*Bellinger v. N. Y. C. R. Co.*, 23 N. Y. 42); and evidence of like character has been admitted on the question of negligence in mooring a vessel (*Moore v. Westervelt*, 9 Bosw. 558); on the necessity of jettison (*Price v. Hartshorn*, 44 N. Y. 94), and on questions involving nautical skill (*Walsh v. Marine Ins. Co.*, 32 N. Y. 427). * * *

In *Moyer v. New York Central & Hudson River Railroad Co.*, 98 N. Y. 645, the question held to be competent was, 'are there any adequate causes, in your opinion, for this,' referring to the injury complained of. The court said, 'the witness, an expert, might very well be asked, in the presence of a given effect, of what causes it either was, or might be, the resultant. * * * It assumed an hypothesis, the truth or falsity of which was left open to the jury, and then asked, not what caused the injury, but what were the adequate causes which might have been its origin, leaving to the jury to determine among them.'

* * * *Commonwealth v. Choate*, 105 Mass. 456, was an indictment for arson, and the case goes no further than to hold admissible the opinion of competent witnesses that two pieces of wood, which it was claimed connected the prisoner with the crime, were parts of the same stick."

In *Avery v. N. Y. C. & H. R. R. Co.*, 121 N. Y. 32, the witness was improperly allowed to answer the following question:

"Q. Do you know what the rental value of your Continental property, real and personal, would have been between the 10th day of September, 1881, and the 28th day of January, 1884, if there had been a sufficient opening kept and maintained by the defendant opposite your hotel, for the convenient access of passengers and their baggage to and from the twenty-foot strip of land lying south of the hotel?"

See *Lamoure v. Caryl*, 4 Denio 370; *Fish v. Dodge*, id. 311; *Harger v. Edmonds*, 4 Barb. 258; *Marely v. Shults*, 29 N. Y. 340; *Teerpenning v. Corn Exchange Ins. Co.*, 43 id. 279.

While medical expert witnesses may be permitted to state, in connection with their opinion, as to the sanity or insanity of a person, based upon the testimony in the case, the reason upon which it was founded, inferences from the facts which are within the range of ordinary judgment and experiences, are to be drawn and found by the jury, and cannot be proved as facts by the opinion of such witnesses.

In a criminal action in which the defense was insanity, medical experts, aside from their opinion as to the main issue, were permitted to give their opinion as to the effect of certain facts proved upon the question of guilt or innocence and of the mental operations of the defendant, to wit, that certain facts indicated consciousness, apprehension, untruth-

fulness, &c. Held, error. *People v. Barber*, 115 N. Y. 475, rev'g judg't for conviction.

A canal bridge gave way, and the plaintiff was injured while moving two mill stones over it. "S.," who had had charge of alterations made to said bridge, was permitted to testify, under objection that he had not shown himself competent to give an opinion, that he left the bridge safe, in his judgment, for the ordinary purposes of a highway. This was error. The fact that the bridge was safe for the ordinary uses of a highway, did not show its safety for traffic in that particular place. It was error to permit the engineer and bridge-builder to testify that two mill stones were an excessive load for the bridge. *McDonald v. State*, 127 N. Y. 18, rev'g judg't for def't.

See *Hughes v. County of Muscatine*, 44 Iowa, 672.

Evidence as to whether a particular belt fastener was suitable and safe for fastening a belt which had been broken, and caused the injury, was improper. *Harley v. Buffalo Car Mfg. Co.*, 142 N. Y. 37, rev'g judg't for pl'ff.

Citing *Van Wycklen v. Brooklyn*, 118 N. Y. 424; *Roberts v. N. Y. E. R. Co.*, 128 id. 455; *Schneider v. Second Avenue R. Co.*, 133 id. 583.

Whether throwing paving stones on flagging would break it, not involving any question of science is not a subject for expert opinion. *Parish v. Baird*, 160 N. Y. 302.

The upper berth fell on a man in the lower berth. It was error to refuse to receive evidence of the defendant's agent, who was acquainted with the subject that the berth was constructed in the most approved manner; also, error to refuse to charge that in case of injury to the eye, great weight should be given to evidence of scientific witnesses. *Tinney v. N. J. S. Co.*, 5 Lansing, 507, rev'g judg't for pl'ff.

The manner of construction of cattle guard having been shown, whether such construction is proper is for the jury and not an expert. Not so as to bridge. *Swartout v. N. Y. C. & H. R. R. Co.*, 7 Hun, 571, rev'g judg't for def't.

It was not error to ask one long in defendant's employ whether a car could safely pass a man four feet from the track. *McDermott v. Third Ave. R. Co.*, 44 Hun, 107 aff'g judg't for nonsuit.

Citing *Hallahan v. New York & C. R. Co.*, 102 N. Y. 199.

In an action brought to recover damages for personal injuries alleged to have been sustained by reason of the plaintiff having fallen through an open trap-door of the defendant (where the negligence of the defendant is a question sharply litigated upon the trial), the declarations of third persons, as to whether the act of leaving the trap-door open was

careless or not, are but an expression of opinion on their part and inadmissible in evidence. *Kirkpatrick v. Briggs*, 78 Hun, 518.

Jury are as competent to judge, where the conditions are or can be fully presented and it is not a subject which is intricate or technical. *Burns v. Farmington*, 31 App. Div. 364.

See, also, *Meyer v. Meyer*, 86 Ill. App. 417; *North Kankakee Street R. Co. v. Blatchford*, 81 id. 609; *Batchelor v. Union Stock Yards &c. Co.*, 88 id. 395; *Chicago &c. R. Co. v. Cummings*, 24 Ind. App. 192; *Langhammer v. Manchester*, 99 Iowa, 295; *Murray v. Woodson County*, 58 Kan. 1; *Boothby v. Lacasse*, 94 Me. 392; *Ohio &c. Co. v. Fishburn*, 61 Oh. St. 608; *Musick v. Latrobe*, 184 Pa. St. 375; *Closser v. Washington*, 11 Pa. Super. Ct. 112; *Southern R. Co. v. Manzy*, 98 Va. 692.

The sufficiency of a flooring of an exhibition stand for the purposes for which it was constructed was a subject for expert opinion. *Fox v. Buffalo Park*, 21 App. Div. 321.

So, as to the sufficiency of a fence to turn away cattle. *Green v. Hornesville &c. R. Co.*, 24 App. Div. 43.

The effect of a violent storm upon a building. *Quigley v. Jones Man. Co.*, 26 App. Div. 434.

Propriety and sufficiency of a method of constructing a cut under a tall chimney for the purpose of its foundation. *Finn v. Cassidy*, 165 N. Y. 584; *aff'g s. c.*, 39 App. Div. 640.

Sufficiency of construction and maintenance of derrick appliances. *Scundell v. Columbia Construction Co.*, 50 App. Div. 512.

Sufficiency of a scaffolding to withstand a 30-ton crane. *Pursley v. Edgemoor Bridge Works*, 56 App. Div. 71.

A carpenter is not qualified as an expert to testify whether a heel striking a nail would pull it out or whether persons not carpenters could tell whether a nail was loose by mere inspection. *Millie v. Man. R. Co.*, 10 Misc. 734.

An opinion of an expert as to whether there would have been time for the team to have passed in safety if the driver of the truck had not whipped up his horses when the car was within fifty or seventy-five feet of it is inadmissible, as that is a question which the jury is competent to answer upon proof of the facts and circumstances. *Myer v. Brooklyn City R. Co.*, 10 Misc. 11.

The following questions have been held subjects for expert opinion:

Distance in which a car could have been stopped if equipped with proper appliances. *Weitzman v. Nassau Electric R. Co.*, 33 App. Div. 585.

Safety in putting a screw between timbers nailed together and subjected to a strain. *Cramer v. Slade*, 66 App. Div. 59.

Speed of a train. *Flanagan v. New York &c. R. Co.*, 70 App. Div. 505.

That an injury would probably continue through life. *Maeer v. Third Ave. R. Co.*, 47 N. Y. Spr. Ct. 461; *L. &c. R. Co. v. Falvey*, 104 Ind. 409.

What distance from a passing train is safe for a section hand to stand. *Culver v. Alabama &c. R. Co.*, 108 Ala. 330.

Character of medical attendance which would be required. *Martin v. Southern P. Co.*, 130 Cal. 285.

Relative strength of wrought and cast iron. *McFaul v. Madera Flume &c. Co.*, 134 Cal. 313.

Sufficiency of a bolt and nut in a harvesting machine. *Snyder v. Holt Man. Co.*, 134 Cal. 324.

What would be the reasonable management of an electric car. *Laufer v. Bridgeport T. Co.*, 68 Conn. 475.

What knowledge of physiology people of plaintiff's class have where injured person was alleged to have been negligent in taking proper rest. *Bloomington v. Perdeu*, 99 Ill. 329.

A physician testifying as to paralysis of the plaintiff may testify that he himself is a paralytic in support of his testimony. *Chicago &c. R. Co. v. Lambert*, 119 Ill. 255.

Whether complicated machinery in a foundry was reasonably safe. *Gundlach v. Schott*, 192 Ill. 509; *aff'g s. c.*, 95 Ill. App. 110.

The proper method of unloading timber from a car. *Cleveland &c. R. Co. v. Hall*, 70 Ill. App. 429.

That there is no known method of preventing stones falling from the roof of mines. *Acme Coal Co. v. Kusner*, 71 Ill. App. 446.

What would be the operation of the governor of an elevator upon allowing it to fall. *Union Show Case Co. v. Blindauer*, 75 Ill. App. 358; *s. c. aff'd*, 175 Ill. 325.

Whether a draw bar was of the standard height of those in general use. *Wabash R. Co. v. Farrell*, 79 Ill. App. 508.

The distance in which a falling cage in a mine could be stopped by approved safety catches. *Diamond Block Coal Co. v. Edmonson*, 14 Ind. App. 594.

The operation and efficacy of a device for preventing the escape of sparks. *Chicago &c. R. Co. v. Grimm*, 25 Ind. App. 494.

Whether a complicated machine would do the work required. *Buckeye Man. Co. v. Woolley &c. Works*, 26 Ind. App. 7.

Whether the peculiar actions of an engine indicated a broken axle. *Brownfield v. Chicago &c. R. Co.*, 107 Iowa, 254.

The manner in which machinery might have been made safe. *Belle of Nelson &c. Co. v. Riggs*, (Ky.) 45 S. W. Rep. 99.

That it was more dangerous for an engine to push than to pull passenger coaches. *Louisville &c. R. Co. v. Scott*, (Ky.) 56 S. W. Rep. 674.

Opinion that a structure was safe; but evidence is not conclusive where there is other evidence. *Hussey v. Ryan*, 64 Md. 426.

Physical condition of health of an injured person after the accident as seen by a non-expert. *Baltimore &c. R. Co. v. Cassell*, 66 Md. 419.

How the dog used in securing an elevator might have been secured so as to prevent its loosening. *Sawyer v. Arnold Shoe Co.*, 90 Me. 369.

That a horse, after once running away, requires no more care than if it had never run away. *Donnelly v. Fitch*, 136 Mass. 558.

Whether an arch would have fallen upon removing its support had it been fixed as testified to. *Tremblay v. Mapes-Reeve Const. Co.*, 169 Mass. 284.

Effect of looseness of a circular saw. *Roskee v. Mt. Tom &c. Co.*, 169 Mass. 528.

Proper method of turning a stone while hoisting it so as not to strain the derrick. *Leslie v. Granite R. Co.*, 172 Mass. 468.

See, also, *Knight v. Overmann Wheel Co.*, 174 Mass. 455.

The effect on a bridge of the loosening its bracing timbers. *Betty v. Denver*, 115 Mich. 228.

Whether a safety valve of a boiler had been properly repaired. *Benwk v. Valley City Desk Co.*, 128 Mich. 562.

Length of time necessary to recover natural power of eye after looking at a bright light. *Shaber v. St. Paul &c. R. Co.*, 28 Minn. 103.

Effect of using a "bolting saw" without a carriage attachment. *Olmstead v. Nelson-Tenny Lumber Co.*, 66 Minn. 61.

Whether blinders are put on race horses liable to bolt or swerve in racing. *Lane v. Minnesota &c. Soc.*, 67 Minn. 65.

Practicability of placing a guard about a gearing in certain machinery. *Peterson v. Johnson-Wentworth Co.*, 70 Minn. 538.

Safety of running an ordinary snow plow into a drift more than 50 feet long and two and a half feet deep. *Sieber v. Great Northern R. Co.*, 76 Minn. 269.

Skill and experience necessary to operate a hydraulic elevator. *Nutzmann v. Germania Life Ins. Co.*, 78 Minn. 504.

Safety of construction and operation of a belt shifter. *Thiel v. Kennedy*, 82 Minn. 142.

Safety of a bundle carrier system. *Byard v. Palace Clothing House Co.*, 85 Minn. 363.

Probable effect of overflow of water on adjoining land. *Walker v. Davis*, 83 Mo. App. 374.

Duties of employ es engaged in examining appliances about cars. *Missouri P. R. Co. v. Fox*, 60 Neb. 531.

That horses are more likely to be frightened when a train comes up behind them, than in front. *Folsom v. Concord &c. R. Co.*, 68 N. H. 454.

The time within which an engine could be stopped. *Cox v. Norfolk &c. R. Co.*, 126 N. C. 103.

Effect of sparks emitted from locomotives in communicating fire. *Cleveland &c. R. Co. v. McKelvey*, 12 Oh. C. C. 426.

Duty of an engineer to see that his train is intact before holding in on a down grade. *Lake Shore &c. R. Co. v. Terry*, 14 Oh. C. C. 536.

Whether a building like that in question could have been constructed within six months so as not to crack. *Johnson v. Slaymaker*, 18 Oh. C. C. 104.

Effect of a diet of castor beans upon a horse's digestion and health. *Coyle v. Baum*, 3 Okla. 695.

Manner of filling in a street recently excavated so as to prevent its becoming soft and miry. *Seamen v. Litts*, 21 R. I. 236.

Testimony as to the manner of lacing belts in different kinds of mills. *McGar v. National &c. Mills*, 22 R. I. 347.

Whether rails could have fallen from a car had they been properly loaded. *McCray v. Galveston &c. R. Co.*, 89 Tex. 168.

Whether an empty car on a sound track could have broken under the circumstances. *Jones v. Shaw*, 16 Tex. Civ. App. 290.

That by "medical treatment" is not understood unusual surgical treatment. *Bonart v. Lee*, (Tex. Civ. App.) 46 S. W. Rep. 906.

As to the necessity of employing a track walker. *Galveston &c. R. Co. v. Bohan*, (Tex. Civ. App.) 47 S. W. Rep. 1052.

Cause of the explosion of a locomotive. *Missouri &c. R. Co. v. Sherman*, (Tex. Civ. App.) 53 S. W. Rep. 386.

Whether or not one injured as described could have feigned his manners and actions. *Missouri &c. R. Co. v. Wright*, 19 Tex. Civ. App. 47.

That orders to conductors gave them rights different from the meaning presented on their face. *Galveston &c. R. Co. v. Robinett*, (Tex. Civ. App.) 54 S. W. Rep. 263.

Manner of operating a hand car. *International &c. R. Co. v. Martinez*, (Tex. Civ. App.) 57 S. W. Rep. 689.

Meaning of the phrase "having his train under control" in company's rules. *Texas &c. R. Co. v. Mortensen*, (Tex. Civ. App.) 66 S. W. Rep. 99.

How a person on a track would be injured by being struck by a locomotive. *Gulf &c. R. Co. v. Matthews*, (Tex. Civ. App.) 66 S. W. Rep. 588.

The height at which it is necessary to string wire so as not to interfere with travel on the street. *Houston &c. R. Co. v. Hopson*, (Tex. Civ. App.) 67 S. W. Rep. 458.

Whether an uneven track would throw out a coupling pin on a down grade. *Chicago &c. R. Co. v. Price*, 97 Fed. Rep. 423.

Effect of injury to foot upon working capacity. *Southern P. Co. v. Hall*, 100 Fed. Rep. 760.

Necessity of a fireman in addition to an engineer. *Wright v. Southern P. Co.*, 15 Utah, 421.

Effect on the person of an explosion of giant powder. *Anderson v. Daly Min. Co.*, 16 Utah, 28.

What effect the running of a "skip" on an incline shaft in a mine in the manner described would have upon it. *Beaman v. Martha Washington Min. Co.*, 23 Utah, 139.

Sufficiency of construction of a sill in a mine. *Faulkner v. Mammoth Min. Co.*, 23 Utah, 437.

Distance an object can be seen and within which a train may be stopped. *Olson v. Oregon &c. R. Co.*, 24 Utah, 460.

Opinion of expert whether it was prudent to blow a whistle at a particular time, or whether a person would have been injured in oiling machinery unless careless, or whether a train stopped long enough to let passengers off. *Stow v. Bishop*, 38 Vt. 836.

That it was safe to leave a horse unhitched in a mill yard or that a bridge was safe. *Stow v. Bishop*, 58 Vt. 498.

That a hoisting apparatus was sufficient in capacity and in repair, but not as to prudence in the use of it. *Beemis v. Central Vermont R. Co.*, 58 Vt. 636.

Effect of the sudden opening of a blow off valve of a boiler; but not what was the cause of accident. *Maitland v. Gilbert Paper Co.*, 97 Wis. 476.

Whether a cast iron elbow to a blow off pipe was safe under the pressure testified to. *Innes v. Milwaukee*, 103 Wis. 582.

The following questions have been held not subjects for expert opinion:

Whether a plank could be lowered safely without guy ropes. *Kelpy v. Triest*, 76 N. Y. Supp. 742.

Whether a trainman assumed the risk of riding on a flat car ahead of an engine. *Fordyce v. Lowman*, 62 Ark. 70.

Whether a defect could have been discovered by the "exercise of ordinary care." *Pacheco v. Judson Man. Co.*, 113 Cal. 541.

Competency of driver. *Rowe v. Such*, 134 Cal. 573.

The effect of a person letting go one end of a pipe resting on the

shoulder of another who is standing on a ladder. *Georgia &c. R. Co. v. Hicks*, 95 Ga. 301.

Opinion of watchman as to whether the deceased person had space enough to pass along a track without entering on it. *Pa. &c. R. Co. v. Conlan*, 101 Ill. 93.

The effect of removing all the stakes on one side of a car load of lumber. *Hughes v. Richter*, 161 Ill. 409; aff'g s. c., 60 Ill. App. 616.

Possibility of a car driver stopping in time to avoid injury. *Brink S. &c. Co. v. Kinnare*, 168 Ill. 643; aff'g s. c., 67 Ill. App. 498.

The effect of the unevenness of a floor on one's ability to walk thereon. *Illinois Steel Co. v. Mann*, 197 Ill. 186.

Evidence of plaintiff as to his own damages. *Chicago &c. R. Co. v. Nicholas*, 71 Ind. 271.

Evidence of what ought to have been done under the circumstances. *McKean v. Binghamton &c. R. Co.*, 55 Iowa, 192.

Opinion as to the propriety of a given method of tallying trains. *Jeffry v. Keokuk &c. R. Co.*, 56 Iowa, 546.

Question of negligence or diligence in protecting boards near a furnace from catching fire. *Duer v. Allen*, 96 Iowa, 36.

Whether two men were enough to move a locomotive tender with safety by means of pinch bars. *Cahow v. Chicago &c. R. Co.*, 113 Iowa, 224.

The distance hand cars should be kept apart to prevent collision. *Atchison &c. R. Co. v. Chance*, 57 Kan. 40

Proper method of stringing wires where there is a tree between the poles. *Flynn v. Boston &c. R. Co.*, 171 Mass. 395.

Danger from a machine, where danger is obvious to ordinary persons. *Gleason v. Smith*, 172 Mass. 50.

Whether a road was safe and convenient for travel. *Edwards v. Worcester*, 172 Mass. 104.

That the dangerous condition of a staging could have been discovered by an examination thereof. *Arnold v. Eastman &c. Co.*, 176 Mass. 135.

Whether it is dangerous to thresh by steam in a high wind. *Morris v. Farmers' Mutual Ins. Co.*, 63 Minn. 420.

Whether certain goods could have been burned without burning the floor on which they lay. *Hamberg v. St. Paul &c. Ins. Co.*, 68 Minn. 335.

Sufficiency of a block system in general use. *Bergen County T. Co. v. Bliss*, 62 N. J. L. 410.

What an engineer should have done in compliance with a rule to prevent danger. *Lake Shore &c. R. Co.*, 14 Oh. C. C. 597.

Evidence of brakeman as to whether he omitted anything to prevent the accident. *Mo. Pac. R. Co. v. Kirk*, 90 Pa. St. 15.

Imprudence of using an elevated cable for more than six or seven years, where it has been used eleven. *Bruce v. Beall*, 99 Tenn. 303.

As to whether culverts in a railroad embankment are sufficient to drain given depressions. *Gulf &c. R. Co. v. Steele*, (Tex. Civ. App.) 69 S. W. Rep. 171.

As to whether an electric car can be safely operated in a city without sand boxes. *Atlantic City R. Co. v. Van Dyke*, 72 Fed. Rep. 458.

As to whether it is necessary in hoisting pipe to bag the ends thereof. *New York &c. E. Co. v. Blair*, 79 Fed. Rep. 896.

As to whether an apparatus was "ordinarily safe and proper." *Hunt v. Kile*, 98 Fed. Rep. 49.

Effect of a driver making a sharp turn to avoid collision. *Lemp Brew. Co. v. Ort*, 113 Fed. Rep. 482.

As to whether a day was suitable for starting fire where the witness saw the fire. *Stow v. Bishop*, 58 Vt. 498.

(b). MANNER OF RECEIVING INJURY.

In a prosecution for murder, some cuts were found in the deceased person's lip; a physician properly testified that they could not have been made without some "mechanical cause," *i. e.*, not by the person while in a spasm. *People v. Wilson*, 109 N. Y. 345, aff'g judg't of conviction.

Citing *People v. Kennedy*, 39 N. Y. 245; *People v. Lindsay*, 63 id. 143; *People v. Colt*, 1 Park. Crim. R. 611; *People v. Gardiner*, 6 id. 155; *State v. Knight*, 43 Me. 11; *Commonwealth v. Piper*, 120 Mass. 185; *Davis v. State*, 38 Md. 15; *State v. Pike*, 65 Me. 111.

In prosecution for murder, a surgeon who had examined the wound made by a narrow iron blade was asked: "Taking the instrument as it is now, how much force would be necessary to drive it through the tissues you have described and into the vertebræ?" A. "I should think it would take a great deal of force." The evidence was proper. *People v. Fish*, 125 N. Y. 136, aff'g judg't for conviction.

A surgeon who had examined the plaintiff immediately after the injury properly testified that, judging from the relative position and condition of the broken bones, the foot of the plaintiff's broken leg struck upon a sloping object and that the heel of the foot struck the object before the ball of the foot, and that the body was in an upright position when he fell. *Johnson v. Steam Gauge & Lantern Co.*, 72 Hun, 535, aff'g judg't for pl'ff; aff'd, 146 N. Y. 152.

When, on the trial of an action brought to recover damages from a railroad company for the alleged wrongful removal of the plaintiff from a car, one of the questions for the jury is as to the degree of force used by the defendant's conductor, testimony by the conductor as a witness for the defendant, as to whether or not he used more force than was

necessary, is properly excluded. *Regner v. The Glens Falls, Sandy Hill and Fort Edward Street Railroad Company*, 74 Hun, 202.

The question whether certain sized sparks could have been thrown through the netting of a spark arrester, had it not been defective, held a subject for expert opinion. *Peck v. New York &c. R. Co.*, 165 N. Y. 347.

So as to the distance sparks would be thrown in such case. *Jamison v. New York &c. R. Co.*, 11 App. Div. 50; s. c. aff'd, 162 N. Y. 630.

Expert may testify that explosion was caused by excessive pressure on the boiler, where the data on which his opinion was based was given. *Beunk v. Valley City Desk Co.*, 128 Mich. 562.

Expert testimony is inadmissible on the question of whether a boy standing near a passing train was sucked under it as claimed by plaintiff or fell as testified by defendants. *Graney v. St. Louis &c. R. Co.*, 157 Mo. 666.

Expert opinion of a driver as to whether he could go with safety over a crossing which had been blocked by a hand car was incompetent. *Locke v. International &c. R. Co.*, (Tex. Civ. App.) 60 S. W. Rep. 314.

Testimony of an engineer, familiar with the machinery in which plaintiff was caught, and who reached the spot immediately thereafter, as to the manner in which injury was received was admissible. *Neidlinger v. Yoost*, 99 Fed. Rep. 240.

Physician may testify:

As to whether the impairment of the nervous system was the result of the injury. *Clegg v. Metropolitan Street R. Co.*, 1 App. Div. 207; s. c. aff'd, 159 N. Y. 550.

Physician may state whether plaintiff's injury was the result of the accident. *Tracey v. Metropolitan Street R. Co.*, 49 App. Div. 197; s. c. aff'd, 168 N. Y. 653.

Bruss v. Metropolitan Street R. Co., 66 App. Div. 554.

That the conditions were produced by the fall received. *Quinn v. O'Keeffe*, 9 App. Div. 68.

Tracy v. Metropolitan Street R. Co., 49 App. Div. 197; *Bush v. St. Joseph &c. R. Co.*, 113 Mich. 513; *Fullis v. Rankin*, 6 N. D. 44; *Barker v. Ohio River R. Co.*, 51 W. Va. 423; *Conrad v. Ellington*, 104 Wis. 367.

That the fall from a sleigh against a rock was sufficient to produce the conditions found. *Dean v. Town of Sharon*, 72 Conn. 667.

See, also, *Illinois C. R. Co. v. Treat*, 159 Ill. 576; aff'g s. c., 75 Ill. App. 327; *Kankakee v. Steinbach*, 89 Ill. App. 513.

Effect of dog bites on the system. *Sanders v. O'Callaghan*, 111 Iowa, 574.

Whether deafness was the natural and probable result of the accident. *Baltimore &c. R. Co. v. Tanner*, 90 Md. 315.

Physician may not testify:

Whether a collision of a cable car with a vehicle would cause the injury sustained. *Chicago &c. R. Co. v. Smith*, 64 Ill. App. 69.

As to whether the accident caused the conditions observed. *Easler v. Southern R. Co.*, 59 S. C. 311.

Chicago &c. R. Co. v. Sheldon, 6 Kan. App. 347.

(c). VALUE.

The court said, in an action for services: "The opinion of the plaintiff and his witnesses as to the value of his services was properly received. Witnesses may give opinions as to the value of services of which they had peculiar knowledge, which a jury is not supposed to possess. They may base their opinions upon what they know of the services rendered, or upon a hypothetical case, including some or all the facts proven and the jury will determine from the skill of the witnesses and all the other circumstances the weight to be given to their opinions." *Mercer v. Vose*, 67 N. Y. 56, aff'g judg't for pl'ff.

Citing *Lamoure v. Caryl*, 4 Denio 370; *Scott v. Lilienthal*, 9 Bos. (N. Y.) 225; *Jackson v. N. Y. C. R. Co.*, 2 N. Y. S. C. (T. & C.) 653.

To prove the value of a clock, there was called "a dealer in such articles and in decorative art goods;" but he had never seen the clock in dispute. It was described in a hypothetical question and his opinion of its value was asked. The evidence was proper. *Whiton v. Snyder*, 88 N. Y. 299, 308, aff'g judg't for pl'ff.

An expert as to the value of a vessel is not confined to an opinion based upon his personal knowledge. He may speak from information obtained from the general records containing description of vessels used and resorted to by ship brokers and owners and underwriters in their business, and also give his opinion hypothetically in answer to questions based on evidence in the case. It seems however that the court took judicial notice of the books referred to. *Slocovich v. The Orient Mutual Ins. Co.*, 108 N. Y. 56, aff'g 13 Daly, 264, and judg't for pl'ff.

After proving speed of mare injured on defendant's road, her value on the assumption of such speed was properly proven. *Reed v. P. W. & O. R. Co.*, 48 Hun, 231, aff'g judg't for pl'ff.

Citing *Miller v. Smith*, 112 Mass. 470; *Clark v. Baird*, 9 N. Y. 183; *Joy v. Hopkins*, 5 Den. 84; *Jackson v. N. Y. C. R. Co.*, 2 Thomp. & Cook 653; s. c., 58 N. Y. 623; *Whiton v. Snyder*, 88 id. 300, 308.

An expert may testify as to the general current of values of property within two or three blocks from the road. *Shephard v. Metropolitan Street R. Co.*, 169 N. Y. 160.

"Amount of damage" may be stated as full value where they had no value after injury. *Krebs Man. Co. v. Brown*, 108 Ala. 508.

Valuation of 200 head of cattle from 50, not permitted. *Bunsler v. Western &c. Teleg. Co.*, 65 Ark. 537.

In absence of market value of a horse, neighbors were allowed to testify. *Burlington &c. R. Co. v. Campbell*, 14 Colo. App. 141.

To be competent to testify on the question of value of animals one must be familiar with values in vicinity. *Clark v. Ford*, 7 Kan. App. 332.

Value of horse may be shown by one who knew it, though not an expert. *Louisville &c. R. Co. v. Jones*, (Ky.) 52 S. W. Rep. 938.

Where plaintiff had no regular occupation, he cannot testify as to the "fair and reasonable value of his time" since injury. *Whipple v. Rich*, 180 Mass. 477.

Valuation of a dog is solely in the province of the jury. *Jones v. Illinois C. R. Co.*, (Miss.) 25 South. Rep. 490.

Persons knowing the cost of a barn in the vicinity may testify as to its value. *Matthew v. Missouri R. Co.*, 142 Mo. 645.

Damages should be based on values in the vicinity of the place where the animals were killed. *Warden v. Missouri &c. R. Co.*, 78 Mo. App. 664.

Value of earning power cannot be established by expert testimony. *Goodhart v. Pennsylvania R. Co.*, 177 Pa. St. 1.

In absence of no market value, value of grass was shown by opinions of those familiar with it. *St. Louis &c. R. Co. v. Campbell*, (Tex. Civ. App.) 34 S. W. Rep. 186.

Witness is qualified where his knowledge of values is based on market quotations daily sent out by commission merchants. *Texas &c. R. Co. v. Fisher*, 18 Tex. Civ. App. 78.

Opinions as to the amount of damage done to cattle is admissible where it appears that the conclusion is based on proper data. *Gulf &c. R. Co. v. Leatherwood*, (Tex. Civ. App.) 69 S. W. Rep. 119.

One familiar with values at the point of destination was permitted to testify as to value of stock as it arrived, though he had not seen it when it started. *San Antonio &c. R. Co. v. Barnett*, (Tex. Civ. App.) 66 S. W. Rep. 474.

See, also, *Missouri &c. R. Co. v. Hall*, 87 Fed. Rep. 170; *Missouri &c. R. Co. v. Truskett*, 104 Fed. Rep. 728; *Norfolk &c. R. Co. v. Reeves*, 97 Va. 284.

(d). SPECULATIVE.

In an action on a policy of life insurance in which the answer was a breach of condition, the medical examiner was asked by the defendant:

"If you had known at the time you made this examination (referring to the examination made for the defendants) that Fish was in the habit of using intoxicating liquors to excess would you have regarded his life healthy and the risk good?"

The question was properly excluded.

Rawls v. American Mutual Life Ins. Co., 21 N. Y. 282, aff'g judg't for pl'ff.

'The plaintiff's physician was asked:

"State from your experience and medical knowledge the probability of a recurrence of an inflammation of this muscle."

A. "I couldn't say; the probabilities were very strong; but still I should feel that there was danger of the return of the inflammation and accumulation of the fluid. I speak from experience."

Q. "What will be the special effect upon the health of Mrs. Filer, in your opinion?"

A. "I expect that her health would suffer more or less in consequence."

This evidence was competent. *Filer v. N. Y. C. R. Co.*, 49 N. Y. 42, aff'g judg't for pl'ff.

From opinion.—"In the case of a fractured limb, it was thought that the present and probable future condition of it were proper matters of inquiry. *Lincoln v. Sar. & Schn. R. Co.*, 23 W. R. 425. The consequences of a hypothetical second fracture were deemed too remote."

When a physician had testified, that he had not sufficient knowledge to enable him to form or express a medical opinion, as to the cause or character of certain symptoms, it was proper to exclude evidence of impressions made upon his mind by casual intercourse with the assured. *Higbie v. Guardian Life Ins. Co.*, 53 N. Y. 602, aff'g judg't for pl'ff.

The evidence of an expert, as to future consequences, which are expected to follow an injury is competent, provided the apprehended consequences are such as, *in the ordinary course of nature, are reasonably certain to ensue*; but if such consequences are contingent, speculative, or merely possible, they are not proper to be considered. *Curtis v. Rochester & Syracuse R. Co.*, 18 N. Y. 541; *Filer v. N. Y. C. R. Co.*, 49 id. 45; *Clark v. Brown*, 18 Wend. 229; *Lincoln v. Saratoga & S. R. Co.*, 23 id. 425, 435. *Strohm v. N. Y., L. E. & W. R. Co.*, 96 N. Y. 305, rev'g 32 Hun, 20, and judg't for pl'ff. *S. P. Tozer v. N. Y. C. & H. R. R. Co.*, 105 N. Y. 617, rev'g judg't for pl'ff. See *Hinman v. Howe*, 1 Silvernail, 241.

A physician may state whether the physical condition, in which he found an injured person, could have resulted from a previous injury, and the permanency of the same. *Turner v. City of Newburgh*, 109 N. Y. 301, aff'g judg't for pl'ff.

From opinion.—"But the questions addressed to the physicians calling for their opinions as to whether the physical condition in which they found the plaintiff to be, upon their examination of her, could have resulted from a fall, were not objectionable and infringing upon no rule of evidence. We see no objection to the expression of opinions by competent medical experts upon an ascertained physical condition of suffering or bad health, as to whether that condition might have been caused by or be the result of a previous injury.

It was for the jury to decide whether the injuries or sufferings, of which the plaintiff complained, were the direct result of the accident, and to that end it was proper to give evidence tending to show, in the opinion of witnesses competent to speak upon the point, that they were the results of the plaintiff's fall. In *Ehrgott v. Mayor &c.*, 96 N. Y. 264, the plaintiff was permitted to give, under

objections, the evidence of physicians as to what was the cause of his present condition and other evidence tending to show that his diseases were the results of the strain and shock caused by being dragged over a dash-board, as the result of an accident to his wagon, caused by a ditch in the street. * * *

We think that, for the proper application of that rule, it is perfectly competent to furnish the jury with evidence of the present physical condition and bodily sufferings, and with the opinions of competent physicians as to whether such could have resulted from the accident, and as to their permanence.

The rule established by the cases of *Strohm v. N. Y., L. E. & W. R. Co.*, 96 N. Y. 305, and of *Tozer v. N. Y. C. & H. R. R. Co.*, 105 id. 617, referred to by counsel, simply precludes the giving of evidence of future consequences which are contingent, speculative and merely possible, as the basis of ascertaining damages. Those authorities in no wise conflict with the rule allowing evidence of physicians as to a plaintiff's present condition of bodily sufferings or injuries, of their permanence and as to their cause."

The physician was asked what was *likely* to follow a fall of the kind received, and as to the *probability* of recovery. The evidence was competent. Distinguishing this case from the *Strohm* case, the opinion stated: "There is an obvious difference between an opinion as to the permanence of a disease or injury already existing, capable of being examined and studied, and one as to the merely possible outbreak of a new disease or sufferings having their cause in the actual injury. In the former, that disease or injury and its symptoms are present and existing, their indications are more or less plain or obvious, and from their severity or slightrness a recovery may reasonably be expected, or the contrary; while an opinion that some new and different complication will arise is merely a double speculation—one that may possibly occur, and the other, if it does it will be a product of the original injury instead of some new and perhaps unknown cause. *Gricwold v. N. Y. C. & H. R. R. Co.*, 115 N. Y. 61; aff'g 44 Hun, 236, and judg't for pl'ff; distinguishing *Strohm v. N. Y., L. E. & C. R. Co.*, 96 N. Y. 305; *Tozer v. N. Y. C. & C. R. Co.*, 105 id. 617.

Upon a hypothetical question a physician was permitted to state, not only that the accident *might* have produced the injury claimed, but that it *did* cause such condition, and this was held to be proper. *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459, aff'g judg't for pl'ff.

From opinion.—"It was given as the judgment of the witnesses that the injury was the cause of the condition of the plaintiff and that certain consequences would follow in relation to his physical health and condition, as the result of the injury, as indicated by such condition; and the same may be said of the exception taken to reception of the answer of the doctor to the hypothetical question. Upon the state of facts assumed by the inquiry it was competent for the witness to state that, in his judgment, the tremor and the impairment of the nervous system, with which the plaintiff was affected, were due to injury. The facts upon which the question was based practically excluded all causes up to the time of the accident, and, therefore, the evidence called for was not specu-

lative. It was offered to show not merely that the injury might produce the condition or that such a result was likely to follow, but that, in view of such facts, it did cause such condition."

"L.," a medical witness called for plaintiff, was permitted to testify, under objection and exception, to his opinion as to the result of the disease in the natural and ordinary course, to wit, that the plaintiff would never be any better and never be able to straighten his limbs. Held, no error.

The witness was then asked to state the length of time plaintiff might live in the natural and ordinary course of events. Upon objection, the court decided that the witness might answer it if he could speak with reasonable certainty. He replied that he could only give the probability from the history of similar cases, and this he was permitted to do under objection and exception. Held, no error. *Alberti v. N. Y., L. E. & W. R. Co.*, 118 N. Y. 77, rev'g judg't for pl'ff.

A medical expert called by defendants was asked if he could trace any of the results he had heard testified to by "D." to the lack of redressing. This was objected to and excluded. Held, no error.

The fracture was claimed to be what is known as "Colles' fracture;" one of the defendants testified, as a witness in his own behalf, that he had treated a number of cases of such fractures, he was then asked: "With what results?" This was objected to and excluded. Held, no error. *Link v. Sheldon*, 136 N. Y. 1, aff'g judg't for pl'ff.

Citing *Reynolds v. Robinson*, 64 N. Y. 589; *Guiterman v. Liverpool S. S. Co.*, 83 id. 358.

A possible future condition resulting from an injury can not be proved; a probable future condition may be proven if the question is discussed. *Tozer v. N. Y. C. & H. R. Co.*, 38 Hun, 100, aff'g judg't for pl'ff.

Plaintiff had her foot on the car step when it started and jerked her off. For jury. Physician was asked, "suppose it is upwards of two years since the injury, and it is still painful on using, what would you say as to the probable duration of that hereafter?" "I should say it would continue." Held, to be proper. *Ganiard v. R. C. & C. R. Co.*, 50 Hun, 22, aff'g judg't for pl'ff. Same Principle, *Jones v. Utica & C. R. Co.*, 40 Hun, 349.

"What is your opinion as an expert as to the permanence or likelihood of permanency of that injury?"

And "would a fall such as I have described be likely to produce such a result to the brain?" Admitted. Error. *Johnson v. Manhattan Ry. Co.*, 52 Hun, 113.

A physician was called as an expert on behalf of the plaintiff and was asked, "have you heard all the medical men testify here on this trial

giving the description of the nature of the disease with which Gregory was affected, and the other witnesses as well?"

(A.) "I have listened to everything that has occurred in this case while being here; I mean while the case was on in court, from Monday until now." (Q.) "From the testimony that you have heard, what do you say that the trouble was with which Gregory was afflicted before June 9th, 1884 (the date of the accident). In view of the evidence that was given here on the trial, what was Mr. Gregory suffering from on June 9th, 1884?"

These questions were improperly allowed, and answered. The opinion of an expert must be given in reply to a hypothetical question containing facts assumed to have been proved. The witness was improperly allowed to answer this question: "What is the probable result of such an injury?" Such a question is proper only when there is such a probability of future consequences as to amount to a reasonable certainty that it will result from injury. The probability of a future dislocation of a broken limb, unless well secured, etc., and degeneration of the cartilage, that might necessitate amputation did not present cause of apprehension of future consequences probable to such a degree as to amount to a reasonable certainty, that the injury would arise therefrom. That it was error for the judge to charge that the jury might give the plaintiff a sum that would represent the capital of his earnings lost from the injury to compensate him for future loss. *Gregory v. N. Y., L. E. & W. R. Co.*, 55 Hun, 303, rev'g judg't for pl'ff.

The rear end of a brake rod passed through a flat iron or stirrup at the bottom of a car and was held in place by a pin; the same having come out of place, the rod lifted out of its position, when the defendant's brakeman attempted to apply the brake, and he was injured. The plaintiff was improperly allowed to state whether in the use of the brake he could have applied sufficient force to displace the pin and as to whether if it had been in place at Norwood, one of its stations, the pin could have worked or fallen out if no accident occurred in the meantime and the brakes were not used. These were not questions embracing matters of science or skill. *Bailey v. R., W. & O. R. Co.*, 55 Hun, 509, rev'g judg't for pl'ff.

See *Vosburgh v. Lake Shore &c. R. Co.*, 14 Week. Dig. 514; aff'd 94 N. Y. 374.

A physician called on behalf of the plaintiff, and after describing the injury was asked, "from what you know of the nature of the case from such an injury, is the result therefrom such that the plaintiff would suffer at all, or would probably suffer from the effects?" (A.) "From my experience of that kind of an injury, my opinion would be that on an unusual exertion or exposure some pain may be suffered there. The

use of the joint will, however, remain the same." The witness also testified that a change of weather might have a temporary effect upon the injury so as to make it painful at times. The evidence was improperly admitted. *Elsas v. Second Av. R. Co.*, 56 Hun, 161, rev'g judg't for pl'ff.

In an action to recover for personal injuries, it is not competent for the plaintiff's attorney to direct a witness to "tell the jury what results were likely to follow the injuries which Mrs. Atkins was suffering from on Jan. 3, 1888." Also the following question was incompetent: "For what have you treated Mrs. Atkins?, what symptoms have you treated her for from the time intervening between Jan. 3, 1888, to the present time, and were they due entirely to the injuries she received at the time of the accident?" as it leaves the witness to determine what injuries the plaintiff has received from the accident, and what her previous condition has been without the jury having any knowledge upon which such determination was based. *Atkins v. M. R. Co.*, 57 Hun, 102, rev'g judg't for pl'ff.

The plaintiff's leg was broken. The plaintiff's physician was, on cross-examination, asked "what would have been the condition of the leg if the plaintiff had 'positively and speedily' obeyed instructions?" The question was, under the circumstances, properly excluded, as it seems to have been already answered. *Palmer v. Conant*, 58 Hun, 333, aff'g judg't for pl'ff.

A physician was allowed to testify to the following question: "Besides the accident, was there any other cause that would account for this condition of the plaintiff's head?" As the witness had attended the plaintiff and knew all his symptoms and condition, the question was proper. *Friess v. N. Y. C. & C. R. Co.*, 67 Hun, 205, aff'g judg't for pl'ff.

Testimony of an expert that there existed a state of corrosion in a boiler at a specific time was not open to objection as being speculative because he could not tell precisely how long it might take to corrode it. *Egan v. Dry Dock & C. R. Co.*, 12 App. Div. 556.

See, also, *Quinn v. O'Keefe*, 9 App. Div. 68.

Evidence as to the effects of injuries that will be "apt to attend a patient," or as to injuries which "may become permanent," is purely speculative, and, therefore, inadmissible.

The court excluded questions put to a physician as follows: "From your experience as a physician, what are the principal effects that will be apt to attend a patient who has suffered the injuries you have described?" and "Can you state, from your experience as a physician, any of the effects which usually attend such injuries as you have testified to, and which are, or may become permanent?" Held, no error, that such questions were vague and speculative.

Such questions affect the question of damages, and their exclusion is not prejudicial to the plaintiff where the jury find by their verdict that she was not entitled to recover at all. *Lewis v. The Brooklyn Elevated Railroad Co.*, 7 Misc. 286, aff'g judg't for def't on verdict.

A physician who had treated plaintiff for a short time after his injury, and examined him again at the time of the trial, properly stated that plaintiff's present condition which he found was permanent. *Reynolds v. City of Niagara Falls*, 81 Hun, 353.

"Q. What is the probability of recovery? A. The limb is *liable* to trouble him for many years. I have known it to trouble a man, an injury of that kind, and to be tender about thirty years." The defendant's counsel moved to strike out the answer as incompetent and speculative, which motion was denied and exception taken. Error. *Miley v. Broadway & 7th Ave. R. Co.*, 29 N. Y. St. Rep. 107.

A physician may not testify:

That certain results flow from similar causes. *Jewell v. New York &c. R. Co.*, 27 App. Div. 500.

That a sprain testified to was very serious. *Stoothoff v. Brooklyn &c. R. Co.*, 50 App. Div. 585.

That complications were liable to set in and that loss of strength was liable to follow. *Bellmore v. Third Ave. R. Co.*, 46 App. Div. 557.

That plaintiff's pains may continue throughout his life. *Savage v. Third Ave. R. Co.*, 25 Misc. 426.

The effect of neuritis on the spinal cord if it extended upward. *Yeager v. Southern C. R. Co.*, (Cal.) 51 Pac. Rep. 190.

Physician may testify:

As to the probable length of time required for recovery. *Clegg v. Metropolitan Street R. Co.*, 1 App. Div. 207; s. c. aff'd, 159 N. Y. 550.

Maher v. New York &c. R. Co., 20 App. Div. 161; s. c. aff'd, 162 N. Y. 633.

As to whether "direct hernia" as applied to conditions existing, may become dangerous to life. *Stever v. New York &c. R. Co.*, 7 App. Div. 392.

Testimony of a physician that either of two conditions could be the result of the accident, cannot be excluded, simply because he cannot say with certainty which of such conditions actually existed. *Quinn v. O'Keefe*, 9 App. Div. 68.

See, also, *Egan v. Dry Dock &c. R. Co.*, 12 App. Div. 556; *Brown v. Third Ave. R. Co.*, 18 Misc. 584; s. c. aff'd, 19 id. 504.

As to whether he can from his knowledge of conditions state with reasonable certainty whether they will be permanent. *Cass v. Third Ave. R. Co.*, 20 App. Div. 591.

Whether in his judgment, plaintiff still suffers and will be able to work again. *Holman v. Union Street R. Co.*, 114 Mich. 208.

As to the future duration of the injury. *Chicago &c. R. Co. v. Archer*, 46 Neb. 907.

As to the probability of success in a given operation. *Western Union Tel. Co. v. Clunch*, (Neb.) 90 N. W. Rep. 878.

Though based in part upon sufferer's statement as to his symptoms. *Mah v. West Jersey &c. R. Co.*, 62 N. J. L. 63.

He may state that plaintiff never recovered so far as to be capable of any persistent occupation. *Lehigh &c. R. Co. v. Merchant*, 84 Fed. Rep. 870.

As to the future result of plaintiff's condition. *Mitchell v. Tacoma R. &c. Co.*, 13 Wash. 560.

What results usually or sometimes follow from the injury testified to. *Crites v. New Richmond*, 98 Wis. 55.

That plaintiff was more apt in the future to be subject to rheumatism than if injury had not occurred. *Lago v. Walsh*, 98 Wis. 348.

(e). HYPOTHETICAL QUESTIONS.

A physician testified that he had several times seen and conversed with the prisoner in jail and in court, and heard probably half of the evidence given on the trial. Then this question was asked:

Q. "From the testimony, was the prisoner, in your opinion, sane or insane at the time he committed the homicide?"

To this the witness answered that he had heard enough of the testimony to believe that the prisoner was not insane, when he committed the homicide.

Several other physicians for the prosecution gave opinions based upon the testimony heard by them, touching the sanity of the prisoner, although they had not heard all the evidence.

The court said (p. 362): "In my opinion, a medical witness, who has been present during the whole trial and has heard *all* the evidence, but had no previous knowledge of the prisoner, cannot, if the evidence be objected to, give his opinion as to the state of the prisoner's mind at the time of the commission of the alleged offense * * * But he may be asked whether such and such appearances were symptoms of insanity, and whether such and such a fact, if it existed and which has been sworn to, is or is not an indication of insanity.

"After they had given their opinions on the direct examination, the counsel for the defendant should have been allowed to put inquiries tending to test the skill and capacity of the witnesses, and the correctness of their conclusions; and to ask them whether certain facts already sworn

to, and many of them by the witnesses for the people, did not furnish evidence of insanity, and the court erred in rejecting the evidence. I think they had a right to put hypothetical questions to those medical witnesses, predicable of the facts then proved, or that might be fairly claimed to have been proved in the case. And I do not say the court could not have permitted the *cross-examination* to have gone further, and put questions upon mere supposition, or in any way calculated to test the correctness of the opinions of the witnesses, within a reasonable limit in the discretion of the court." *The People v. Lake*, 12 N. Y. 358, aff'g judg't rev'g conviction.

A physician, in an action to recover for injury, was asked by the plaintiff:

"Q. From the evidence, what is your opinion upon the question whether his elbow was fractured?"

"A. Whether there was a fracture I cannot judge from the evidence."

"Q. What would be the effect as to the permanency of the injury to the defendant's person?"

"A. In a man of the age of this man, judging from his account, the bone of his elbow has either received a severe bruise or a fracture; in either case, my opinion is that he may recover mostly, but may never recover entirely."

The court thought the evidence harmless although probably improper; and that the doctor should speak from his own observation and not from mere description of others. *Millard v. Brown*, 35 N. Y. 297, rev'g judg't for pl'ff, on other grounds.

See, also, *Matteson v. N. Y. Cent. R. Co.*, 35 N. Y. 492.

The following evidence was competent:

"Q. Assuming that in November, 1864, while attempting to alight from the cars, she was thrown and dragged upon her back for a number of feet, until she became insensible, and from that time until this, there was pain in this part, and no intervening cause, that you have the knowledge of, what, in your opinion, was the cause of this psoas abscess?"

"A. If we could find no other cause, we would naturally attribute it to that injury. I think the injury was adequate to produce the condition I saw in 1867." *Filer v. N. Y. C. & H. R. R. Co.*, 49 N. Y. 42, aff'g judg't for pl'ff.

From opinion.—"It is the privilege of the counsel in such cases to assume, within the limit of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed. The facts are assumed for the purposes of the questions and for no other purposes."

In an action to recover for value of services rendered by the plaintiff's

wife, a physician, without personal knowledge of the case who had testified to his knowledge of cancer cases and of the value of services in caring for them, also to having heard the evidence of other physicians, who had treated her, and who had described the cancer, and to having heard the testimony of the plaintiff's wife, was asked:

"What would be the value of the services, rendered by her, in nursing and dressing the cancer?"

The evidence was error as it called upon the witness to assume the correctness of and to draw inferences from the evidence of other witnesses; that his opinion should have been obtained by stating to him a hypothetical case. *Reynolds v. Robinson*, 64 N. Y. 589, rev'g judg't for pl'ff.

From opinion.—"An expert opinion may be obtained by stating to him a hypothetical case, taking in *some or all* of the facts stated by witnesses and claimed by counsel, putting the questions to be established by this evidence, and when the question is thus stated, the witness has in his mind a definite state of facts, and the province of the triers, whether referees or jurors, is not interfered with. They will determine whether the facts exist which are thus assumed, and then give the opinion such weight as they think it entitled to, with a full knowledge of the facts upon which it is based."

In an action against a common carrier by sea to recover damages for injuries to the freight by a collision with a collier, after a statement as to the circumstances attending the injury and the management of the vessel had been given in evidence, and after witnesses had testified in reference thereto, there being a discrepancy between the statement and some of the testimony and the evidence covering a great variety of facts, a witness called as an expert by the plaintiff, after having testified, that he had heard the testimony of one or two of the witnesses and the circumstances as detailed by them, was asked: "Under the circumstances detailed by these witnesses and in the protest" (or statement) and under certain circumstances which were specified, "what, in your opinion, should have been done by the person in charge of the steamship?"

The evidence was held incompetent.

The court said: "A nautical man cannot be called upon to testify as to his opinion upon evidence, given by other witnesses, which covers a great variety of facts and calls for a comprehensive and critical view of the testimony given and the inferences to be drawn from the evidence of the witnesses. * * * When the facts are not entirely clear, a hypothetical question may be put, based upon the facts claimed to have been proved by the evidence. *Guterman v. The Liverpool, New York & Philadelphia Steamship Co.*, 83 N. Y. 358, rev'g judg't for pl'ff.

Counsel, in framing hypothetical questions, are not confined to facts admitted or absolutely proved, but facts may be assumed, which there is any evidence on either side tending to establish, and which are perti-

ment to the theories which they are attempting to uphold. In the direct examination of their own witnesses, it would tend to confusion, if facts were assumed in hypothetical questions, which did not bear upon the matters under inquiry, or which were not fairly within the scope of the evidence. Upon the cross-examination of an expert, counsel may not be so narrowly confined, but may, in putting hypothetical questions, assume any facts pertinent to the inquiry whether testified to by witnesses or not, with the view of testing the skill and accuracy of the expert, but such cross examinations must, to some extent, be under the control of the trial court.

In the hypothetical questions excluded on the trial of this case, no fact was inserted which was not pertinent to the inquiry and based on some evidence in the case, and hence the questions were improperly excluded. *Dilleber v. Home Life Ins. Co.*, 81 N. Y. 79, rev'g judg't for plff.

Cowley v. The People, 83 N. Y. 464, aff'g 21 Hun, 415, and judg't of conviction.

From opinion.—"The claim is that a hypothetical question may not be put to an expert unless it states the facts as they exist. It is manifest, if this is the rule, that, in a trial where there is a dispute as to facts which can only be settled by the jury, there would be no room for a hypothetical question. The very meaning of the word is that it supposes, assumes something for the time being.

Each side, in an issue of fact, has its theory of what is the true state of facts and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming, shapes hypothetical questions to experts accordingly, and as such is the correct practice. *Erickson v. Smith*, 2 Abb. Ct. App. Dec. 64; *The People v. Lake*, 12 N. Y. 358; *Seymour v. Fellows*, 77 id. 178; *Guiterman v. The Liv., N. Y. & Phil. S. S. Co.*, 83 id. 358."

To entitle a party, as a matter of legal right, to put hypothetical questions to an expert witness, the hypothesis must be based upon facts admitted or established by evidence, or which, if controverted, the jury might legitimately find from the evidence.

While, upon cross-examination of a witness, an expert, purely imaginary or abstract questions assuming facts or theories for which there is no foundation in the evidence, may be put for the purpose of testing the knowledge and competency of the witness, to give an opinion, called out on the direct-examination, the allowance of such questions rests in the discretion of the court, and, when this discretion is fairly exercised, it is not error to exclude them. *Dilleber v. Home Life Ins. Co.*, 87 N. Y. 79-88; *Le Beau v. People*, 34 id. 223.

The objection, that there is no foundation for a hypothetical question, was sufficient to authorize its exclusion. *The People v. Augsburg*, 97 N. Y. 501, aff'g judg't of conviction.

A medical expert was improperly asked by the prosecution and answered, whether in his "judgment, based upon all the testimony, the acts of the defendant on the night of the homicide, the testimony as to his past life given by the witnesses in his defense, and based upon the whole case, whether this young man is sane or insane," the question added "based upon the whole testimony of the prosecution and defense * * * and everything you have heard sworn to, now will you answer the question?" *The People v. McElvaine*, 121 N. Y. 250, rev'g judg't of conviction.

After evidence had been given as to the condition of the yacht before and after the injury, defendant, to prove the amount of damages, called a shipwright, and put a hypothetical question assuming the conditions before and after the injury, and asking what it would cost to put the yacht in as good condition as it was before the injury. The question was objected to and excluded. *Wintringham v. Hayes*, 144 N. Y. 1, rev'g 3 Misc. 604, and judg't for pl'ff.

The overruling of an objection to a hypothetical question on the ground only of its incompetency, will not justify a reversal of the judgment on appeal on the ground that the question did not contain all the facts necessary to enable the expert to answer it and thus bring them to the minds of the jurors. *McCooley v. The Forty-second St. and Grand St. Ferry Rd. Co.*, 79 Hun, 255.

Physician stated in testifying as an expert, that his opinion was based upon the facts which he had previously testified to. It was unnecessary to go through the perfunctory ceremony of repeating his testimony to him to get it in the form of a hypothetical question. *Niendorrf v. Manhattan R. Co.*, 4 App. Div. 46.

So in the case of a physician who has actual knowledge of the facts through personal attendance upon the plaintiff. *Clegg v. Metropolitan Street R. Co.*, 1 App. Div. 207; but see *Tibbits v. Phipps*, 30 App. Div. 274.

Hypothetical questions cannot be objected to because of omission of evidence where the omission is immaterial and of slight value. *Cass v. Third Ave. R. Co.*, 20 App. Div. 591; *Horn v. New Jersey Steamboat Co.*, 23 App. Div. 302.

Expert was asked if certain tumors were the result of a blow, assuming the blow to have been made. His response was that they were if no other tumors developed. Subsequent testimony that none had developed perfected the hypothetical question. *Jarvis v. Metropolitan Street R. Co.*, 65 App. Div. 490.

Question may be asked an expert based on what he has heard of the evidence without being cast in the form of an hypothetical question. *Lant v. Rasines*, 16 Misc. 504.

Hypothetical question to an expert must be based on facts fairly within the scope of the evidence. *Hayes v. Third Ave. R. Co.*, 18 Misc. 582.

Hypothetical questions must conform to the facts proved. *Rowe v. Such*, 134 Cal. 573.

McLean v. Lewiston (Id.) 69 Pac. Rep. 478.

Hypothetical question may be based on probabilities in the evidence. *Courvoiser v. Raymond*, 23 Colo. 113.

Hypothetical question must not be based on mere conjectures. *Kelly v. Perrault*, (Id.) 48 Pac. Rep. 45.

Hypothetical questions may be based on what the evidence tends to establish. *People v. Sullivan*, 70 Ill. App. 634.

See *Roark v. Green*, 61 Kan. 299, 329; *Sigafus v. Porter*, 84 Fed. Rep. 430; *Denver &c. R. Co. v. Roller*, 100 id. 738.

Witness may be interrogated hypothetically. *Myers v. Lockwood*, 85 Ill. App. 251.

Hypothetical questions need not embody all the facts proved. *Brooks v. Sioux City*, 114 Iowa, 641.

See *Cushman v. Carbondale Fuel Co.*, (Iowa) 88 N. W. Rep. 817.

A hypothetical question as to whether a fire would kill a hedge similar to the one in question was unobjectionable, being founded on the actual facts as far as they appeared. *Swans v. Keokuk &c. R. Co.*, (Iowa) 89 N. W. Rep. 1088.

Answers to hypothetical questions need not be to a certainty. *Roark v. Greene*, 61 Kan. 299.

Hypothetical questions must be sufficiently comprehensive to enlighten the jury. *Atchison v. Atchison*, 9 Kan. App. 33.

A material fact not in evidence cannot be assumed for the purpose of a hypothetical question. *Charokee &c. Co. v. Dickson*, 10 Kan. App. 391.

Facts on which such question is based need not be proved to a certainty. *Baxter v. Knox*, (Ky.) 44 S. W. Rep. 972.

Evidence need not be put in the form of a hypothetical question to an expert. *Baltimore &c. R. Co. v. Tanner*, 90 Md. 315.

Omission of a fact material only as corroborating the supposition does not make the question objectionable. *Roskee v. Mt. Tom &c. Co.*, 169 Mass. 528.

Where the evidence is conflicting the question to an expert must be in the regular form and embrace all the material facts. *Oliver v. North End &c. R. Co.*, 170 Mass. 222.

Connell v. McNutt, 109 Mich. 329; *Holman v. Union S. R. Co.*, 114 Mich. 208; *Wittenberg v. Onsgard*, 78 Minn. 342; *Culbertson v. Metropolitan Street R. Co.*, 140 Mo. 35.

Hypothetical questions are proper to test the qualifications of experts. *Kansas Central R. Co. v. Marsh Oil Co.*, 140 Mo. 458.

The question to an expert must not call for facts which an ordinary man could answer. *Missouri &c. R. Co. v. Fox*, 56 Neb. 746.

Where the hypothetical statement was founded on the facts an expert may be asked what the physician should have done under such circumstances. *Challis v. Lake*, 71 N. H. 90.

Hypothetical question as to how long it would take posts in a building to burn must state in what part thereof the fire started. *Western Assur. Co. v. Mohlman Co.*, 83 Fed. Rep. 811.

Whether plaintiff was negligent under the facts shown cannot be the subject of a hypothetical question. *Bradford Glycerine Co. v. Kezer*, 113 Fed. Rep. 894.

Where based on facts proved question may be allowed, though not in the proper form. *Mangum v. Bullion &c. Co.*, 15 Utah, 534.

Where the facts are doubtful, the question must be in the hypothetical form. *State v. Musgrave*, 43 W. Va. 672.

Where hypothetical question embraces all the testimony witness may state what caused the injury. *Klingel v. Aitken*, 94 Wis. 432.

See, also, *McKeon v. Chicago &c. R. Co.*, 94 Wis. 477; *Crouse v. Chicago &c. R. Co.*, 102 Wis. 196; *Werner v. Chicago &c. R. Co.*, 105 Wis. 300.

Otherwise where the question omits testimony as to a fatal disease existing at the time. *Schaidler v. Chicago &c. R. Co.*, 102 Wis. 564.

XXV. Photographs, Maps, Diagrams, &c.

Plaintiff offered in evidence a photograph representing, as he claimed, the *locus in quo* of the accident, and testified that it represented fairly the locality. On cross-examination he testified that he did not take it and did not know from what point it was taken. The reception of the photograph was objected to generally and objection overruled. Held, no error; that the photograph, if a fair representation, was admissible the same as a map or other diagram. *Archer v. N. Y., N. H. & H. R. Co.*, 106 N. Y. 589.

Photographs of the injured parts of a person are admissible. *Alberti v. N. Y., L. E. &c. R. Co.*, 118 N. Y. 77; *Blair v. Pelham*, 118 id. 420; *Baker v. Perry*, 67 Iowa, 146.

An expert witness may be permitted to make illustrations upon a blackboard, before the jury for the purpose of explaining his testimony and rendering it more intelligible to them. *McKay v. Lasher*, 121 N. Y. 477, aff'g judgt for pl'ff.

Prosecution was properly permitted to give in evidence a photograph

shown to have been actually taken, of the place, where the homicide was committed, also one of the head and neck of the decedent, showing wound. *People v. Fish*, 125 N. Y. 136, aff'g judg't of conviction.

Citing *Ruloff v. People*, 45 N. Y. 213; *Cowley v. People*, 83 id. 464; *People v. Buddensieck*, 103 id. 487; *Archer v. N. Y. &c. R. Co.*, 106 id. 589. See, also, *Cozzens v. Higgins*, 1 Abb. (U. S.) App. 457; *Taylor Will Case*, 10 Abb. N. Y. Pr. N. S. 300.

It is not essential to the competency of a photograph as evidence, that its accuracy as a true representation of its subject should be verified by the photographer who took it.

Such verification may be furnished by any other eye witness of equally correct vision and powers of observation as the photographer, and equally interested to observe the features of the scene depicted.

Photographs of the scene of a personal injury are admissible in evidence, when they bear evidence, on their face, of the correctness of their representation of the scene depicted, in clearness of delineation, sharpness of outline, correct perspective, and in the just proportion between the various objects. *Nies v. Broadhead*, 75 Hun, 255.

Testimony may be illustrated by a diagram, where it is accompanied with a statement that the locations marked thereon are correct. *Clegg v. Metropolitan Street R. Co.*, 1 App. Div. 207; s. c. aff'd, 159 N. Y. 550.

Accident occurred at night, but the photographs offered in evidence were shown to present a fair representation of the premises in question. *Warner v. Randolph*, 18 App. Div. 458.

Any one familiar with the facts may identify a photograph as that of a person. *Steasney v. Metropolitan Street R. Co.*, 58 App. Div. 172.

X-Ray photographs may be admitted to assist in the testimony of doctors. *Smith v. Grant*, 29 Ch. L. N. 145.

Testimony of the photographer himself is not essential to prove the accuracy of photographs. *McGar v. Bristol*, 71 Conn. 652.

Photographs of objects must be shown to represent them in their true proportions and relations before they can be admitted. *Cunningham v. Fairhaven &c. R. Co.*, 72 Conn. 244.

Harris v. City of Ansonia, 73 Conn. 359; *Wabash R. Co. v. Jenkins*, 84 Ill. App. 511; *Iroquois Furnace Co. v. McCrea*, 91 id. 337; *Williams v. Cartersville*, 97 id. 160; *Hupper v. National Dist. Co.*, (Wis.) 90 N. W. Rep. 191.

A map of place in question is admissible though made several years before the accident along with evidence that it has not changed up to the time of accident. *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152.

Photographs, properly proved to be complete, of the condition of a

place at the time, which condition is in dispute and has long since been altered, admitted. *Lake Erie &c. R. Co. v. Wilson*, 189 Ill. 89; rev'g s. c., 87 Ill. App. 360.

Where the place is not shown to have remained in the same condition, a photograph of it a year before was inadmissible. *Iroquois Furnace Co. v. McCrea*, 191 Ill. 340; aff'g s. c., 91 Ill. App. 337.

One taken 9 years before the accident was not admitted. *Rock Island v. Drost*, 71 Ill. App. 613.

Plaintiff may locate the place of injury, on a photograph of the track. *Chicago &c. R. Co. v. Meyers*, 86 Ill. App. 401.

They may be excluded where they add nothing to the proofs in evidence. *Lake Erie &c. R. Co. v. Wilson*, 87 Ill. App. 360.

Admitted, where the conditions shown to remain the same. *Chicago &c. R. Co. v. Lawrence*, 96 Ill. App. 635.

Admitted, where the only change was that there was snow on the ground. *Fitzgerald v. Hedstrom*, 98 Ill. App. 109.

Photographs of the wreck just after the accident introduced. *Bach v. Iowa C. R. Co.*, 112 Iowa, 241.

A plan or picture, however executed, if shown to be correct, is admissible. *Maney v. Barnes*, 16 Gray, 161; *Hollenbeck v. Rowley*, 8 Allen, 473; *Underzook v. Commonwealth*, 76 Pa. St. 340; *Church v. Milwaukee*, 31 Wis. 512.

Whether its accuracy is sufficiently proven is a preliminary question for the court. *Commonwealth v. Coe*, 115 Mass. 481, 505; *Walker v. Curtis*, 116 id. 98.

Photographs of sidewalk, taken when ice, which caused the accident, had disappeared, were excluded. *Harris v. Quincy*, 171 Mass. 472.

See, also, *Stewart v. St. Paul &c. R. Co.*, 78 Minn. 110; *Hampton v. Norfolk &c. R. Co.*, 120 N. C. 534; *Beardslee v. Columbia*, 188 Pa. St. 496.

The exclusion is in the discretion of the court. *Dolan v. Mutual &c. Asso.*, 173 Mass. 197.

See *Lake Erie &c. R. Co. v. Wilson*, 87 Ill. App. 360.

An X-ray photograph is properly verified where it appears that it was taken by a physician experienced in their production. *De Forge v. New York &c. R. Co.*, 178 Mass. 59.

Photograph including a portion of the railroad not including place of accident, excluded. *Threlkeld v. Wabash R. Co.*, 68 Mo. App. 127.

See *Baustian v. Young*, 152 Mo. 317.

Photographs must be shown to be accurate representations. *Holdsboro v. Central R. Co.*, 60 N. J. L. 49.

Map may be used as an aid to explanation of points and distances. *Arrowwood v. South Carolina &c. R. Co.*, 126 N. C. 629.

An engineer's map was not admitted where testimony of witnesses was available. *Jones Fertilizer Co. v. Cleveland &c. R. Co.*, 7 Oh. N. P. 245.

X-ray photograph may be introduced to show condition of bone at different times. *Fish v. Walker*, 7 Oh. N. P. 472.

Photographs are unnecessary where the jury have seen the premises. *Dobson v. Philadelphia &c. R. Co.*, 7 Pa. Dist. 321.

Picture of animal enlarged from a photograph taken and published by the state department of entomology, admitted. *Virginia-Carolina Chem. Co. v. Kerien*, 57 S. C. 445.

X-ray photograph of a bone taken by one experienced in producing pictures and stated to be a correct representation, introduced. *Bruce v. Beall*, 99 Tenn. 303.

Photographs of machinery taken immediately after the explosion, shown. *Livermore Foundry &c. Co. v. Union Storage &c. Co.*, 105 Tenn. 187.

Photographs of a machine admitted to elucidate testimony. *Record v. Chickasaw Cooperage Co.*, (Tenn.) 69 S. W. Rep. 334.

Experience in photography not essential to qualify one to state that a photograph is a correct representation. *Missouri &c. R. Co. v. Magee*, (Tex. Civ. App.) 49 S. W. Rep. 928.

New York &c. R. Co. v. Moore, 105 Fed. Rep. 725.

The difference in light and shade on a photograph and on the eye is immaterial as long as the jury was instructed not to be misled thereby. *Scott v. New Orleans*, 75 Fed. Rep. 373.

Photograph of a jetty three months after the accident was excluded. *Tracy v. Baltimore &c. R. Co.*, 98 Fed. Rep. 633.

Diagram of the surroundings shown to be correct is competent. *Southern R. Co. v. Hall*, 100 Fed. Rep. 760.

Photographs of wrecks, shown to be accurate representations, admitted to elucidate testimony. *Denver &c. R. Co. v. Roller*, 100 Fed. Rep. 738.

Dedericks v. Salt Lake C. R. Co., 14 Utah, 137.

Photograph of a writing was held inadmissible, where the original might have been produced. *Baxter v. Chicago &c. R. Co.*, 104 Wis. 307.

X-ray photographs are admissible to elucidate testimony. *Mauch v. City of Hartford*, 112 Wis. 40.

Where they are unnecessary and have a tendency to enlist sympathy, they should be excluded. *Selleck v. City of Janesville*, 104 Wis. 570.

See, also, *Guhl v. Whitcomb*, 109 Wis. 69.

XXVI. Exhibits of Physical Objects.

The plaintiff, injured by the falling of the mast of a derrick, exhibited iron and gave evidence tending to prove that the same was a part of the hooks, which the plaintiff alleged were defective. This was proper. *King v. N. Y. C. & H. R. R. Co.*, 72 N. Y. 607; affirming 4 Hun, 769, and judg't for pl'ff; s. c., 66 N. Y. 181.

Citing *People v. Gonzales*, 35 N. Y. 49, and distinguishing *Yates v. The People*, 32 id. 509.

Defendant sought to introduce the foot of a child which had been amputated to show the size of the child at the time of accident. It was not admitted. *Roost v. Brooklyn &c. R. Co.*, 10 App. Div. 477.

The following were exhibited:

Plaintiff exhibited the injured part to the jury in a case of rupture. *Chicago &c. R. Co. v. Clausen*, 70 Ill. App. 350; s. c. aff'd, 173 Ill. 100.

An eye after being removed; the bullet and the piece of bone removed with it. *Seltzer v. Saxton*, 71 Ill. App. 229.

In case of an injured arm, to what extent it can be used. *Prichard v. Moore*, 75 Ill. App. 553.

A leg. *Swift v. O'Neill*, 88 Ill. App. 162; s. c. aff'd, 58 N. E. Rep. 416.

An injured arm. *West Chicago &c. R. Co. v. Grennell*, 90 Ill. App. 30.

A thumb, allowing physician to describe its condition. *Freeman v. Hutchinson*, 15 Ind. App. 639.

A broken leg, in comparison with the other. *Topeka v. Bradshaw*, 5 Kan. App. 879.

Bones removed on account of gangrene, to be submitted to the inspection of experts. *Williams v. Nally*, (Ky.) 45 S. W. Rep. 874.

Exhibit not excluded because it would excite sympathy on account of plaintiff's youth and good appearance. *Omaha Street R. Co. v. Emminger*, 57 Neb. 240.

An injured member. *Crete v. Hendricks*, (Neb.) 90 N. W. Rep. 215.

Amputated toes. *Nebonne v. Concord R. R.*, 68 N. H. 296.

Sparks shown to have been emitted by a locomotive. *Cleveland &c. R. Co. v. McKelvey*, 12 Oh. C. C. 426.

An injured knee, showing impaired ability to move it. *Arkansas R. P. Co. v. Hobbs*, 105 Tenn. 29.

A foot, where there is full evidence as to the injury thereof. *Texas Midland R. R. v. Brown*, 58 S. W. Rep. 44.

XXVII. Miscellaneous Instances.

In actions for negligence the following evidence was sustained:

Evidence of compliance by the plaintiff with his instructions from another engineer in regard to speed of engine. *Augusta &c. R. Co. v. Dorsey*, 68 Ga. 228.

Of evidence of effort to secure a lantern when charged with neglect in driving without it. *Chamberlin v. Ossippe*, 60 N. H. 212.

Of the length of a car driver's day's work in an action for injury through his negligence. *Phila. &c. R. Co. v. Henrice*, 92 Pa. St. 431.

On cross-examination, evidence of plaintiff's skill as billiard player as bearing on an alleged wrecked nervous system. *Gamble v. Central &c. R. Co.*, 74 Ga. 586.

A party may testify to the declarations made to him by his surgeon at the time of performing the operation. *Alabama R. Co. v. Arnold*, 80 Ala. 600.

In actions for negligence the following evidence was inadmissible:

That the plaintiff was directed to a forbidden place by a stranger. *Baltimore &c. R. Co. v. Rose*, 65 Md. 485.

Evidence of the character and habits and carefulness of a person killed at a crossing as bearing on his negligence. *Chase v. Maine &c. R. Co.*, 77 Me. 62.

S. P., *Phila. &c. R. Co. v. Stebbing*, 62 Md. 504.

Evidence of general incapacity of an engineer as bearing on his capacity on a special occasion. *Central &c. R. Co. v. Roach*, 64 Ga. 635.

FIRES.

(As to damages, see, "Damages.")

It is lawful for a person to set a fire upon his own premises for the purposes of husbandry, or for any other necessary purpose, and such person is not liable for injury done to the property of another provided he kindled the fire at a proper time and used reasonable and ordinary care in watching and tending it. The person intending to kindle a fire, in determining upon the propriety of doing it, should consider the dryness of the weather, the direction and violence of the wind, the proximity of combustible material to which it might spread either along the ground or in the air, and other circumstances that would make the act prudent or otherwise in the judgment of a man of ordinary prudence.

Whoever, by negligence or misconduct, creates or suffers fire in his own premises, which spreads and damages his neighbor, is liable. Such fire is not "accidentally begun," within the meaning of act Anne 66, chap. 31, sec. 67, amended by George 3, chap. 78, sec. 76. *Webb v. R. W. & O. R. Co.*, 49 N. Y. 420, aff'g 3 Lansing 453, and judg't for pl'ff.

Defendant, in an unusually dry summer season, set fire to various log heaps upon his fallow, adjoining the woodland of "H.," plaintiff's intestate. The fallow was covered with old logs, stumps and other combustible material, extending to the line of "H.," defendant's ground was also covered with muck, which, at that season, was itself combustible. The day before the fire was set, there had been a heavy shower, and, at the time, it looked like rain; it came off dry and hot, and a wind springing up, in spite of all due exertions on the part of defendant and his employés, the fire extended to plaintiff's lands. In an action to recover the damages, held, that the evidence was sufficient to sustain a finding of negligence. *Hays v. Miller*, 70 N. Y. 112, aff'g 6 Hun, 320, and judg't for pl'ff.

The court refers approvingly to the opinion in the Supreme Court, which is as follows:

From opinion.—"The burning of a fallow and of superincumbent combustible matter on the surface, is of frequent necessity in husbandry, and is a lawful act, unless the fire be set at an improper time or be carelessly managed. Then, was it kindled at an improper time, and was it watched and attended to with due care and diligence? In the case of *Stuart v. Hawley*, 22 Barb. 619, the fire was set at a dry time, on the seventeenth of July; from the seventeenth to the twentieth it continued very hot and dry, but it rained a very little on the morning of the seventeenth. On the twentieth, the wind commenced blowing violently; the fire spread, and on the twenty-sixth it was blown on to plaintiff's premises, where the injury occurred. The court held that the only evidence of carelessness was the fact that the fire was set in a dry time in July. This was held

not to be a careless or negligent act. The court say, that the evidence of want of attention on the part of the defendant, if it be conceded that he did nothing to prevent the fire from spreading, does not help the case, and cites, in support of this remark, *Clark v. Foot*, 8 Johns. 421. The case of *Calkins v. Barger*, 44 Barb. 424, was decided principally on the strength of the decision in *Stuart v. Hawley*. Here, too, the fire was set at a dry time, and the party left it unattended. The court held, that the plaintiff was properly nonsuited. In *Webb v. R., W. & O. R. Co.*, 49 N. Y. 420, the principal question considered was whether the damages were not so remote that the action would not lie; but the question here under examination, as to what facts may be deemed evidence of negligence, was also somewhat examined, and the court lay down the rule that, on this question, the dryness of the atmosphere and earth, the strength and direction of the wind, the permitted accumulation of weeds, grass and rubbish, were all constituents of the act, and bore on the inquiry as to negligence. As I understand this ruling, it amounts to this, that on proof of some or all of these facts, or of other facts similar in character, the case becomes one of fact, to be determined on a fair consideration of the proof by the jury or referee to whose judgment it is submitted. It is for the jury or referee to make the proper deduction or inferences from the facts proved. This seems sound in principle, and accords with the general current of authority relating to the subject of negligence. So it was held in *Weber v. N. Y. C. & H. R. R. Co.*, 58 N. Y. 451, that a case is made for the jury on the question of ordinary care, if there be inferences to be drawn from the proof, which are not certain, and incontrovertible; or if it is necessary to determine what a man of ordinary care and prudence would be likely to do under the circumstances. I am not aware that *Stuart v. Hawley* and *Calkens v. Barger* have ever received the direct sanction of the court of appeals. They were cited by Judge Earle in *Losee v. Buchanan*, 51 N. Y. 476, on page 487, but merely as authority that negligence, in setting a fire, gave a cause of action when damage ensued. The learned judge gave no approval of the decision in those cases, on the question as to what constituted negligence in the setting or controlling of fires. They are, very manifestly, not in harmony with the ruling in *Webb v. R., W. & O. R. Co.*, and in *Weber v. N. Y. C. & H. R. R. Co.*, *supra*. Now, accepting *Stuart v. Hawley* and *Calkens v. Barger* as well decided, it is difficult to see how the judgment in the case at bar can be upheld. According to *Stuart v. Hawley*, the setting of the fire in a dry time was no evidence of negligence; nor was the party bound to take into consideration the fact that the wind might rise and carry it beyond his control. And in *Calkens v. Barger* it was held, in effect, that the party owed his neighbor no duty to give the fire attention after it was set. I must confess I prefer the rule laid down in *Webb v. R., W. & O. R. Co.*, which would, as I think, make the question one of fact on the proof submitted; and this, too, well accords with the decision in the case of *Weber v. New York Central & Hudson River R. R. Company*."

The defendant leased "H.'s" lands to work on shares, and agreed to pay a fixed price for all lands cleared. The defendant was not liable for the negligence of "H." in setting fires. *Ferguson v. Hubbell*, 97 N. Y. 507, rev'g 26 Hun, 450, and judg't for def't and distinguishing *Hays v. Miller*, 70 N. Y. 320.

Plaintiff, upon discovery of fire to woods set by the defendant's neg-

ligence should use reasonable and practical means to suppress it, if he would recover for subsequent damages. Question came up on refusal to charge. *Hogle v. N. Y. & H. R. Co.*, 28 Hun, 363.

Citing *Bevier v. D. & H. C. Co.*, 13 Hun, 254; *Milton v. Hudson R. &c. Co.*, 37 N. Y. 214.

One of two adjoining landowners set fire to some brush heaps on his own land at a point where there was a pond-hole originally made by fires, which in wet time was filled with water, distant some one hundred yards from the land of the adjoining owner. The fire communicated to the soil and continued to burn slowly for six weeks or more and then entered upon and damaged the land of the adjoining owner.

Held, that the owner setting fire to the brush was not liable for the injuries caused by the fire.

That the fact that the fire was started in a very dry time, and that nothing was done by him to prevent its spread, did not create a liability on his part for its consequences. *McGibbon v. Baxter*, 51 Hun, 587, aff'g judg't of nonsuit; following *Clark v. Foot*, 8 Johns. 421; *Stuart v. Hawley*, 22 Barb. 619.

Gas fitter applied light to detect the escape of gas from an elbow in a pipe only two or three inches from a wall covered with cotton flannel. Held negligent. *German &c. Ins. Co. v. Standard Gaslight Co.*, 67 App. Div. 539.

The use of a steam engine for threshing, without spark arrester, near a barn filled with hay, is negligence. *Dennis v. Harris*, 46 N. Y. S. R. 535.

When person sets fire to fallow, wood and timber, for the purpose of bringing land into cultivation, and the wind rises, and causes the flames to spread and communicate fire to his neighbor's land, doing damage, defendant's negligence must be shown. Mere fact that fire was set in a dry time, in July, upon low swampy ground, previously burnt over and destitute of brush, will not be sufficient to entitle the party injured to recover. *Stuart v. Hawley*, 22 Barb. 619.

Person, without reason to apprehend a change of weather or rising of wind, set fire to log heaps, and went away from home; the wind did rise and carry fire to neighbor's premises, doing damage. Defendant was not obliged to keep a watch and was not liable. *Calkens v. Barger*, 44 Barb. 424.

A compress company held not liable for the emission of a spark from its smoke stack without proof of negligence. *Planters' Warehouse &c. Co. v. Taylor*, 64 Ark. 307.

When person makes fire for necessary purpose, upon or near grounds of another, but negligently leaves it with combustible material about,

and fire spreads, doing damage, he is liable. *Cleland v. Thornton*, 43 Cal. 437.

It is not negligent to set fire to one's stubble if due care is taken to prevent its spreading and doing damage. *Garnier v. Porter*, 90 Cal. 105.

Statute imposing liability for damage by fire set, construed to apply to damage by fire only, and not to include compensation for services. *Spencer v. Murphy*, 6 Colo. App. 453.

One using a steam threshing machine must use only reasonable means and efforts to prevent conveyance of fire to stacks when he is threshing by well constructed machinery and proper spark arresters. *Holman v. Boston &c. Co.*, 20 Colo. 7.

One who, contrary to statute, sets fire on his own premises, so that it escaped to the premises of another, is liable. *Dunleavy v. Stockwell*, 45 Ill. App. 230.

When a person threshing wheat with a steam machine, under contract with owner of the wheat, and owner temporarily left the field, and while absent the wind increased so that there was danger of firing the stacks, and it would so appear to an ordinarily prudent man, it was the duty of the person running the machine to stop, and his failure to do so, whereby stack was fired, would make him liable. *Collins v. Crose-close*, 40 Ind. 414.

One accidentally, but not negligently, firing his own house is not liable for the spread of the same by wind. *Pennsylvania &c. R. Co. v. Whitlock*, 99 Ind. 16.

It is negligence to start a fire on a bed of peat or turf, when the ground is dry, so that a fire may follow peat bed to another's land and do damage. *Louisville &c. R. Co. v. Nitsche*, 126 Ind. 229.

It is negligence in time of drouth to fire rubbish on a person's own land when a slight breeze may carry sparks to a peat bed, from whence fire may spread to a neighbor's land. *Brummit v. Furness*, 1 Ind. App. 401.

Railroad company held liable for permitting fire, set in a dry time, to burn off right of way, to escape and injure adjoining land. *Tien v. Louisville &c. R. Co.*, 15 Ind. App. 304.

Railroad company is bound to use only reasonable care in burning off its right of way. *Lake Erie &c. R. Co. v. Naron*, 18 Ind. App. 193.

Negligent to pile combustible material, likely to take fire, along a highway where horses are driven. *Island Coal Co. v. Clemmitt*, 19 Ind. App. 21.

Ordinary prudence, honest motives in setting a fire, and due diligence in preventing it from spreading, will exempt person setting it from damages to property of another.

Should use precautionary means, which a prudent and cautious man would use with reference to his own property. *Hanlon v. Ingram*, 3 Iowa, 80.

Statutory liability for damage from fire set on prairie did not apply where fire was made in a hole, to smoke out a wolf. *Ellsworth v. Ellingson*, 96 Iowa, 154.

It is negligence to burn off dry weeds on a windy day. *Atchison &c. R. Co. v. Scrafford*, 2 Kan. App. 73.

See, also, *Grant v. Omaha &c. R. Co.*, 94 Mo. App. 312; *Mobile &c. R. Co. v. Stinson*, 74 Miss. 453.

Where fire was set fifty feet in the direction of the wind from a plowed guard, negligence was for the jury. *Padgett v. Atchison &c. R. Co.*, 7 Kan. App. 736.

Burden of proof is on plaintiff. *Bachelder v. Heagan*, 18 Me. 32.

Sturgis v. Robbins, 62 Me. 289; *Stuart v. Hawley*, 22 Barb. 619.

Person is negligent if he do not use ordinary care in guarding fire made on his land. If defendant is negligent in setting and guarding fire, he is liable although thereafter a violent wind made it impossible to arrest it before firing plaintiff's premises. *Hewey v. Nourse*, 54 Me. 256.

A man who negligently sets fire on his own land, and keeps it negligently, is liable to an action at common law for any injury done by the spreading or communication of the fire directly from his land to the property of another, whether through the air or along the ground, and whether he might or might not have reasonably anticipated the particular manner and direction in which it is actually communicated. *Higgins v. Dewey*, 107 Mass. 494; *Perley v. East. R. Co.*, 98 id. 414.

Defendant was held liable for blocking the street so as to prevent firemen connecting their hose to a hydrant. *Kiernan v. Metropolitan Const. Co.*, 170 Mass. 378.

Statute imposing liability for damage from fire set, construed not to apply to fire set upon private premises by the State Board of Agriculture, without negligence, to exterminate a moth. *Globe &c. Ins. Co. v. Lexington*, 173 Mass. 6.

A sudden shift and violent increase of the wind caused fire to escape from a fire pit lawfully in use. No liability. *Polzen v. Morse*, 91 Mich. 208.

Lessee of saw mill negligently allowed fire to communicate with sawdust and debris during existence of a lease, whereby, after the expiration of the lease, such fire extended to the mill and burned it. Lessee was liable. It seems that the lessor protested against allowing the fire

to connect with the sawdust, but the lessee kept a watchman, and the fire occurred after the watchman had been withdrawn, without lessor's knowledge. *Stevens v. Pantlind*, 95 Mich. 145.

When owner of property knew that fire was dangerously near his property and made no effort to control it, he was negligent and did not recover. *Richter v. Harper*, 95 Mich. 221.

One who negligently suffers fire to reach a point, where a reasonably prudent man would not have started a fire, and it reaches his neighbor's land, is liable for damages although a rising wind aided the injury. *Needham v. King*, 95 Mich. 303.

It was held negligence not to provide saw mill, situated near an inflammable structure, with a spark arrester. *Webster v. Symes*, 109 Mich. 1.

Wind blowing at the time a fire is negligently started, held not an intervening cause. *Lillibridge v. McCann*, 117 Mich. 84.

Defendant set a fire in his grain stubble on the third of October, after plowing around the field to prevent the spreading of the fire. The fire "jumped" the plowing, and spread over the prairie. The defendant attempted to extinguish it the same day, the evidence tending to show that the fire was not actually extinguished, but that it continued to burn smouldering in the soil of a slough until the fifth of the same month, when, without other intervening cause than an ordinary change in the wind, it burned afresh, and, running upon plaintiff's land, two miles from where the fire had been set, destroyed his property. If the defendant was chargeable with negligence in the setting and care of the fire, the fact that it was so long stayed in its progress in the slough, burning there in a latent condition, did not, as a matter of law, excuse defendant from liability for the subsequent injury caused by the fire, although he might not have had reason to anticipate that the fire would so smoulder in the slough and so revive; nor can it be said, as a matter of law, that such injury was too remote to warrant a recovery against the defendant. *Kripner v. Biebl*, 28 Minn. 139.

See 28 Minn. 139; 45 id. 88.

It was sufficient evidence of negligence that a person fired grass with the wind blowing towards a marsh of dry grass, which, taking fire, carried fire to plaintiff's land. *Jespersion v. Phillips*, 46 Minn. 147.

A person setting a fire must use reasonable or ordinary care under the circumstances considering the dangers that may reasonably be expected to result. *Day v. H. C. Akeley & Co.*, 54 Minn. 522.

Remaining to save property of slight value until escape is cut off defeated recovery. *Berg v. Great Northern R. Co.*, 70 Minn. 272.

Defendant set fire on its right of way to burn off stubble. A child

entered the right of way and fell into the fire. Recovery denied. *Kalz v. Winona &c. R. Co.*, 76 Minn. 351.

When stack had once taken fire from a steam threshing machine, and the owner of machine continued to use it, he was liable for burning of stack. *Garrison v. Graybill*, 52 Mo. App. 580.

The spreading of a fire lawfully set raises no presumption of negligence. *Carton v. Nichols*, 81 Mo. 80.

Unless there is negligence in creating it. *Reid v. Pennsylvania R. Co.*, 44 N. J. L. 280; *Merchants &c. Assn. v. Wood*, 64 Miss. 661.

Presumption of negligence from setting of fire in the case of locomotives held not to apply to a traction threshing machine. *Coffman v. McCauslin*, 70 Mo. App. 34.

Conditions increasing the risk in the use of a steam thresher increase the degree of diligence required. *McClelland v. Scroggin*, 48 Neb. 141.

Allegation that defendant set out a fire on his premises which spread to plaintiff's land, does not show any liability. *Vansyoc v. Freewater &c. Asso.*, (Neb.) 88 N. W. Rep. 162.

An agreement to protect another's premises from fire held an answer to a complaint charging negligence. *Roberson v. Morgan*, 118 N. C. 991.

At evening, when wind had arisen, the ashpan of a threshing machine with sparks in it was tipped up and emptied and the machine left for the day. Negligence was for the jury. *Lieuallen v. Musgrove*, 37 Ore. 446.

Defendant, in violation of statute, set fire to a straw stack which set fire to the adjoining stubble. He was *per se* negligent. *Kelley v. Anderson*, 15 S. D. 107.

Liability of landlord and tenant for damage by fire does not depend on the terms of their rental agreement, but on whether the character of the acts makes them joint tortfeasors. *Meadows v. Truesdell*, (Tex. Civ. App.) 56 S. W. Rep. 932.

Party who sets fire to logs and brush on his lands is not liable, although it be blown on the lands of his neighbor, doing damage, unless the party is negligent in setting it at that place and time. *Fahn v. Reichart*, 8 Wis. 105.

Case v. Hobart, 25 Wis. 654.

In *Case v. Hobart*, 25 Wis. 654, the court considered that there was no evidence of negligence on the part of the defendant, and that he "had every reason to suppose that it (the fire) was entirely extinguished," and sustained a nonsuit in an action for burning of property *seventeen* days afterwards.

The statutory limitation of one year for presenting notice of claim.

construed not to expire until a year after the fire ceases burning. *Atkinson v. Chicago &c. R. Co.*, 93 Wis. 362.

That a fire originated on defendant's right of way does not establish negligence, where there were several other fires in the vicinity at the same time. *Montague v. Minneapolis &c. R. Co.*, 96 Wis. 633.

That a fire negligently set by defendant, joined another, which would have done the damage any way, did not render him liable. *Cook v. Minneapolis &c. R. Co.*, 98 Wis. 624; s. c., 40 L. R. A. 457.

Charge that care required to prevent the setting of fire is such as the great mass of mankind ordinarily exercise under the same circumstances, held erroneous. *Nass v. Schulz*, 105 Wis. 146.

FIRES FROM LOCOMOTIVE.

- I. RAILWAY COMPANY IS ONLY LIABLE FOR NEGLIGENT USE OF FIRE TO CREATE MOTIVE POWER.
- II. FROM WHAT NEGLIGENCE RESULTS.
 - (a) From failure to use proper appliances.
 - (b) From failure to use reasonable care.
 - (1) In repairing appliances.
 - (2) In operation of locomotive.
 - (3) In keeping of right of way free from combustible material.
- III. COMPETENT AND SUFFICIENT EVIDENCE OF DEFENDANT'S LIABILITY.
- IV. INSUFFICIENT EVIDENCE OF DEFENDANT'S LIABILITY.
- V. CONTRIBUTORY NEGLIGENCE.
- VI. PROXIMATE CAUSE.
- VII. CASES IN NEW YORK.

I. Railway Company Is Only Liable for Negligent Use of Fire to Create Motive Power.*

Railway companies have the right to use fire to create a motive power. *Uline v. N. Y. C. R. Co.*, 101 N. Y. 98.

Searles v. Manhattan R. Co., 101 N. Y. 661; *Penn. &c. R. Co. v. Hendrickson*, 80 Penn. St. 182; *Penn. &c. R. Co. v. Shultz*, 93 id. 341; *Babcock v. Fitchburg R. Co.*, 140 N. Y. 308.

Unless authorized by the public authority so to do, it would be negligent to operate a railway and to emit fire causing damage, as the act itself would be dangerous. *Wharton on Neg.* § 868.

Railway locomotives cannot be operated without the emission of cinders, although coals may be contained in ash pans, barring accidents and defects arising without immediate opportunity of the company to correct the same. *Searles v. Manhattan R. Co.*, 101 N. Y. 661.

Flynn v. N. Y. C. &c. R. Co., 142 N. Y. 11; *Collins v. N. Y. C. R. Co.*, 5 Hun, 503.

Hence, unless liability be created by statute, a railway company is not responsible for fire communicated from its locomotives, unless it be guilty of negligence in exercising the right conferred upon it by the state. *Sheldon v. R. Co.*, 14 N. Y. 218.

Hinds v. Barton, 25 N. Y. 514; *Frankford T. P. v. Phila. &c. R. Co.*, 54 Pa. St. 345; *Baltimore &c. R. Co. v. Woodruff*, 4 Md. 242; *Flinn v. N. Y. C. R. Co.*, 142 N. Y. 11.

*NOTE.—The New York cases are given *in extenso* at page 1249 *et seq.*

Railroad company held liable for loss of storehouse fired by sparks from a stove kept by the carrier's permission in a freight car by a shipper to prevent his shipment of potatoes from freezing. *Rolfe v. Boston &c. R. Co.*, 69 N. H. 476.

II. From What Negligence Results.

Negligence in such case results from the failure of the railway company or its servants.

(a). FROM FAILURE TO USE PROPER APPLIANCES.

To use as effective appliances as are in general practical use to check in size and quantity the cinders emitted, and to adopt, not new devices demonstrable in theory, or even limited service,* but rather such superior improvements as have been tested and approved by sufficient practical operation through sufficient time; but any change of appliances must depend upon the certainty and extent of benefits to be obtained therefrom, the expense thereof compared with the benefit, the time requisite to make the change, and all the problems connected therewith. *Flinn v. N. Y. Cent. &c. R. Co.*, 142 N. Y. 11 (see also dissenting opinion).

Babcock v. Fitchburg &c. R. Co., 140 N. Y. 308; *Lackawanna & B. R. Co. v. Doak*, 52 Pa. St. 379; *Chicago &c. R. Co. v. Pennell*, 94 Ill. 448; *Anderson v. Cape Fear S. Co.*, 64 N. C. 399; *Toledo, W. & W. R. Co. v. Wand*, 48 Ind. 476; *Hoyt v. Jeffers*, 30 Mich. 181; *Philadelphia &c. R. Co. v. Yerger*, 73 Pa. St. 121.

This rule excludes the necessity of using the most perfect possible appliances to prevent the emission of sparks. Wharton on Neg., sec. 872, citing *Indiana R. Co. v. Paramore*, 31 Ind. 143; *St. Louis &c. R. Co. v. Gilham*, 39 Ill. 455.

Railroad was not liable for escape of sparks, where its engine was equipped with a proper spark arrester in good order and was operated with care. *Moore v. Wilmington &c. R. Co.*, 124 N. C. 338.

See, also, *Chicago &c. R. Co. v. Madison*, 81 Ill. App. 393; *Union P. R. Co. v. Motzner*, 2 Kan. App. 342; *Louisville &c. R. Co. v. Samuels*, (Ky.) 57 S. W. Rep. 235.

Statutory permission to run without spark arresters, from December to March, construed not to remove the common law duty of ordinary care to prevent escape of sparks. *Toledo &c. R. Co. v. Wickenden*, 11 Oh. C. C. 378.

Contra, *West Jersey R. Co. v. Abbott*, 60 N. J. L. 150.

*NOTE.—In Wharton on Negligence, §872, it is said: "A more perfect contrivance than that employed may be possible, and may be even patented; yet, until it has been accepted in general use a company cannot be charged with negligence in not adopting it. It is unnecessary to give for this position the reason that if the test be a perfect apparatus, we lose ourselves in a maze of purely speculative mechanics. It is enough for us to fall back on the essential principle that lies at the base of this branch of the law that the diligence to be exacted from a specialist is the diligence which good specialists in his department are accustomed to show. Indeed, if we force him to go beyond this limit and require him to experiment when working his engine with conjectural improvements, such as good specialists are not accustomed to apply, disaster much more terrible would be occasioned than that which under the present rule occurs."

The fact that the best appliances were not used does not necessarily make the railroad liable for the escape of sparks. *Paris &c. R. Co. v. Nesbitt*, 11 Tex. Civ. App. 608.

See, also, *Missouri &c. R. Co. v. Carter*, (Tex.) 68 S. W. Rep. 159.

A statutory requirement to use the best and most approved kind of appliance, shown by experience to be proper and suitable for the protection from fire, held valid. *Burrows v. Delta Trans.*, 106 Mich. 582; s. c., 29 L. R. A. 468.

A statutory provision relieving company on proof of good order of machinery is satisfied, where the appliances are such as have been in use for a long time and substantially accomplish the purposes sought. *Peter v. Chicago &c. R. Co.*, 121 Mich. 324; s. c., 46 L. R. A. 224.

Duty of railway company is performed by equipment with modern appliances, competent men and by careful and skillful operation. *Blue v. Aberdeen &c. R. Co.*, 117 N. C. 644.

That higher power engines, though fitted with proper spark arresters, emit more and hotter sparks than ordinary engines, does not constitute negligence. *Rosen v. Chicago &c. R. Co.*, 83 Fed. Rep. 300.

To instruct that, if a company could have devised more efficient means of preventing the escape of sparks, it should have put them in use was held improper. *Farrington v. Rutland R. Co.*, 72 Vt. 24.

Not negligence, not to adopt a device believed by the jury, but not generally established, to be the best. *Menominie River Sash &c. Co. v. Milwaukee &c. R. Co.*, 91 Wis. 447.

(b). FROM FAILURE TO USE REASONABLE CARE.

Statutory *prima facie* case of negligence from proof of the communication of fire from a locomotive is met by proof of use of proper appliance and due care in operation. *First National Bank &c. Co. v. Lake Erie &c. R. Co.*, 65 Ill. App. 21.

See, also, *Continental Trust Co. v. Toledo &c. R. Co.*, 89 Fed. Rep. 637.

Such a statute is constitutional. *Baltimore &c. R. Co. v. Tripp*, 175 Ill. 251.

Lake Erie &c. R. Co. v. Falk, 16 Oh. C. C. 125.

But absence of negligence is not absolutely shown by proof of proper appliances on engine and due care in its use. The question is for the jury. *Hemmi v. Chicago &c. R. Co.*, 102 Iowa, 25.

A statute imposing liability for loss by fire communicated directly or indirectly from locomotives and giving the company an insurable interest in property along the route, held constitutional. *Lumberman's &c. Ins. Co. v. Kansas City &c. R. Co.*, 149 Mo. 165.

The expression "along the route" in such a statute in reference to the property included, construed. *Martin v. Railway*, 87 Me. 411.

A statute imposing liability for fires communicated "directly or indirectly," construed to apply to the destruction of a building 165 feet away, where fire was communicated through a building adjoining the track fired by sparks from a locomotive. *Lumberman's &c. Ins. Co. v. Kansas City &c. R. Co.*, 149 Mo. 165.

That an insurable interest is given, does not restrict the operation of the statute to such property as the company is able to get insurance upon. *Dean v. Charleston &c. R. Co.*, 50 S. C. 504.

In the absence of statute the duty of a railroad as to fires is not that of an insurer but that of an ordinarily prudent person. *St. Louis &c. R. Co. v. Hoover*, 3 Kan. App. 577.

See, also, *Lesser Cotton Co. v. St. Louis &c. R. Co.*, 114 Fed. Rep. 133; *Watt v. Nevada C. R. Co.*, 23 Nev. 154; *Home &c. Ins. Co. v. Atchison &c. R. Co.*, 4 Kan. App. 60; *St. Louis &c. R. Co. v. Knight*, (Tex. Civ. App.) 49 S. W. Rep. 250.

Admission of emission of sparks puts the burden on defendant of establishing proper contrivances for its prevention. *Illinois C. R. Co. v. Barret*, (Ky.) 66 S. W. Rep. 9.

The elements embraced in determining what is ordinary care under the circumstances include the dryness of the surrounding vegetation, the speed and direction of the wind and the proximity of property in risk as well as the interests of the railroad company, and the public using its trains. *Riley v. Chicago &c. R. Co.*, 71 Minn. 425.

The duty under the New Jersey statute is entirely discharged by providing a spark arrester. *West Jersey R. Co. v. Abbott*, 60 N. J. L. 150.

Under a reservation of right to alter, amend or repeal, a Legislature cannot amend a charter of a railroad company so as to make it liable as insurer without its consent. *McDonald v. New York &c. R. Co.*, (R. I.) 51 Atl. Rep. 578.

Railroad held liable, where both the defectiveness of the locomotive and its negligent operation contribute to cause injury. *Gulf &c. R. Co. v. Johnson*, (Tex. Civ. App.) 51 S. W. Rep. 531.

Failure to use the ordinary prudence which the circumstances demand of an ordinarily prudent man is negligence. *Caswell v. Chicago &c. R. Co.*, 42 Wis. 193.

1. IN REPAIRING APPLIANCES.

In repairing the appliances to check the emission of cinders, and prevent the dropping of coals. *Chicago &c. R. Co. v. Boller*, 7 Brad. (Ill.) 625.

Longabaugh v. Va. City &c. R. Co., 9 Nev. 271; *Frankfort v. B. T. Co.*, 54 Pa. St. 345; *Spaulding v. Chicago &c. R. Co.*, 30 Wis. 110; *Diamond v. Northern Pac. R. Co.*, 6 Mont. 580; *Ryan v. Gross*, 68 Md. 377.

2. IN OPERATION OF LOCOMOTIVE.

Greater care is required in running through a village where there are wooden buildings, or wind is blowing when engine is standing still, toward buildings. *Fero v. Buffalo &c. R. Co.*, 22 N. Y. 209.

Louisville &c. R. Co. v. Dalton, (Ky.) 43 S. W. Rep. 431; Atchison &c. R. Co. v. Huitt, 1 Kan. App. 788; Gulf &c. R. Co. v. Wittie, 68 Tex. 295; Great Northern P. R. Co. v. Coates, 115 Fed. Rep. 452; Caswell v. Chicago & N. W. R. Co., 42 Wis. 193.

3. IN KEEPING THE RIGHT OF WAY FREE FROM COMBUSTIBLE MATERIAL.*

Defendant partially cut, but failed to remove dry grass on its right of way. Negligence was for the jury. *Brown v. Buffalo &c. R. Co.*, 4 App. Div. 465.

See, also, *Watt v. Nevada &c. R. Co.*, 23 Nev. 154.

Fire communicated by engine to combustible material allowed to accumulate on right of way, is evidence of negligence. *Brush v. Long Island R. Co.*, 10 App. Div. 535.

See, also, *Southern R. Co. v. Corine*, 115 Ga. 664; *Wabash R. Co. v. Schultz*, (Ind. App.) 64 N. E. Rep. 481; *Atchison &c. R. Co. v. Hays*, 8 Kan. App. 545; *International &c. R. Co. v. Newman*, (Tex. Civ. App.) 40 S. W. Rep. 854; *Sutwiler v. Chesapeake &c. R. Co.*, 95 Va. 443.

Plaintiff's ties were allowed to remain on defendant's right of way as an accommodation. Defendant owed him no duty to prevent the accumulation of grass and leaves about them. *Connelly v. Erie R. Co.*, 68 App. Div. 542.

Dead grass was allowed to remain for a long time on right of way. Railroad company was negligent. *Louisville &c. R. Co. v. Miller*, 109 Ala. 500.

See, also, *Chicago &c. R. Co. v. Glenney*, 70 Ill. App. 510; *St. Louis &c. R. Co. v. Ludlum*, 63 Kan. 719; *Atchison &c. R. Co. v. Ireton*, id. 888; *Shields v. Norfolk &c. R. Co.*, 129 N. C. 1; *Fort Worth &c. R. Co. v. Hogsett*, 67 Tex. 685; *Abrams v. Seattle &c. R. Co.*, 27 Wash. 507.

Especially in placing a car of powder near the accumulation. *Crissey &c. Co. v. Denver &c. R. Co.*, (Colo. App.) 68 Pac. Rep. 670.

Railroad company held liable for firing combustible material on right of way and scorching branches, overhanging right of way, of trees on adjoining land. *Rabberman v. Callaway*, 63 Ill. App. 154.

See, also, *Missouri &c. R. Co. v. Sparks*, (Tex. Civ. App.) 35 S. W. Rep. 745.

Accumulation held negligence *per se*. *Baltimore &c. R. Co. v. Ferryman*, 95 Ill. App. 199.

NOTE.—This care is not exacted in an increased degree when the conditions, like high winds, or the direction thereof, or combustible material, or dry weather increase the danger of fires. *Michigan Cent. R. Co. v. Anderson*, 20 Mich. 244.

Ordinary care to prevent or remove accumulations of combustible materials on right of way is the measure of the duty required. *Chicago &c. R. Co. v. Bailey*, 19 Ind. App. 163.

Fire set by sparks from a locomotive, properly equipped and managed, in combustible material negligently allowed to accumulate on right of way, imposes liability. *Chicago &c. R. Co. v. Bailey*, 19 Ind. App. 163.

So, though the fire was set by the engine of another company. *Heron v. St. Paul &c. R. Co.*, 68 Minn. 542.

Knowledge of the fire which actually did the damage is immaterial, if the accumulation was negligent. *Pittsburg &c. R. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322.

Maintenance of fire guard at maximum distance required by statute is not *per se* a discharge of the duty to use ordinary care. *Buck v. Union P. R. Co.*, 59 Kan. 328.

Company must observe duty to keep right of way clear of combustible material, although compensation has been made to the adjoining owners for the right of way; for such care was contemplated as a part of the compensation. *Delaware, L. & W. R. Co. v. Salmon*, 10 Vroom. 209.

Lehigh Valley R. Co. v. Lazarus, 28 Pa. St. 203; *Pierce v. Worcester &c. R. Co.*, 105 Mass. 199.

A grain elevator was held not within a statute as to the accumulation of "weeds, high grass, decayed timbers and combustible materials." *Martz v. Cincinnati &c. R. Co.*, 12 Oh. C. C. 144.

Allowing accumulation to remain during the winter is not negligence *per se*. *Taylor v. Pennsylvania R. Co.*, 174 Pa. St. 171.

These rules generally obtain, save in certain states where by statute the railroad company is made liable for fires caused by it, and it may effect insurance for its benefit in property exposed to such destruction. These states are:*

Massachusetts, *Lyman v. Boston &c. R. Co.*, 4 Cush. 288; *Pierce v. Worcester &c. R. Co.*, 105 Mass. 199; Iowa, *Rodermacher v. Milwaukee &c. R. Co.*, 41 Iowa, 297; Maine, *Pratt v. Atlantic &c. R. Co.*, 42 Me. 579, *Martin v. Grand Trunk R. Co.*, 87 Me. 411; Missouri, *Lumberman's Mut. Ins. Co. v. Kansas City &c. R. Co.*, 149 Mo. 165; New Hampshire, *Powell v. R. Co.*, 57 N. H. 132; South Carolina, *Dean v. Charleston &c. R. Co.*, 55 S. C. 504; Vermont, *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

III. Competent and Sufficient Evidence of Defendant's Liability.

Aside from these states the contention has usually been over the evidence competent and sufficient to prove that the fire originated from the

* NOTE.—These statutes do not cover chattels, *Chapman v. Atlantic, &c. R. Co.*, 37 Me., 92; *Hart v. Western, &c. R. Co.*, 13 Metc. 99. They extend to remote as well as proximate damages, *Hart v. Western, &c. R. Co.*, 113 Metc. 99; *Hooksett v. Concord R. Co.*, 38 N. H. 242.

railway locomotives and through failure of the railway company to observe proper care usually in the particulars above, viz.: in furnishing proper appliances, in operation, and in removing combustibles. Generally the burden is on the plaintiff to prove (1) failure of the defendant in one of these particulars; (2) that the fire originated from such failure (*Palmer v. Mo. Pacific R. Co.*, 76 Mo. 217; *Phila. &c. R. Co. v. Yerger*, 73 Pa. St. 121).

However, in some states a statute, upon proof that fire came from locomotive, places the burden on the company of showing fulfillment of its duty in each of the above particulars.

Maryland, *Annapolis &c. R. Co. v. Gantt*, 39 Md. 115; Iowa, *Small v. Chicago &c. R. Co.*, 50 Iowa, 338; Illinois, *Chicago &c. R. Co. v. Clampit*, 63 Ill. 95.

This same rule has been adopted by the courts in North Carolina, *Lawton v. Giles*, 90 N. C. 374, *Ellis v. Portsmouth R. Co.*, 2 Ired. L. R. 138; Wisconsin, *Spaulding v. Chicago &c. R. Co.*, 30 Wis. 110; New Jersey, *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247; Nebraska, *Burlington &c. R. Co. v. Westover*, 4 Neb. 268; Tennessee, *Burke v. Louisville &c. R. Co.*, 7 Heisk. 451; Missouri, *Campbell v. St. Louis &c. R. Co.*, 58 Mo. 498; California, *Hull v. Sacramento &c. R. Co.*, 14 Cal. 387.

Independently of a statutory liability, and evidence just mentioned that raises a presumption of liability, the plaintiff must prove:

(1) That the fire came from defendant's engines; (2) That there had been negligence usually in some one of the respects above mentioned. *Burroughs v. Housatonic R. Co.*, 15 Conn. 124.

Ind. &c. R. Co. v. Paramore, 31 Ind. 143; *Phila. & Read. R. Co. v. Yerger*, 73 Pa. St. 121; *Morris &c. R. Co. v. State*, 36 N. J. L. 553; *Garrett v. R. Co.*, 36 Iowa, 121; *Bevier v. D. & H. Canal Co.*, 13 Hun, 254; *Smith v. Han. &c. R. Co.*, 37 Mo. 287.

Negligence may be established by evidence as follows:

That unusually large size or quantity of coals dropped before or after the fire in question. *Sheldon v. Hudson R. Co.*, 14 N. Y. 218.

Field v. N. Y. C. R. Co., 32 N. Y. 399; *Westfall v. Erie R. Co.*, 5 Hun, 75; *Flinn v. N. Y. C. &c. R. Co.*, 142 N. Y. 11; *Home Ins. Co. v. Penn. R. Co.*, 11 Hun, 182.

From dropping coals of fire on track, whence adjoining property was burned. *Field v. R. Co.*, 32 N. Y. 339; 49 id. 420.

Direct evidence that there was on the right of way combustible material, like dried grass, weeds, refuse ties, and other wooden substances, of a kind likely to be kindled; and that fire might have been communicated therefrom. *O'Neill v. N. Y., O. & W., R. Co.*, 115 N. Y. 579.

Rockford &c. R. Co. v. Rogers, 62 Ill. 346; *Ohio & M. R. Co. v. Porter*, 92 id. 437; *Phila. &c. R. Co. v. Hendrickson*, 80 Pa. St. 182; *Pittsburg, C. & St. Louis R. Co. v. Nelson*, 51 Ind. 150; *Troxler v. Richmond & Danville T. Co.*, 74

N. C. 377; *Kesee v. Chicago & N. W. R. Co.*, 30 Iowa, 78; *Henry v. So. Pac. R. Co.*, 50 Cal. 176; *Martin v. N. Y., O. & W. R. Co.*, 62 Hun, 181; *Perry v. So. Pac. R. Co.*, 50 Cal. 578; *Siblrud v. Minneapolis & c. R. Co.*, 29 Minn. 58; *Bevier v. D. & H. C. Co.*, 13 Hun, 254.

That the appliances used were inferior. *Flinn v. N. Y. C. R. Co.*, 142 N. Y. 11.

Home Ins. Co. v. Penn. R. Co., 11 Hun, 182.

That the right of way was afire shortly after an engine passed. *Louisville & c. R. Co. v. Miller*, 109 Ala. 500.

Burlington & c. R. Co. v. Burch, (Colo. App.) 69 Pac. Rep. 6; *Hygienic & c. Man. Co. v. Raleigh & c. R. Co.*, 122 N. C. 881; *Tyler v. Chicago & c. R. Co.*, 102 Iowa, 632; *Lake Side & c. R. Co. v. Kelley*, 10 Oh. C. C. 322; *Atchison & c. R. Co. v. Hamilton*, 6 Kan. App. 447.

That a fire originated from sparks communicated by a locomotive. *Gainesville & c. R. Co. v. Edmonson*, 101 Ga. 747.

See, also, *Chicago & c. R. Co. v. Glenney*, 70 Ill. App. 510; *Hemmi v. Chicago & c. R. Co.*, 102 Iowa, 25; *Rodgers v. Kansas City & c. R. Co.*, 52 Neb. 86; *Gulf & c. R. Co. v. Johnson*, 92 Tex. 591; *Edwards v. Campbell*, 12 Tex. Civ. App. 236.

The presumption so arising is rebutted by proof that the engine was properly equipped and being handled with proper care. *Cleveland & c. R. Co. v. Case*, 71 Ill. App. 459.

See, also, *Edwards v. Campbell*, 12 Tex. Civ. App. 237; *Patteson v. Chesapeake & c. R. Co.*, 94 Va. 16.

From failure to use available servants to extinguish fires, although kindled without negligence. *Bass v. Chicago, B. & Q. R. Co.*, 28 Ill. 9.

But see, *Kenney v. Hannibal & c. R. Co.*, 70 Mo. 252.

From use of wood in coal engine, as the netting sufficient for a coal engine has larger meshes than are needed by a wood burning engine. *Chicago & c. R. Co. v. Quaintance*, 58 Ill. 389.

St. Joseph & c. R. Co. v. Chase, 11 Kan. 47.

From cinders of unusual size or quantity, or that they were thrown an unusual distance, when the fire occurred. *Toledo & c. R. Co. v. Maxfield*, 72 Ill. 95.

Jackson v. Chicago & c. R. Co., 31 Iowa, 176; *Fitch v. Pacific R. Co.*, 45 Mo. 322.

Direct evidence of disrepair. *Chicago & c. R. Co. v. Boller*, 7 Brad. (Ill.) 625.

Longabaugh v. Va. City & c. R. Co., 9 Nev. 271; *Bedell v. L. I. R. Co.*, 44 N. Y. 367.

That engine afterwards emitted fire. *Pittsburg & c. R. Co. v. Noel*, 77 Ind. 110.

From escape of sparks, and that defendant allowed fire to spread from its right of way. *Louisville &c. R. Co. v. Stevens*, 87 Ind. 198.

The existence of combustible material is not *per se* negligence. *Louisville &c. R. Co. v. Stevens*, 87 Ind. 198.

From fact that defendant's engine did emit fire in a dangerous manner in comparison with engines in requisite order. *Mo. Pacific R. Co. v. Kincaid*, 29 Kan. 654.

Hull v. Sacramento Valley R. Co., 14 Cal. 387; *Illinois Central R. Co. v. McClelland*, 42 Ill. 355; *Field v. N. Y. C. R. Co.*, 32 N. Y. 339; *Bedell v. Long Island R. Co.*, 44 id. 367.

That same engine had previously set fires, on question of defective construction or repair. *Wharton on Ev. sec. 42*.

Proof that notwithstanding the prevailing dryness and strong winds an engineer unnecessarily used such an amount of steam as to force out fire from the smoke stack. *Atchison &c. R. Co. v. Huitt*, 1 Kan. App. 788.

Evidence sufficient to show that fire came from defendant's engines must be submitted to jury. *Baltimore &c. R. Co. v. Shipley*, 39 Md. 251.

This may also be done by showing facts that circumstantially lead to such conclusion; and in this regard the plaintiff is not confined to any particular engine. *Atchison &c. R. Co. v. Stanford*, 12 Kan. 354.

Gandy v. Chicago &c. R. Co., 30 Iowa, 420; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454; *Penn. R. Co. v. Stranahan*, 79 Pa. St. 405; *Annapolis &c. R. Co. v. Gantt*, 39 Md. 115; *Hoyt v. Jeffers*, 30 Mich. 181; *Kenney v. Hannibal &c. R. Co.*, 70 Mo. 243.

From the irruption of several fires following passage of trains. *Woodson v. Milwaukee &c. R. Co.*, 21 Minn. 60.

From exclusion of other causes for the fire. *Karsen v. Milwaukee &c. R. Co.*, 29 Minn. 12.

Woodson v. Milwaukee &c. R. Co., 21 Minn. 60.

From failure of defendant's employes to prevent fire spreading, as they could easily have done. *Kenney v. Hannibal &c. R. Co.*, 63 Mo. 99.

Rolke v. Chicago &c. R. Co., 26 Wis. 537.

From general infirm equipment and imperfect condition of engines on the railway. *Haley v. St. Louis &c. R. Co.*, 69 Mo. 614.

Evidence that sparks from defendant's locomotive set fire to plaintiff's property and uncontradicted evidence of the most improved spark arresters being used furnished a question for the jury in the following instances. *Brown v. Missouri &c. R. Co.*, 13 Mo. App. 462.

Sappington v. Missouri &c. R. Co., 14 Mo. App. 86; *Thompson v. Keokuk &c. R. Co.*, (Iowa) 89 N. W. Rep. 975; *Swanson v. id.*, id. 1088; *Preece v. Rio Grande &c. R. Co.*, (Utah) 68 Pac. Rep. 413.

It may be shown that at the time of the fire, fire was scattered by the defendant's engine or engines. *Diamond v. Northern R. Co.*, 6 Mont. 580.

From unusual cinder emissions, setting fires, even at a distance from the place of fire. *Penn. R. Co. v. Shanahan*, 79 Pa. St. 405.

Sheldon v. Hudson R. Co., 14 N. Y. 218.

This alone would not seem to be sufficient evidence of liability, and should only bear on the possibility of the engine's carrying and setting the fire at the distance involved. *Smith v. Old Colony R. Co.*, 10 R. I. 22.

Evidence that company's engines had on other occasions before or after the fire thrown fire as far as in the case in question, and that fires had resulted. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

Atchison &c. R. Co. v. Stanford, 12 Kan. 354; *Ross v. Boston &c. R. Co.*, 6 Allen, 87; *Sheldon v. Hudson River R. Co.*, 14 N. Y. 218; *Field v. N. Y. C. R. Co.*, 32 N. Y. 339; *Crist v. Erie R. Co.*, 58 N. Y. 638.

This might be proper as evidence, but would seem not to be sufficient in itself. *Lester v. Kansas City &c. R. Co.*, 60 Mo. 265.

That no spark arresters were used, which is *per se* negligence; when the omission would be likely to result in fires. *Milwaukee &c. R. Co. v. Kellogg*, 94 U. S. 469.

Anderson v. Cape Fear Steamboat Co., 64 N. C. 399.

The fact that the appliances were in good condition on the morning of the day when the accident happened and also four days afterwards did not rebut the presumption of negligence in a case where the engine traveled some 200 miles after the first inspection and before the fire. *Missouri Pacific R. Co. v. Texas R. Co.*, (La.) 31 Fed. Rep. 526.

From unlawful speed. *Martin v. Western &c. R. Co.*, 23 Wis. 437.

Brushberg v. Milwaukee &c. R. Co., 55 Wis. 106.

From trainmen throwing off burning sticks of wood. *Spaulding v. Chicago &c. R. Co.*, 33 Wis. 582.

From frequent setting of fires by defendant's engines. *Missouri Pacific R. Co. v. Kincaid*, 11 Am. & Eng. R. Cas. 83.

Whether railroad company was negligent in allowing weeds to grow on the right of way, which spread the fire, was for the jury in the following instances:

White v. M. &c. R. Co., 31 Kan. 280; *Gibbons v. Wisconsin &c. R. Co.*, 58 Wis. 335; *Atchison &c. R. Co. v. Dennis*, 38 Kan. 424; *Richmond R. Co. v. Medley*, 75 Va. 499.

IV. Insufficient Evidence of Defendant's Liability.

The fact that on a few occasions, unconnected with plaintiff's property, sparks larger than would go through the meshes of a proper arrester is not sufficient. *Flinn v. N. Y. Cent. R. Co.*, 142 N. Y. 11.

That a large volume of smoke and cinders were thrown off on a heavy up grade. *Flinn v. N. Y. Cent. R. Co.*, 142 N. Y. 11.

That fuel used was more likely to cause fires, as it is not obliged to use the safest fuel. *Collins v. New York Cent. &c. R. Co.*, 5 Hun, 494. *Baltimore &c. R. Co. v. Woodruff*, 4 Md. 242.

Mere setting fire by sparks from engine. *Collins v. N. Y. Cent. &c. R. Co.*, 5 Hun, 503.

Field v. N. Y. Cent. &c. R. Co., 32 N. Y. 339; *Sheldon v. Hudson R. Co.*, 14 id. 218; *McCully v. Clark*, 40 Pa. St. 399; *Small v. Chicago &c. R. Co.*, 50 Iowa, 338; *Bryan v. Fowler*, 70 N. C. 596.

This is based on the uncontroverted fact that cinders must issue from engines, and that too in considerable quantity; the draft of the engine depends upon an opening in the smoke stack; and where the opening is there cinders may issue. Any reported case that omits to show that the cinders were in size or abundance, out of proportion to those that could issue from an engine in requisite condition, however that fact be proved, is either deficient in the statement of the facts, or the decision is from the very nature of the case erroneous, provided negligence is predicated upon the mere emission of cinders.

See *Tanner v. N. Y. Cent. R. Co.*, 108 N. Y. 623; *Weidmer v. N. Y. E. R. Co.*, 114 id. 462; *O'Neil v. N. Y., O. & W. R. Co.*, 115 id. 579; *McCaig v. Erie R. Co.*, 8 Hun, 599.

Evidence of subsequent repair to prove that spark arresters were defective. *Louisville &c. R. Co. v. Malone*, 109 Ala. 509.

Proof merely of emission of sparks without proof of some defect or negligence. *Tinney v. Central &c. R. Co.*, 129 Ala. 523.

Failure to stop train and extinguish fires. *Bass v. Chicago &c. R. Co.*, 28 Ill. 9.

Statutory presumption of negligence from setting fire by locomotive is met by proof that all the appliances about the engine were in good order and that it was operated with care. *St. Louis &c. R. Co. v. Ludlum*, 6 Kan. App. 700.

First National Bank v. Lake Erie &c. R. Co., 65 Ill. App. 21.

Mere fact that fire was set by engines. *Sturgis v. Robbins*, 62 Me. 289.

McCully v. Clarke, 40 Pa. St. 399; *Bryan v. Fowler*, 70 N. C. 596; *Indianapolis &c. R. Co. v. Paramore*, 31 Ind. 143; *Ruffner v. Cincinnati &c. R. Co.*, 34 Oh. St. 96.

Absence of section hands, who were engaged elsewhere and failure to extinguish fire. *Baltimore &c. R. Co. v. Shipley*, 39 Md. 251.

Failure to keep men along the line to guard against and extinguish fires. *Id.*

As against evidence that much smoke and sparks were emitted, de-

fendant showed that frequent firing increases smoke, but not sparks, and that the engine was in proper condition. No recovery. *Williams v. Southern R. Co.*, 130 N. C. 116.

On the issue of communication, evidence of communication at other times and places held inadmissible. *Pennsylvania Co. v. Rossman*, 13 Oh. C. C. 111.

That after passage of train combustible material was on fire along line. *Reading &c. R. Co. v. Latshaw*, 93 Pa. St. 449.

See, however, *Karsen v. Milwaukee &c. R. Co.*, 29 Minn. 12.

(But otherwise if sparks might have done it, and the other causes were excluded. *Wiley v. West Jersey R. Co.*, 44 N. J. L. 247.)

V. Contributory Negligence.

The owner of an unfinished building is bound to use ordinary care, and whether it was contributory negligence to leave a door of such unfinished building open is for the jury. *Fero v. Buffalo & State Line R. Co.*, 22 N. Y. 209, aff'g judg't for pl'ff.

Negligence, in allowing manure of horse stable to accumulate and dry near track, was for jury. *Collins v. N. Y. Cent. &c. R. Co.*, 71 N. Y. 609, affirming 5 Hun, 499.

Location of premises near railway, and use of same to make black varnish with benzine, where the fire from engine set fire to vapor from boiling material was not contributory negligence. *Kalbfleisch v. L. I. R. Co.*, 102 N. Y. 520.

An adjoining owner was not negligent because he erected but 63 feet from the track a single roofed house and allowed dry leaves to accumulate along a break in the slope nearest the road. *Louisville &c. R. Co. v. Malone*, 116 Ala. 600.

If servants are employed in other departments of business, they have no duty to protect the particular property endangered. *St. Louis &c. R. Co. v. Hecht*, 38 Ark. 357.

Adjoining owner is not negligent from failure to keep premises adjoining track free from combustible material, such as hay, shavings, &c., usually attending the vocation of the owner. *Flynn v. San Francisco &c. R. Co.*, 40 Cal. 14.

Phila. &c. R. Co. v. Schultz, 93 Pa. St. 341; *Delaware &c. R. Co. v. Salmon*, 39 N. J. L. 299; *Fitch v. Pacific R. Co.*, 45 Mo. 322; *Palmer v. Mo. Pac. &c. R. Co.*, 76 id. 217; *Garrett v. Chicago &c. R. Co.*, 36 Iowa, 121; *Erd v. Chicago &c. R. Co.*, 41 Wis. 65.

"Contributory negligence" in fire statute permitting the defence, construed to have its ordinary meaning. *Hubbard v. New York &c. R. Co.*, 72 Conn. 24.

When the owner of a building exposes it to such a degree of danger that it will most probably be destroyed, he cannot recover, unless the party causing the injury is shown to have been guilty of greater negligence; and such owner, when he permits the windows to remain open and unglazed, and other openings in the building to remain unrepaired, so that the fire emitted from a passing engine is liable to be blown into it, is negligent, and if injury happen cannot recover unless the defendant's negligence be greater. *Great Western R. Co. v. Haworth*, 39 Ill. 346.

When the son and servant of the plaintiff was in a position to have prevented any damage from a fire, and made no effort to do so, it was an act of negligence on his part for which the plaintiff is answerable. *Illinois Central R. Co. v. McClelland*, 42 Ill. 355.

S. P., *Ross v. Boston &c. R. Co.*, 6 Allen 87; *Bryan v. Fowler*, 70 N. C. 596.

In Illinois it has been held that the land owners' duty respecting combustible material likely to be ignited is the same as that of the railway company's duty respecting such material within the right of way. *Illinois Cent. R. Co. v. Nunn*, 51 Ill. 78.

This would not apply to woodland. *Chicago &c. R. Co. v. Simosson*, 54 Ill. 504.

Spaulding v. R. Co., 30 Wis. 110.

Accumulation of combustible materials was not negligent under a statute permitting use of premises as if no railroad was near. *Cleveland &c. R. Co. v. Stephens*, 173 Ill. 430; aff'g s. c., 74 Ill. App. 586.

Plaintiff was not negligent in continuing the use of certain grounds as a straw-stack yard to a paper mill, which had been running for many years, though a switch track had lately been constructed near it. *Chicago &c. R. Co. v. American Strawboard Co.*, 91 Ill. App. 635.

Erection of a warehouse for the storage of dry hoop poles near the right of way, was not negligence. *Cleveland &c. R. Co. v. Scantland*, 151 Ind. 488.

See, also, *St. Louis &c. R. Co. v. Miller*, (Tex. Civ. App.) 66 S. W. Rep. 139; *Texas &c. R. Co. v. Rutherford*, 68 id. 825.

Leaving a building closed and unguarded, though knowing of the accumulation of combustible material on the adjoining right of way, was not contributory negligence. *Pittsburg &c. R. Co. v. Indiana Horseshoe Co.*, 154 Ind. 322.

Nor was failure to anticipate a railway's negligence and provide against it. *New York &c. R. Co. v. Grossman*, 17 Ind. App. 652.

See, also, *Mobile &c. R. Co. v. Stinson*, 74 Miss. 453.

Nor, failure to move cars out of the danger of fire negligently set by railroad company. *Chicago &c. R. Co. v. Ross*, 24 Ind. App. 222.

Failure of adjoining owner to use care in accumulating or allowing to accumulate combustible material near the track may constitute contributory negligence. *Garrett v. Chicago &c. R. Co.*, 36 Iowa, 121.

Chicago &c. R. Co. v. Simonson, 54 Ill. 504; *St. Joseph &c. R. Co. v. Chase*, 11 Kan. 47; *Smith v. R. Co.*, 37 Mo. 287.

Contributory negligence of the plaintiff may defeat recovery for injury to his property by fires through the negligence of another. *Central &c. R. Co. v. Hotham*, 22 Kas. 41.

Chicago &c. R. Co. v. Scates, 90 Ill. 586; *Chicago &c. R. Co. v. Pennell*, 94 id. 448; *Marquette &c. R. Co. v. Spear*, 44 Mich. 169; *Missouri &c. R. Co. v. Bartlett*, 69 Tex. 79; *Missouri &c. R. Co. v. Cornell*, 30 Kan. 35. But see *Stebbins v. Central R. Co.*, 54 Vt. 464.

Persons near railways must exercise greater care. *Kansas City &c. R. Co. v. Owen*, 25 Kan. 419.

Maintenance of a building of dry and inflammable material with defendant's consent was not contributory negligence. *Kansas City &c. R. Co. v. Chamberlain*, (Kan.) 60 Pac. Rep. 15; s. c., 61 Kan. 859.

See, also, *Louisville &c. R. Co. v. Samuel*, (Ky.) 57 S. W. Rep. 235; *Boston &c. Co. v. Bangor*, 93 Me. 52.

Where a farm was four miles away from railroad, with other farms and highways between, lack of a fire guard did not prevent recovery. *Union P. R. Co. v. McCollum*, 2 Kan. App. 319.

See, also, *Missouri &c. R. Co. v. Steinberger*, 6 Kan. App. 585.

Adjoining owner is only bound to use ordinary care in the erection of a building. *St. Louis &c. R. Co. v. Stevens*, 3 Kan. App. 176.

See, also, *Union P. R. Co. v. Ray*, 46 Neb. 750.

So, as to the stacking of grain $2\frac{1}{2}$ miles away without immediately surrounding stacks with fire guards. *Padgett v. Atchison &c. R. Co.*, 7 Kan. App. 736.

Light in a window facing the track in a hay barn remained out for a few days. Not *per se* negligence. *Wild v. Boston &c. R. Co.*, 171 Mass. 245.

See, also, *Louisville &c. R. Co. v. Richardson*, 66 Ind. 43.

To exempt railroad from statutory liability, plaintiff's negligence must be so gross as to amount to fraud. *Bowen v. Boston &c. R. Co.*, 179 Mass. 524.

Walker v. Missouri &c. R. Co., 68 Mo. App. 465.

It is not *per se* negligence to erect buildings near a chimney with a defective spark arrester. *Alpern v. Churchill*, 53 Mich. 607.

Contributory negligence is no defense to absolute statutory liability. *Matthews v. Missouri &c. R. Co.*, 142 Mo. 645.

See, also, *Peter v. Chicago &c. R. Co.*, 121 Mich. 324; s. c., 46 L. R. A. 224.

Not contributory negligence to allow roof of barn to be in a condition that made it more susceptible to fires. *Phila. &c. R. Co. v. Henderson*, 80 Pa. St. 182.

See *Ward v. Milwaukee &c. R. Co.*, 29 Wis. 144.

Nor from fire wood placed in right of way by contract with company. *Pittsburg &c. R. Co. v. Nelson*, 51 Ind. 150.

Nor for building on right of way by license of company. *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

But person should in such case use reasonable care to protect or save his property from a fire that threatens it, and cannot recover if his negligence contributed to the loss. *Doggett v. Richmond &c. R. Co.*, 78 N. C. 305.

Ingersoll v. Stockbridge &c. R. Co., 8 Allen 438; *Chicago &c. R. Co. v. Pennell*, 94 Ill. 448; *Small v. Chicago &c. R. Co.*, 50 Ia. 338. See *Briggs v. N. Y. C. R. Co.*, 72 N. Y. 26.

Not negligent to use a building on owner's land, although near the track, for ordinary purposes. *Burk v. Louisville &c. R. Co.*, 7 Heisk. 451.

Caswell v. Chicago &c. R. Co., 42 Wis. 193; *Toledo &c. R. Co. v. Maxfield*, 72 Ill. 95.

Owner of a barn 130 feet from the track is only required to use ordinary care for its protection. *Gulf &c. R. Co. v. Jagoe*, (Tex. Civ. Rep.) 32 S. W. Rep. 717.

Phila. &c. R. Co. v. Hendrickson, 80 Pa. St. 182; *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454.

Owner left cotton in open cars near a track where trains were frequently passing. Contributory negligence was for the jury. *Bennett v. Missouri &c. R. Co.*, 11 Tex. Civ. App. 423.

See, also, *Louisville &c. R. Co. v. Marbury Lumber Co.*, (Ala.) 28 South. Rep. 438; *Edwards v. Campbell*, 12 Tex. Civ. App. 237.

Negligence in leaving lumber on the right of way prevented recovery, though a railroad was grossly negligent in the operation of its trains. *Paris &c. R. Co. v. Nesbitt*, 11 Tex. Civ. App. 608.

Railroad company was not relieved, where the location of the lumber was for the convenience of both the shipper and the company. *Ann Arbor R. Co. v. Fox*, 92 Fed. Rep. 494.

Failure of plaintiff's well diggers in the vicinity to prevent the spread of fire was not chargeable to him, as that was not within the scope of their duties. *Antonio &c. R. Co. v. Adams*, (Tex. Civ. App.) 66 S. W. Rep. 578.

What is not contributory negligence. *King v. American Transportation Co.*, 1 Flipp. C. C. 1.

Pittsburg R. Co. v. Noel, 77 Ind. 110; Tacoma Lumber Co. v. Tacoma, 1 Wash. 12. Compare, Pa. R. Co. v. Gallentine, 77 Ind. 322.

Owner's negligence extending the loss prevents recovery for such increased injury. *Stebbins v. Central Vermont R. Co.*, 54 Vt. 464.

If owner, or his servant, refuse or neglect to save or protect property, no recovery. *Ward v. Milwaukee R. Co.*, 29 Wis. 144.

Chicago &c. R. Co. v. Pennell, 94 Ill. 448; Illinois Cent. &c. R. Co. v. McClelland, 42 id. 355.

Hay and shavings between building and under one of them, whose under side was exposed toward the track was for jury. *Murphy v. Chicago &c. R. Co.*, 45 Wis. 222.

VI. Proximate Cause.

The question is, what injury is the natural and ordinary result of the defendant's negligence? That a fire negligently communicated directly from a locomotive to a building would make the railroad company liable admits of no doubt. *Field v. N. Y. C. &c. R. Co.*, 32 N. Y. 339.

It was early decided in the state of New York that beyond this the damage was not the ordinary or natural result of the negligent act, and that if the fire extended from the house directly fired to a second, the wrongdoer would not be liable for the second house, *Ryan v. N. Y. C. R. Co.*, 35 N. Y. 210. But this last authority was not extended and was modified or distinguished in *Webb v. Rome &c. R. Co.*, 49 N. Y. 420, where it was held that when a railroad company, while a strong wind was blowing from its land to the adjoining woodland of the plaintiff, negligently dropped coals from its engine, which set fire to the tie, from whence the fire was communicated to inflammable material suffered to gather by the side of the track, and then spread to fences and on to the plaintiff's land, doing damage, the defendant was liable.

This decision rested upon the settled principle that one negligently creating or suffering a fire upon his own premises, which spreads thence on to the immediately adjoining premises of another and does damage, is liable therefor.

In *Pollett v. Long*, 56 N. Y. 200; *Ryan v. R. R. Co.*, *supra*, was again considered but did not deter the court from holding that where a dam gave way on account of the negligent way in which it was maintained, the wrongdoer might be found liable not only for the carrying away of the first dam below, but also the second dam, even though the volume of

water was increased by the giving way of the second dam so as to contribute to the injury to the third dam.

In *Lowery v. M. R. Co.*, 99 N. Y. 158, it appeared that fire fell from the defendant's elevated railroad upon a horse and driver in the street below. The horse was frightened and ran away, and the driver attempted to drive him against the curbstone to arrest his progress, and the wagon passed over the curbstone, threw the driver out, and the plaintiff on the sidewalk was run over and injured. The recovery against the defendant was sustained. Again the case of *Ryan v. R. Co.*, was considered and distinguished and its authority seemingly diminished.

In *O'Neill v. N. Y., O. & W. R. Co.*, 115 N. Y. 579, it appeared that sparks from a locomotive passing on the defendant's road set fire to combustible material allowed to accumulate on the defendant's land; that the fire spread to the lands of one C., and from thence to the plaintiff's lands. A recovery was maintained, and it was held that the objection that the land of the third person intervened between the plaintiff's wood land and the defendant's road did not establish that the damage was too remote, but rather that the destruction of the plaintiff's property was the natural and direct effect of the first firing. Whatever authority remains in the *Ryan* case was denied in the opinion of the court in the case last cited.

In *Read v. Nichols*, 118 N. Y. 224, the authority of the *Ryan* case was apparently and measurably revived. It appeared that a strong wind carried sparks from the defendant's smoke stack *past* the buildings in question to the roof of a building 280 feet away. There was no fire apparatus in the village and no means of reducing the fire. *The wind changed its course*, communicated the fire to the plaintiff's barn, then to a building north of the one first set on fire, and thence the fire spread to and destroyed another building. The court charged that, as to the last building, the damage was too remote, and the jury found a verdict for the defendants. The appellate court sustained the charge.

In this case it was said, in the opinion, respecting the *Ryan* case, "It has never been overruled, and the rule still applies in this state that, when facts are proved, the court may, under some circumstances, determine, as a matter of law, whether the act complained of is the immediate or remote cause of the injury. * * * It may be said that the rule laid down in the *Ryan* case has been impaired somewhat by the decisions referred to, but it cannot be contended that it has been so far modified as to permit a holding that the burning of the Main street building was the ordinary and natural result of the act complained of; if it could be so held, then, however many buildings might be burned, if the fire started from one building and spread to another, the negligent party

would be liable to respond in damages to every owner, even if, as in this case, the course of the wind had so changed as to drive the flames and sparks from the burning buildings in the direction other than was possible at the moment of the performance of the wrongful act."

See *Reiper v. Nichols*, 31 Hun, 491.

When the fire from a locomotive was first carried to a barn, and thence communicated to a hotel about forty feet distant therefrom, the court charged that, to justify a verdict for the destruction of the hotel, the jury must find "that the same was destroyed by reason of the fire being communicated thereto directly from the engine, or without the assistance of other agencies." The Court of Appeals held that this properly submitted to the jury, whether the burning of the hotel was the natural and direct result of the sparks from the engine, and, that the principle of the *Ryan* case "ought not to be applied to other facts." *Frace v. N. Y., L. E. & W. R. Co.*, 143 N. Y. 182, rev'g judg't for pl'ff.

But in *Martin v. N. Y., O. & W. R. Co.*, 62 Hun, 181, it was held that when the course of a fire was direct, with no change of wind, the company was liable for a fire a mile and a half distant from the track.

The extension of the fire by an extraordinary wind would not be ascribed to the company. *Toledo &c. R. Co. v. Mathersbaugh*, 71 Ill. 572.

A sudden gust of wind in the opposite direction from that in which it was when the fire was set was not an intervening agency. *Indiana &c. R. Co. v. Hawkins*, 81 Ill. App. 570.

Company was liable, where the direction of the wind toward plaintiff's property had not changed from the start. *Chicago &c. R. Co. v. Ross*, 24 Ind. App. 222.

So, where the wind was only an ordinary one. *Chicago &c. R. Co. v. Lesh*, 158 Ind. 423.

And, where fire by its natural progress would have spread to other premises. *Pittsburg &c. R. Co. v. Iddings*, 28 Ind. App. 504.

Contributory negligence of owner of building first burned in not stopping a fire, is not defense for burning of a second building from communication with first building. *Small v. Chicago &c. R. Co.*, 55 Iowa, 582.

See, also, as to negligence of third person, *Johnson v. Chicago &c. R. Co.*, 31 Minn. 57.

Contributory negligence, to be a bar to statutory liability, must contribute as a proximate cause to the injury. *Union P. R. Co. v. Eddy*, 2 Kan. App. 291.

Piling wood near the right of way did not prevent recovery, where the railroad company had knowledge of its existence and of the accumula-

tion of dry grass on its right of way adjoining it. *Boston Excelsior Co. v. Bangor &c. R. Co.*, 93 Me. 52; s. c., 47 L. R. A. 82.

Railway company is liable for fire caused by its negligence, whether carried through the air or along the ground. *Higgins v. Dewey*, 107 Mass. 494.

Defendant is liable for injury to property which is not itself abutting on the right of way, where fire is communicated to it through property which is. *Alabama &c. R. Co. v. Barrett*, 78 Miss. 432.

See, also, *Chicago &c. R. Co. v. Burden*, 14 Ind. App. 512.

When fire is communicated indirectly, it is for the jury to determine whether injury was the natural result of defendant's negligence. *Clemens v. Hannibal &c. R. Co.*, 53 Mo. 366.

Annapolis &c. R. Co. v. Gantt, 39 Md. 115; Atchison &c. R. Co. v. Bales, 16 Kan. 262; Perry v. So. Pacific R. Co., 50 Cal. 578; Delaware, Lack. &c. R. Co. v. Salmon, 40 N. J. L. 299; Lehigh Valley R. Co. v. McKim, 90 Pa. St. 122; Milwaukee &c. R. Co. v. Kellogg, 94 U. S. 469; Toledo &c. R. Co. v. Mathersbaugh, 71 Ill. 572.

As to fire communicated by burning oil carried on flowing water, see *Kuhn v. Jewett*, 5 Stewart, (N. J.) 647.

Hoagg v. Lake Shore &c. R. Co., 85 Pa. St. 293.

But when new agency, like sparks from a building fired are carried by wind directly to a building a hundred rods away, the fire from railway was not the proximate cause. *Toledo &c. R. Co. v. Mathersbaugh*, 71 Ill. 572.

The continuance of liability may be broken by an interruption of the fire by apparent exhaustion or extinguishment, or negligence of persons engaged in extinguishing it, so that its renewed continuance cannot be ascribed to the first cause. *Doggett v. Richmond &c. R. Co.*, 78 N. C. 305.

But it has been sometimes, and, in case facts are not in dispute, should be, treated as a question of law. *Hoag v. Lake Shore &c. R. Co.*, 85 Pa. St. 293.

The acts of defendant's servants in setting the fire and allowing it to escape from the premises was the proximate cause of injury and not plaintiff's failure to enter right of way and extinguish it. *Texas &c. R. Co. v. Blum Land Co.*, (Tex. Civ. App.) 49 S. W. Rep. 253.

Company is liable, although, before reaching plaintiff's property, fire passed over intervening land, or communicated therefrom, or was communicated, directly or indirectly, by wind, inflammable matter or other natural means or agency. *Kellogg v. Chicago &c. R. Co.*, 26 Wis. 222.

Atchison &c. R. Co. v. Stanford, 12 Kan. 354; *Longaburgh v. Va. City &c. R. Co.*, 9 Nev. 271; *Poeppers v. Mo. &c. R. Co.*, 77 Mo. 715; *Del., L. & W. R. Co. v.*

Salmon, 10 Vroom. 299; *Pearley v. Eastern R. Co.*, 98 Mass. 414; *Burlington &c. R. Co. v. Westover*, 4 Neb. 288; *Troxler v. Richmond &c. R. Co.*, 74 N. C. 377; *Hoyt v. Jeffers*, 30 Mich. 181; *Doggett v. Richmond &c. R. Co.*, 78 N. Y. 305; *Toledo &c. R. Co. v. Maxfield*, 72 Ill. 95; *Pa. &c. R. Co. v. Lacey*, 89 Pa. St. 458; *Annapolis &c. R. Co. v. Gantt*, 39 Md. 115.

A fire negligently started by the defendant spread to plaintiff's house. Defendant was liable although the fire first caught in shavings negligently left by a third person, and although the city was negligent in not arresting the fire. *Atkinson v. Goodrich &c. R. Co.*, 60 Wis. 141.

VII. Cases in New York.

In an action against a railroad company, to recover the value of a building which was burnt, and which is alleged to have been set fire by sparks from one of the defendants' engines which passed shortly before the fire was discovered, and is claimed to have been carelessly managed and unskillfully constructed, evidence that engines of the company, passing near that place on other occasions, emitted sparks and coals, which fell further from the track than the building in question, is competent, after the plaintiff has given evidence tending to exclude the probability that the fire was communicated by any other means. *Sheldon v. H. R. R. Co.*, 14 N. Y. 218, rev'g nonsuit.

From opinion.—"It was proved that, about twenty-five minutes before the fire was discovered, a train of cars of the defendants, drawn by a locomotive engine called the Oneida, passed the place. On the first floor of the building there was a parcel of shavings and a quantity of lumber, and some of the glass in the windows of that story had been broken. As I understand the testimony, the place where the fire was first seen was on this floor, and not far from one of the windows. Having proved these facts, and that the day on which the fire took place was windy, the direction of the wind being toward the building, and the persons in charge having sworn that no person, to their knowledge, had been in it during the day, the plaintiff proposed to prove, by a witness who lived close to the railroad and about one-fourth of a mile from the building, that shortly before it was burned he had seen sparks and fire thrown from the engines used by the defendants in running their trains through the witness's premises, a greater distance than this building stood from the track of the railroad, and that he had picked up from the track, after the passage of the trains, lighted coals more than two inches in length. The plaintiff also gave evidence which, as his counsel insists, tended to show that the engines used by the defendants lacked some apparatus which was in use upon some other locomotive engines, and which rendered the latter less liable to communicate fire to substances at the side of the road than those which were without that apparatus."

In the last case one judge argued from the standpoint that the plaintiff could not designate the particular engine that set the fire and hence the evidence was admissible to show. (1) that engines on its road could throw sparks the necessary distance and set the fire, and (2) that the amount and size of fire dropped imputed negligence; another judge, from the standpoint that a designated engine

caused the fire, argued that the evidence was admissible to show that the engine did cause the fire, on the ground that the construction of the engines was alike, and would throw out the same amount of fire. But that would depend upon uniformity of management and repair. Because one engine throws excessive sparks it could not be logically argued that all did. The evidence seems admissible to show that some engine might have negligently done it, but not that a particular engine did it negligently because at some time, somebody had seen another engine drop coals.

A railroad company running an engine through a village where wooden buildings are so near the track as to be exposed to fire from the sparks, is bound to a higher degree of care than when running in the open country.

When the exposure of the buildings is increased by reason of a wind blowing towards them from the engine, which is standing at rest upon the track, the corporation is responsible for the utmost vigilance and care.

Under such circumstances, and after the law had been stated in effect as above, an instruction to the jury that the plaintiff could not recover if the engine was in good order, of proper construction, and used with ordinary care, was properly refused.

The owner of an unfinished building thus exposed is bound to the use of such care as a man of ordinary prudence would employ under the circumstances; but does not forfeit his right to redress for the wrongful negligence of another, because he might have escaped injury by a higher vigilance on his own part.

Whether the leaving a door partly open, through which sparks from the engine flew—such door being in a part of the house then in course of construction and under the hands of the builders—was culpable negligence on the part of the owner or his servants, is a question, which may properly be referred to the jury as one of fact. *Fero v. The Buffalo & State Line Railroad Co.*, 22 N. Y. 209, aff'g judg't for pl'ff.

No presumption of negligence from mere proof that fire was communicated from the locomotive.

In an action against a railroad corporation for damages occasioned by a fire apparently originating from coals on the track of the road over which defendant's locomotives had been passing just previously to the fire, it is competent to prove that its locomotives in passing over said road, have on former occasions, dropped coals at or near such place, as bearing on both branches of proof required of plaintiff, viz.: the cause of the fire, and defendant's negligence.

Where it is in evidence that engines properly constructed and in good order will not drop coals upon the track, the dropping of coals from defendants' engines upon the track is, of itself, evidence of negligence sufficient to charge the defendants with negligence.

Under such circumstances, the burden of proof is upon the defendants to show that they were not guilty of negligence. *Field v. The New York Central Railroad Co.*, 32 N. Y. 339, aff'g judg't for pl'ff.

It should be observed that cases involving the dropping of coals are not necessarily applicable to a case involving the emission of cinders. Coals can be contained in the ash pan without interference with the operation of the engine. Cinders cannot be contained in the smoke stack without stopping the draft of an engine and this would prevent operation.

Where goods, having been shipped upon the defendant's railway under a bill of lading containing a clause releasing it from liability "for damage or loss to any article from or by fire or explosion of any kind," were destroyed by fire kindled by sparks from the locomotive hauling them, —Held, that such clause did not exempt the defendant from liability for loss by fire occasioned by the omission to apply to the locomotive any apparatus known and actually in use, which would prevent the emission of sparks; but, that the charge that, if the jury should find "that a locomotive could be so constructed as to prevent the emission of sparks, and thereby secure combustible matter from ignition, and the defendant neglected so to construct his locomotive, they should find for plaintiff, because there was a duty upon the defendant to use every precaution and adopt all contrivances known to science to protect the goods intrusted to it for transportation" was error. *Steinweg v. The Erie Railway Co.*, 43 N. Y. 123, rev'g judg't for pl'ff.

From opinion.—"And here arises the principal question in this case. The rule of law is, that the appellant was guilty of negligence, if it adopted the most approved modes of construction and machinery in known use, in the business, and the best precautions in known practical use for securing safety. If there was known and in use any apparatus which, applied to an engine, would enable it to consume its own sparks, and thus prevent the emission of them, to the consequent ignition of combustible property in the appellant's charge, it was negligence, if it did not avail itself of such apparatus. But it was not bound to use every possible prevention which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction. 2 Redfield on Railways, 3d ed., 189, chap. 24, sec. 1, 176; *Ford v. London and Southwest. R. Co.*, 2 Foster and Finlayson, Nisi Prius R., 730; *Hegeman v. Western R.*, 3 Kern. 9; *Field v. N. Y. C. R.*, 32 N. Y. 339. * * *

There must exist, not only the scientific power to make locomotives which will consume their own smoke and sparks, but such locomotives must have been made by skill and put into practical use, and the use have become known, before a railway company can be charged with negligence in not putting them on to its road."

In an action to recover damages for setting fire to and burning the plaintiff's house by the negligent use of a steam engine, evidence that a screen, formerly used to cover the smoke pipe, had been removed, and that while so removed, large burning cinders, which could not have passed the screen, were thrown to considerable distances, and fences and build-

ings ignited thereby, is sufficient to sustain a verdict establishing negligence, notwithstanding the fact that it is not unusual to use screens upon such engines. It is sufficient, if the evidence tended to show that the engine in question could not safely be used without one. *Bedell v. The Long Island R. Co.*, 44 N. Y. 367, aff'g judg't for pl'ff.

In this case the thought is present that, had there been a proper screen, only evidence of emission of sparks, too large to pass a proper screen could impute negligence.

There was an extreme drought and a strong wind from the defendant's road, towards the woodland, and coals negligently dropped from the engine, set fire to the ties. The fire was carried to an accumulation of dry weeds, thence to the fence and thence to the woods. The jury should pass on the defendant's negligence both as to dropping the coals and leaving the weeds. *Webb v. R., W. & O. R. Co.*, 49 N. Y. 420, aff'g 3 Lansing, 453, and judg't for pl'ff.

In an action against a railroad company to recover for buildings destroyed by fire, alleged to have been occasioned by *coals* from defendant's engine, after testimony has been given tending to exclude the probability that the fire originated from another source, evidence that defendant's engines passing on other occasions emitted sparks and *coals*, which fell further from the track than the building destroyed, is proper.

It is not required that plaintiff's preliminary evidence should exclude all possibility of another origin, or that it be undisputed. It is sufficient if it presents a question for the jury.

Plaintiff was allowed to prove, under objection, that engines passing on defendant's road, upon other occasions, emitted sparks and coals which fell further from the track than the barn. Held, no error, as above, citing *Shannon v. Hudson River R. Co.*, 14 N. Y. 218; *Hinds v. Barton*, 25 id. 544. This seems to have been admitted as to the cause of the fire. *Crist v. The Erie Ry. Co.*, 58 N. Y. 638, aff'g 1 N. Y. S. C. (T. & C.) 435.

If by coals reference in any case be to fire from the ash-pan, it would not seem to be correct to allow evidence of cinders to prove a case depending upon coals, and so the converse of this.

Cinders and coals are governed by different rules, are different in their nature, and happenings from the one prove nothing as to the other.

Fire fell from a locomotive on defendant's road upon a horse attached to a wagon in the street below, and upon the hand of the driver. The horse became frightened and ran away, the driver attempted to drive him against a curb-stone to arrest his progress; the wagon passed over the curb-stone, threw the driver out and plaintiff, who was on the sidewalk, was run over and injured. In an action to recover damages for alleged negligence causing the injury, the court charged, in substance, that if the jury believed the coal fell through negligence on the part of the defendant, causing the horse to become unmanageable

and run against plaintiff inflicting the injury, defendant was liable and refused to charge that if the accident occurred through the driver's error of judgment in endeavoring to obtain control of the horse, plaintiff cannot recover.

Held, no error; that so long as the injury was chargeable to the original wrongful act of the defendant, it was liable; that the action of the driver in view of the exigency of the occasion, whether prudent or otherwise, might be considered as a continuation of the original act, and so that act was the proximate, not the remote cause of the injury; also, that the injury was a natural and probable consequence of defendant's negligence. *Lowery v. The Manhattan R. Co.*, 99 N. Y. 158, aff'g judg't for pl'ff.

Distinguishing *Ryan v. N. Y. C. R. Co.*, 35 N. Y. 210; *P. R. R. Co. v. Kerr*, 62 Pa. St. 353.

Searles v. Manhattan Ry. Co., 101 N. Y. 661.

From opinion.—"There was sufficient evidence to show that the plaintiff's eye was injured by a cinder lodged therein; that the cinder came from a locomotive upon defendant's railway, and that the plaintiff was free from contributory negligence. But there was an utter failure of evidence to show that the accident occurred from any fault, negligence or unskillfulness on the part of the defendant. The defendant had the right to operate its railway over the street by steam, and to generate steam by the use of coal, and any damage necessarily caused by the careful and skillful exercise of its lawful rights could impose no obligation upon it. To maintain his action, therefore, the plaintiff was bound to give evidence legitimately tending to show that the damage to his eye was caused in consequence of some negligence or unskillfulness chargeable to the defendant.

The undisputed evidence shows that all the appliances used upon defendant's locomotives to prevent the escape of sparks and cinders were skillfully made and were the best known. There was no evidence that any of such appliances were defective or out of order. On the contrary, the proof tended to show that they were in order. The mere proof of the escape of cinders was not sufficient, as the evidence showed that their escape could not be avoided and was inevitable. According to the proof cinders from one of defendant's locomotives could come only from the smokestack or ash-pan. There is no claim that the defendant is liable for this accident if the cinder came from the smoke-stack; but the claim is that it came from the ashpan because it was out of repair. But there was no evidence that the ashpan was out of repair, or that the cinder came from it."

One whose premises adjoin a railroad is not chargeable with contributory negligence simply because he took out of doors and used upon his premises an inflammable article necessary to be used in the business carried on on the premises, to which, through the negligence of the railroad company, fire was communicated by sparks from one of its engines; the mere location of the road and its use does not operate as a prohibition upon certain branches of industry in its vicinity, which may be endangered by such use. *Kalbfleisch v. The Long Island R. Co.*, 102 N. Y. 520, aff'g judg't for pl'ff.

From opinion.—"The plaintiff was the owner of certain buildings in Brooklyn, adjoining the tracks and station of the defendant, which he leased to one Lewis Kupper, who used them as a varnish factory. In September, 1882, the latter was engaged in making black varnish and had commenced thinning down with benzine. It was giving off vapor. At that time defendant's train stopped at the station to let off its passengers, 'when,' according to one witness, 'she started off again and commenced to puff,' and he says, 'I saw a flash come from the engine right into the kettle and it was all on fire;' 'the train had just got in front of our place when it caught on fire.' 'I looked up,' he says, 'and the vapor was afire.' This was about one o'clock. The fire on plaintiff's premises had been extinguished at eleven, and there was no fire in the neighborhood, except as it was emitted from the locomotive. That its condition permitted this escape was established by its engineer, who testified 'that the wire netting' of the smoke-stack was out of order; 'it was,' he says, 'split lengthwise of the smoke-box about a foot and a half, and through working the engine it opened out and made a space there, I should say, very near a foot wide and a foot and a half long—open in the netting; this netting is supposed to be a spark arrester; it is right underneath the smoke-stack on the inside of the smoke-box; that was the only thing there was there to arrest the sparks; I know of this engine having set fire to lots of fences and one thing and another along the road that I know of; I knew it would set fire to fences about the beginning of September or the latter part of August of the same year.'

On cross-examination by defendant's counsel, he testified that a week before the fire he reported this break when it first occurred to the master mechanic, and after the fire it was patched up.

'The effect of such a hole as I have described would be that all the sparks would come through the flues and would escape through the opening, where if the vent was closed the sparks would be arrested; I think it would increase the amount of sparks thrown largely—more or less; it increased the sparks coming out of this engine.'

This action was brought to recover damages for the destruction of plaintiff's barn, which, he alleged, was set on fire by coal escaping from the smoke-stack of a locomotive passing on defendant's road adjoining plaintiff's premises.

Defendant claimed that the fire was caused by one of two locomotives passing about the time of the fire, both of which were properly provided with fire screens. It appeared, however, that other engines passed a short time prior to the fire, through the fire screens of which holes had been cut to make a better draft. The court held the question was one of fact for the jury, and that defendant was properly found guilty of negligence. *Seeley v. N. Y. C. & H. R. R. Co.*, 102 N. Y. 719, aff'g judg't for pl'ff.

This action was brought to recover the value of certain goods belonging to plaintiff delivered to defendant, to be transported to Rome, which, after their arrival at home, and while still in the freight car, were destroyed by fire communicated to the car from the freight depot near which it was standing. *Tanner v. N. Y. C. & H. R. R. Co.*, 108 N. Y. 623, aff'g judg't for pl'ff.

From opinion.—"Whether the fire which burned the freight house and the car containing the plaintiff's goods standing on the adjoining track, was caused by sparks thrown from a defective engine; and, Second, Assuming that the engine from which the fire was communicated was in good order, whether the defendant was negligent in leaving the plaintiff's goods in the car exposed to the danger of fire from the burning of the freight house.

The evidence on the part of the plaintiff tended to show that the freight house was fired by sparks 'half the size of a walnut,' thrown from the engine of an east bound train upon the roof of the freight house, and that the fire ran down the roof in a number of places 'like a stream of water.'

The defendant gives no evidence as to the condition of the engine on this train, but apparently assuming that the fire was set by an engine on a west bound train, which passed the freight house a few minutes after the east bound train, introduced evidence to show that the smoke stack and spark arresting arrangements of the west bound train were perfect, and that the fire could not have been set by sparks therefrom * * *."

"If, however, the defendant is exempted from the imputation of negligence in respect to the condition of the engine or the management of the train, nevertheless it was bound to protect the plaintiff's goods from unreasonable hazard from extrinsic dangers, and it was for the jury to say whether this obligation was discharged in this case. The day was windy, the freight house was a wood building, standing close to the track, with a sloping shingle roof covered with moss, and so constructed that sparks from a passing engine, when the wind was in the east or south, fell upon it. The roof had frequently, before the occasion in question, taken fire from sparks from passing locomotives, which was known to the defendant. The roof was very dry and highly inflammable; a high wind was blowing from the south-east, and the car containing the plaintiff's goods was left standing directly in the path of the flames, which consumed the freight house."

(This case involves the relation of a common carrier to its shipper, and is not entirely applicable to loss by fire by one not standing in that relation.)

Carrier is liable for the burning of cotton caused by defective locomotive. *Railway Co. v. Fire Association*, 55 Ark. 163.

In an action to recover damages for injuries alleged to have been received by plaintiff through defendant's negligence, plaintiff's evidence tended to show that a hot coal, not as large as a pin head, from an engine on defendant's elevated road, fell into her eye, but there was no direct evidence that the locomotive from which it came was defective in design, construction, condition or operation, or that it was not supplied with the best known appliances for arresting sparks and cinders; nor was there evidence that defendant knew or had any means of identifying the locomotive complained of. It did not appear that *more than one coal came from the engine on this occasion*, or that coals were emitted from any of its locomotives on other occasions. It was claimed that, in the absence of explanatory evidence by defendant, proof of the falling of the coal was sufficient to authorize the jury to infer that the defendant negligently used a locomotive improperly designed, defectively constructed, out of repair or negligently operated.

Held, untenable; and that the evidence did not authorize a verdict for the plaintiff; that defendant was not bound to assume the burden of showing the condition of all its locomotives in use on that particular

part of its line during the afternoon in question. *Widemer v. New York Elevated Railroad Co.*, 114 N. Y. 462, rev'g 41 Hun, 284, and judg't for pl'ff.

Distinguishing *Ruppel v. Manhattan R. Co.*, 13 Daly, 11; *Burk v. Manhattan R. Co.*, id. 75; *McNaier v. Manhattan R. Co.*, 46 Hun, 502; 4 N. Y. Supp. 310.

In an action to recover damages for injuries to certain woodlands belonging to plaintiff, lying near defendant's road, which the complaint alleged had been set on fire through defendant's negligence, it appeared that sparks from a locomotive passing on defendant's road set fire to brush wood, old rails, and other combustible materials, which it had allowed to accumulate on its lands; that the fire spread to the lands of one "C." and from thence to plaintiff's lands. A motion for a nonsuit was denied. Held, no error; that the fact sparks were scattered upon defendant's roadway *in such quantities as to endanger property on abutting premises*, raised an inference that defendant's engines were improperly constructed or managed; also, that conceding the escape of fire from an engine is inevitable, *a railroad company is bound to remove combustible material from its path or to prevent such an accumulation thereof by the side of its tracks as will, in consequence of fire falling upon it, endanger the property of others.*

Also, held, the objection that land of a third party intervened between plaintiff's woodland and defendant's road, and so the damage complained of was too remote, not having been raised on trial, could not be urged on appeal; but that the fact was not decisive upon the question, other circumstances would control; and, as the result was to have been anticipated from the moment fire dropped upon defendant's premises, and the destruction of plaintiff's property was the natural and direct effect of the first firing, the damages were not remote. *O'Neill v. N. Y., O. & W. R. Co.*, 115 N. Y. 579, aff'g 45 Hun, 458, and judg't for pl'ff.

Distinguishing *Ryan v. N. Y. C. R. Co.*, 35 N. Y. 210.

From opinion.—"Immediately after the passage of the 'express freight' through a tunnel, about twelve o'clock, or a little after, smoke was seen rising from several places on the land of the company, close to the track and along its side. The fire at once began to run and spread rapidly 'onto the land of one Carley,' and from there to the lands of the plaintiff. By the side of the defendant's land were cut brush and leaves and old ties piled up. Before the train came along there was no smoke or other appearance of fire. Sparks were seen coming from the engine; one witness says, 'probably, and as I judge, as large as a pea.' Another says, 'I saw the train when it came out of the tunnel,' and 'she set fire right at the approach of the tunnel,' the engine was throwing large volumes of smoke and sparks; they seemed unusually large; 'as large as walnuts; she set fire three or four times to this old brush, old bark and stuff that falls off the train, and brush they cut down and left there.' * * *

If, as the defendant claims, the escape of fire from an engine is inevitable and

a necessary consequence of its profitable employment, the defendant was, at least bound to move combustible material from its path, or, at least, prevent such accumulation of rubbish as would, in consequence of fire falling upon it, be the cause of danger to another's property. *Webb v. R., W. & O. R. Co.*, 49 N. Y. 420. The fire on the track was its fire as much as if confined in the engine, and it owed a like duty to see that it did no harm. * * *

The fact that land of a third party intervened between the woodland of the plaintiff and the defendant's road cannot be doubted, but that alone is not decisive. Other circumstances would control, and, if not already apparent in evidence, we cannot say that further testimony would not have shown that the result was to have been anticipated from the moment fire dropped upon the defendant's premises, and that the destruction which happened to the plaintiff's property was the natural and direct effect of the first firing. If so, it was not remote. *Vandenburgh v. Truax*, 4 Denio 464; *Pollett v. Long*, 56 N. Y. 200; *Webb v. R., W. & O. R. Co.*, *supra*.

Ryan's case, 35 N. Y. 210, relied upon by the defendant, is sufficiently commented upon in the last two cited cases, and is not analogous to this case as now presented. The origin of the fire, upon the evidence and the verdict of the jury under proper instructions from the court, is to be attributed to the defendant, and, to have been occasioned by its negligence. By its negligence, therefore, the fire which burned the plaintiff's woodlands was set in operation. The fact that it reached those woodlands by first burning the brush and other articles on other land, furnishes no new cause to which the injury can be ascribed."

It appeared from the evidence that a strong wind carried sparks from a smoke-stack belonging to defendants, past the buildings in question to the roof of a building 280 feet distant from the smoke-stack, setting it on fire; the village in which the buildings were located had no fire apparatus, and there was no means of reaching the fire; after the building commenced to burn, the wind died down and changed its course; the fire communicated to another building north and thence across the street to a barn of plaintiff, then a building north of the one first set on fire was burned, and from it the fire spread to and destroyed the building as to which the testimony was excluded. Held, that the ruling of the court was proper; that the alleged negligent act was not the proximate cause of the loss. *Read v. Nichols*, 118 N. Y. 224, aff'g judg't for def'ts.

Distinguishing *Webb v. R., W. & O. R. Co.*, 49 N. Y. 420; *Pollett v. Long*, 56 id. 200; *Lowery v. M. R. Co.*, 99 id. 158.

"B," plaintiff's intestate, was killed by the explosion of a powder house alleged to have been caused by sparks escaping from one of defendant's engines. In an action to recover damages, the negligence charged was in not using the safest engines, *i. e.*, those the best calculated to prevent the escape of sparks. These facts appeared: The engine and its appliances were in perfect condition; it was of a kind formerly in general use. The mill had been in the same location for many years,

and the defendant's road had been operated since 1876 with the same kind of locomotives, without causing injury to the mill. Another kind had come into general use, *but there was no proof showing that they were safer or less likely to cause fire*; it simply showed that they emitted fewer but larger sparks. This new kind was brought into use, not because they were considered safer, but because of greater efficiency and of economy in the use of fuel. Held (Andrews, Ch. J., O'Brien and Maynard, JJ., dissenting), that the evidence failed to show negligence on defendant's part and so was insufficient to sustain a verdict for plaintiff. *Babcock v. The Fitchburg Railroad Co.*, 140 N. Y. 308, reversing 67 Hun, 469 and judg't for pl'ff.

From opinion.—"The engine which is charged with this explosion was a diamond stack, and it was such as had been prior to about the year 1879, in universal use upon railroads in this country. About that time extension front engines began to come into use, and in 1889, at the time of this accident, there is evidence tending to show that they were coming into general use. In a diamond stack engine the cinders pass through the flues into the smoke-box and then are carried by the exhaust steam up the smoke-stack against an inverted cone which acts as a deflector; and as they are deflected they are thrown up again and again until they are rendered quite small, when most of them are thrown through the wire netting across the smoke-stack above the inverted cone. This netting has four meshes to the square inch. By the operation of the deflector the tendency is to throw the sparks out of the smoke-stack to the sides of the road. In an extension front engine there is a large smoke-box extending in front of the smoke-stack into which the largest share of the sparks are thrown. There they are agitated by the steam and some of them are thrown out of the smoke-stack through a wire netting which has from two to two and a half meshes to the square inch. The sparks which pass into the smoke-box accumulate there in large quantities and are from time to time, when the engine stops, removed. Fewer sparks are emitted from the extension front engines, but they are larger, and from such engines the sparks are thrown directly upwards. No witness testified that the extension front engines were safer or less liable to set fires than the diamond stack. The only fact from which any inference can be drawn as to the comparative safety of the two engines is that in the diamond stack engine more sparks are emitted, but they are smaller. The plaintiff seeks to charge the defendant with negligence solely upon the ground that it continued to use the diamond stack engines, and had not converted them into extension fronts, the proof showing that the engine in question was in perfect condition, and that all the appliances of the diamond stack were in perfect order. To maintain her action she was bound at least to show that the extension front engines were safer and less liable to cause fires along the railroad than the diamond stack. This, we think, she failed to do. She could have proved, if her claim be well founded, by firemen, engineers, railroad superintendents and mechanics that in the operation of railroads the extension front engines are less liable to cause fires than the diamond stack engines. Upon this point there must be experience and observation among railroad men, and there should be some proof upon the subject from which a jury could find the facts in reference to the comparative safety of the two kinds of engines.

But still further, there is no proof in this case that the extension front engine was invented or brought into use because it is safer or less liable to set fires than the diamond stack. All the witnesses who spoke upon the subject testified that the purpose of the extension front was to make the engine more efficient by giving more draft, and for economy in the use of coal.

Finch and Gray, JJ., concur, with Earl, J., for reversal. Peckham, J., concurs with Earl, J., on second ground, and dissents from first ground of opinion."

A railroad company may not be made liable for the unavoidable or usual consequences, to adjacent property of the proper operation of its road.

Where a building upon adjacent property is destroyed by fire, caused by sparks escaping from passing engines, to make the company liable for the loss, negligence in the management or condition of the engines must be proved.

It is the duty of the company to avail itself of the best mechanical contrivances and inventions in known practical use which are effective in preventing the burning of private property by the escape of sparks and coals from its engines; but this duty is limited to such contrivances as have been tested and put in use. *The company is not bound at once to introduce a new appliance which it is claimed will have the effect to make its engines safer in the respect mentioned; it is entitled to a reasonable time for trial and experiment, and to make the necessary changes.*

In an action to recover damages for injuries to and the final destruction of a building on plaintiff's premises which adjoined defendant's road these facts appeared: In 1874 defendant laid down a new track, which came within about three feet and a half of plaintiff's building. There was a steep grade in defendant's road where it passed plaintiff's lot, and engines, because of the heavy pull in drawing the trains up it, *emitted large quantities of cinders and sparks*; these frequently set fire to the building, and in 1884 it was destroyed by fire thus started. It did not appear that the fires were caused by any defects in said engines, and up to 1880 it was undisputed that defendant used upon its engines the most approved spark arresters; *there was a regular system of daily inspection of the smoke-stack and spark arresters, and if the defects were discovered they were at once repaired.* In 1880 a new spark arrester began to come into use which reduced the number of escaping sparks. Defendant had, prior thereto, begun to use it in his freight engines, and kept on altering them, and before the trial of the action the new system was in general, but not universal use. Defendant, after 1880, had a large number of engines in use.

Held, the evidence did not justify a verdict for plaintiff; that defendant could not be charged with negligence in not fully introducing the new system of arresting sparks upon all its engines previous to the fire, in the absence of evidence that it was reasonably practicable and possible so to do. *Flinn v. N. Y. C. & H. R. R. Co.*, 142 N. Y. 11; rev'g 67 Hun, 631, and judg't for pl'ff.

From opinion.—"There was no evidence that any engine was out of repair. On the contrary, the evidence shows that there was a regular system of daily inspection of the smoke-stacks and spark arresters upon the engines in use, and that they were at once repaired when any defects were discovered. Where the railroad passed this lot there is a steep grade ascending to the westward, and engines drawing trains there are obliged to labor, and sometimes they made headway slowly and with difficulty, and on account of the heavy grade and hard pull they emitted a large amount of smoke and cinders. The only evidence (I am now speaking to the time prior to 1880) from which the plaintiff can claim to infer negligence is the great emission of sparks and setting of the fires thereby. But the emission of the sparks was continuous and from all engines on account of drawing heavy trains, and thus there could be no claim that any particular engine was defective unless they were all defective, and that is not claimed. On this subject the plaintiff testified as follows: 'The showers of sparks and smoke would be thrown into the windows, if they were open in warm weather, and set fire to the carpets; I am speaking of what they did; the effect was still greater if they did not pass readily; if they were lodged there, because it was up grade, and the trains would sometimes become stalled; impossible for the locomotives to do their work, and then if the locomotives were lodged in front of that building showers of sparks would be thrown all about, and if it were dry weather the building would take fire, and sometimes when it was not dry it would take fire; the entire roof and alley and all about there would be flooded with these live coals; this state of things continued about ten years. The final result was that the house was destroyed; these fires continued from 1874, the time the additional track was laid, until the destruction of the building by one of these fires in August, 1884.'

Another witness testified: 'When I have been on one of these pushers and on No. 4 track going from Albany to West Albany I have seen plenty of sparks from that locomotive; plenty of it with a heavy load. You have got to work the engine heavier, and there are more sparks. I can't tell how far it would throw them; a good ways back; the sparks were all over, from the bottom of the grade to the top of the grade; they would fly all the while; worse when it slipped.' Another witness testified: 'These pushers, as they pushed up the heavy freight trains on No. 4, through Railroad avenue always threw sparks more or less; of course, the larger the train, the more exertion and the more sparks were thrown, and the wetter the track, made it so much worse; but the pushers are not the only ones that threw the sparks; the engine ahead throws as many sparks as the other one; these engines used on No. 4, both the forward engines and the pushers, and the others had large, bulging smoke stacks; all of them, as far as I remember.'

Another witness testified: 'Of course engines, when they are working hard and pushing and pulling heavy, throw more sparks than when they are working light; there is a harder exhaust on the fire, and consequently they throw more sparks; have seen the sparks come out of the stack pretty thick sometimes; sometimes they go straight up, according to the way the wind blows; I couldn't describe the exact quantity; they go the direction the wind blows; come thick enough so you can see them readily. * * * I never saw any spark arresters that would absolutely and entirely prevent sparks from flying. So far as my judgment and experience are concerned, it is not possible to entirely prevent the emission of sparks from locomotive engines.' Another witness, a tenant in the

house, testified: 'We didn't dare to leave our windows up in front, because the sparks would fly into the front room. I never carpeted the front room on that account. Sometimes left the windows open and sparks would come in.' Another tenant testified: 'I lived there about a year; occupied the down stairs part; paid three dollars a month; it was a small place; the fires broke out a couple of times while I was there; I couldn't leave my windows open for the sparks coming in; caught fire on the roof; sparks used to come in through the window and door, and I always had to keep them shut.' Another witness testified: 'I mean to say every time I saw trains stalled there I saw sparks as big as a walnut coming from the engine, when they commenced working, about every time.' Another witness testified: 'When they were working in that way they threw out a great deal of cinders, sparks, and smoke; have observed the size of sparks they threw out; they were probably half an inch in diameter; live sparks would fly all over the building. * * * I lived in that vicinity about thirty years; had noticed these things other witnesses had spoken of in regard to trains ever since he had been there, more or less; sometimes there would be heavy trains, and several engines would be used in pushing them up the grade; on such occasions frequently sparks would be emitted from the engines, and would fly all over.'

This evidence came from the plaintiff and his witnesses, and it shows that the emission of sparks at that up grade was continuous and inevitable. There was no evidence and no inference that fewer sparks were emitted when there were but two tracks, but as the nearest track was then further from the plaintiff's house, the danger was less. * * * If there had been evidence that any particular engine emitted an unusual quantity of sparks of an unusual size, that might, within the authorities cited, have furnished *prima facie* proof that the engine was out of repair, and the burden would have been cast upon the defendant to show that it was in proper condition and that the emission of sparks was inevitable notwithstanding the use of any ordinary care. Suppose it had been shown that all the engines upon the defendant's road were built and equipped in the usual manner, with approval smoke-stack and spark arresters, and yet that they emitted large volumes of sparks and smoke, would the mere fact of the emission of sparks in such quantities be any evidence to charge the defendant with negligence? * * *

But the plaintiff claims that about 1880 a new spark arrester used in what are called extension front engines began to come into use; that such engines emitted fewer sparks and that the defendant was therefore negligent in not adopting the improvement upon its freight engines, and thus in some measure protecting adjacent property from the danger due to escaping sparks. The meshes of the wire netting constituting the spark arrester were the same in both systems, and the only difference in their operation was that fewer sparks were emitted under the new system than under the old. * * * We may assume from our personal observation and from official reports that the defendant after 1880 had in the neighborhood of at least 1,000 engines, and what bias is there in this evidence for charging the defendant with negligence for not equipping all these engines with the new system during the brief period of four years? A railroad is not bound at once to introduce every new appliance which is claimed to make its engines safer and more useful. It must have time for trial and experiment. It cannot arrest all of its engines at once to make changes, but must have the time requisite, taking into consideration expense, convenience, the operation of

its road, and all the problems connected with such a change. Before the plaintiff could charge the defendant with negligence in not introducing the new system for arresting sparks prior to 1884 he should have furnished some evidence that it was reasonably practicable and possible to do it. Therefore there was no evidence upon which a charge of negligence could be based because the defendant had not introduced this new system prior to 1884. * * * The defendant is not bound absolutely to keep the spark arresters upon its engines in perfect condition. It is in proof that they would sometimes break and get out of repair, and if the defendant, having a regular system of inspection, repaired them at the first opportunity, it cannot be said to have been negligent."

In an action to recover damages for the destruction of plaintiff's property by a fire alleged to have been kindled by sparks which escaped from an engine passing on defendant's road, it appeared that what is known as a "straight stack spark arrester" was used upon the engine, and the evidence was uncontradicted that this kind of spark arrester was in general use on many of the large railroads and on some was almost exclusively employed, and that it in fact arrested sparks as well as any kind that was known. The question was submitted by the trial court to the jury as to defendant's negligence in the adoption of a proper system or kind of spark arresters. Held, error.

It seems the court may take judicial notice that the "diamond stack" and the "straight stack spark arresters" are in very general use upon the railroads of the country, and are both well-known systems for arresting sparks.

The property destroyed was a barn and an hotel about forty feet distant therefrom. The barn first caught fire. The court charged that to justify a verdict including the value of the hotel that jury must find "that the same was destroyed by reason of the fire being communicated thereto directly from the engine, or without the assistance of other agencies." Held, no error.

It seems the doctrine of the case of *Ryan v. N. Y. C. R. Co.* (35 N. Y. 210) is not to be extended beyond the precise facts appearing therein. *Frace v. N. Y., L. E. & W. R. Co.*, 143 N. Y. 182, rev'g 68 Hun, 182, judg't for pl'ff.

Distinguishing *Cornish v. F. B. F. Ins. Co.*, 74 N. Y. 295.

From opinion.—"The engine had just been equipped with this new spark arrester, the change having been made from the diamond stack kind. In the case of *Flinn v. Central Hudson Railroad* (142 N. Y. 11) the diamond stack spark arrester was used and the claim was made by the plaintiff in that case that the defendant should be held liable because it had not adopted the straight stack spark arrester, such as was used upon this engine. Here the claim seems to be just the opposite, and the jury was permitted upon the evidence in the case to find that the straight stack system was not a good one and the diamond stack should have been used. Thus, whichever kind may be used by a railroad com-

pany, it is open to the plaintiff to claim that it was the other that should have been used, and the question must, therefore, be submitted to the jury.

We think the court can take judicial notice of the fact that diamond stack and straight stack spark arresters are in very general use upon the railroads of the country, and that they are both well-known systems for arresting sparks, while no system that has yet been invented can wholly prevent the emission of live sparks from an engine under certain circumstances. In the Flinn case we held that the defendant could not be found guilty of negligence in failing to introduce upon its road the straight stack extension (the kind actually used in the case at bar) within the time then existing since its invention, even assuming that the straight stack was an improvement on the old diamond stack form. Here the jury is permitted to find, in opposition to the whole evidence in the case, that the straight stack extension is not a proper system of spark arrester. We hold it was error to submit to the jury the question of defendant's negligence in the adoption of a proper system or kind of spark arrester."

The railroad company held not liable for loss of property not adjoining its right of way from a fire negligently set on its right of way and communicated through property adjoining its right of way. *Hoffman v. King*, 160 N. Y. 618; rev'g s. c., 30 App. Div. 621.

From opinion.—"If a person negligently throws a live coal of fire upon another's building, causing it to burn, the damages are the direct result of the negligent act and the result is that which the ordinary mind would reasonably expect. If a person lights a fire upon his own premises upon which he has maintained inflammable material, extending to his neighbor's lands, and, the fire fed by this material spreads upon abutting lands, the damage is the proximate result of the act and the liability exists, and this, we think, is the limit. It is contended that liability ought not to be thus limited; that a fire once set may run across the lines of an abutting owner and upon lands of other proprietors, causing damage. It must be conceded that such a result often happens. It did in the case we have under consideration. But where is the line to be drawn? Shall it be one mile, two miles or ten miles distant from the place of the original starting of the fire? Who is to specify the distance? It is suggested that it might be left to the jury; but the jury in one part of the state might answer one mile and in another part it might determine the rule of liability to extend ten miles. The evidence upon this branch of the case is undisputed and in such case the question as to what is proximate cause, is always for the court and not for the jury." * * * * "No man is able to answer for all the remote consequences of his acts and those for whom he is responsible. Hence, the wisdom of the rule of approximate cause which as defined by Webster is that which immediately precedes and produces the effect. The fire set by the defendant did not immediately precede the fire upon plaintiff's land; other lands intervened covered with inflammable material over which the defendant had no control and without which the fire could not have extended upon plaintiff's premises. The drought, atmosphere and wind were the principal agents assisting the fire in its work of destruction and were the intervening causes of the damage. It is unfortunate for the plaintiff, but we think her damage was the remote and not the proximate result of defendant's fire." The authorities are fully discussed. A vigorous dissenting opinion is written by Vann, J.

See, also, *Van Inwegen v. Port Jervis &c. R. Co.*, 165 N. Y. 625; rev'g s. c., 53 N. Y. Supp. 1025.

The fact that property in the vicinity of a railroad is consumed by fire originating from sparks emitted from a passing locomotive, does not necessarily imply that the railroad company has been guilty of negligence.

Where, upon the trial of this action, brought to recover damages sustained by a fire occasioned by a spark emitted from the smoke stack of one of defendant's locomotives, evidence was given tending to show that the engine was of the first class, fitted with the most approved kind of spark arrester in use, and that it was in good order on the day of the fire, and that the escape of sparks *from engines when in motion cannot be wholly prevented*; held, that it was error in the court to refuse to charge that unless there was some defect in the smoke-stack or spark arrester from which the sparks escaped, the defendant was not liable.

In an action to recover the value of property destroyed by a fire occasioned by the negligence of the defendant, the fact that the property was insured and that the insurance company has paid the loss, cannot be given in evidence in mitigation of damages. *Collins v. N. Y. Cent. & Hudson R. R. Co.*, 5 Hun, 503, rev'g judg't for pl'ff.

Following *Merrick v. Brainard*, 34 N. Y. 208.

The mere fact that a fire is occasioned by sparks emitted from the smoke-stacks of locomotives used by a railroad company, does not, of itself, establish negligence on its part, nor would it be sufficient to authorize a jury to infer negligence, unless the *emission of the sparks was unusual in degree or character*, or the sparks were of an *extraordinary size and such as would not be emitted from perfectly constructed locomotives*.

In a case not within such exception, the burden of proving that the railroad company did not exercise due precaution rests on the plaintiff.

Upon the trial of an action to recover damages sustained by a fire started by sparks from a locomotive owned by the defendant, the judge charged the jury "if all the evidence satisfied them that there had been negligence on the part of the defendants, although they might not be able to satisfy themselves in what that negligence consisted, they would be authorized to find a verdict for the plaintiff." Held, that this was error; that if the jury could not *find in the evidence any rational ground upon which to impute negligence* to the defendant, they should give a verdict in their favor. *McCaig v. The Erie Railway Co.*, 8 Hun, 599.

From opinion.—"In overruling the motion for nonsuit, the judge, at the trial, must have held, in effect, that the fire having been occasioned by sparks thrown from one of defendant's engines, the jury might infer or presume negligence from such fact. In his charge to the jury afterwards, he stated that it was not pretended to show what particular negligence was the cause of the fire, but, from

the distance at which the fire was caught, it was sought to be shown that it was thrown from the smokestack, and carried by the wind to some distance. If this were so, it seems to me the evidence was not sufficient to warrant a verdict for the plaintiff, without further proof showing that such emission of sparks was *unusual* in degree or character, or the sparks were of an *extraordinary size*, and such as would not be emitted from perfectly constructed locomotives. *Rood v. N. Y. & E. R. Co.*, 18 Barb. 80. But the motion for a nonsuit being overruled, the defendant's evidence was properly given and directed to repel such presumption or inference of negligence, arising from such emission of sparks.

The evidence given by the defendants tended to show, and I think did show quite conclusively, that the said engines were properly constructed, and had the best and most approved apparatus to prevent the emission of fire or sparks. It was error, therefore, to hold, in respect to such evidence, that the burden of proof was upon the defendants."

In such an action, evidence of emission of sparks by plaintiff's engines, prior and subsequent to the time of the burning in question, is admissible. *The Home Insurance Co. v. The Pennsylvania Railroad Co.*, 11 Hun, 182.

In an action to recover damages for the burning of woodland, by a fire started by the negligence of a railroad company in allowing sparks and coals to escape from its engines, the plaintiff is not required to prove which one of the defendant's engines set the fire.

When he is unable to identify the engine that set the fire by name or number, or by any other designation, if he prove either *by the manner in which it was operated or by the extent to which it scattered fire that it was so far out of repair as to charge the company with negligence*, it is sufficient.

The counsel for the defendant requested the court to charge that the defendants were not bound to use any other appliances than such as are known in practical use. The court so charged, adding: "That is, the known and recognized means for preventing the escape of sparks from a locomotive, and such as are best adapted for that purpose." Held, that the qualification added by the court was proper.

The court charged that the plaintiff was not bound to use extraordinary means to extinguish or prevent the spread of the fire. Held, that this was proper.

The defendant's counsel requested the court to charge that, if the plaintiff allowed dry limbs, brush, grass and other combustible matter to lie and accumulate on his premises adjacent to the line of the railroad, and that if such accumulation contributed to produce the fire, by means of which the premises were burned over, he was not entitled to recover. Held, that the request was properly refused; that, whether or not the plaintiff had been guilty of negligence contributing to the injury, was a question for the jury; it was not the province of the court to instruct the jury that certain specified acts or omissions constitute negligence.

Bevier v. Prest. &c. D. & H. C. Co., 13 Hun, 254, ordering judg't for pl'ff on verdict.

From opinion.—"On the 24th of May, 1871, an engine of the defendant passed

over the road, scattering fire from the smoke-stack and fire-pan in large quantities, and soon thereafter fire appeared in a pile of brush on defendant's side of the fence. It extended from thence into a pile of brush on plaintiff's side of the fence and then extended into the plaintiff's woodland, and thus caused the injury complained of * * * It is incumbent on the plaintiff to prove, in an action for injury to property from fire from an engine, that an engine of defendant scattered from its fire-pan or smoke-stack, fire in such quantity and in coals of such size as might kindle a fire and as could not be thrown off from an engine whose smoke-stack, etc., were in proper repair."

On May 29, 1882, sparks and burning cinders escaped, through the defendant's negligence, from the top of a smoke-stack in the defendant's factory, and set fire to the roof of an old unoccupied building situated about 280 feet in a southeasterly direction from, and on the same side of the street with, the smoke-stack. Owing to the lack of proper appliances and to the fact that the doors of the building were locked, the roof of the building could not be reached until the fire had spread across the street to an old barn some 110 feet long and some fifty feet distant; from this barn it again passed across the street to a saloon and other buildings, and from these to a building owned by the plaintiff, which stood near the smoke-stack from which the sparks were emitted.

Held, that the defendant's negligence was not the immediate and proximate cause of the burning of the plaintiff's building, and that he was not liable for the damage occasioned thereby. *Reiper v. Nichols*, 31 Hun, 491, rev'g judg't for pl'ff.

Following *Ryan v. N. Y. Cent. R. Co.*, 35 N. Y. 210.

From opinion.—"The decision of the courts in all the other states, so far as I have been able to examine their reports of cases, hold that the question of natural and proximate cause and effect is not only to be left to the jury to determine, but that the liability extends just as far as the cause can be traced in effects which follow the prime cause without some intervening agency, either active or passive, changing, diverting, modifying or affecting, in some degree, the operation of the prime cause. *Delaware, Lack. & W. R. Co. v. Salmon*, 10 Vroom. (N. J.) 299; s. c., 23 Am. R. 13; *Hart v. Western Ry. Co.*, 13 Mete. 99; *Cleveland v. Grand Trunk Ry. Co.*, 42 Vt. 449; *Kellogg v. Chicago & N. W. Ry. Co.*, 26 Wis. 223; s. c., 7 Am. R. 69; *Milwaukee & St. Paul R. Co. v. Kellogg*, 4 Otto, 469; *Sneesy v. Lan. & Y. R. Co.*, L. R. 9, Q. B. 263.

These cases hold that a person guilty of negligence is to be held responsible for all the consequences flowing naturally and proximately from the negligent cause, and that diversity of ownership of the buildings burnt, or the lands traversed by the fire, or mere distance of locality, or the period of time between the burning of the buildings, do not necessarily or at all relieve from liability until the primal cause ceases to operate, or the chain of natural and proximate cause and effect have been interfered with by some agency, or neglect or fault of some other person either by his conduct or the condition of his property."

In an action brought to recover damages to the woodland of one Martin, caused, as alleged, by a fire started by sparks or cinders from the engines of a railroad company, it appeared that the fire began in old brush and ties lying by the side of the track; that there was no change of wind during the continuance of the fire; that between this place and Martin's land the lands of other persons intervened, and that their condition was favorable to carrying the fire onward; that it crossed a river about ninety-seven feet wide, its point of crossing being where

old trees overhung the river; that the course of the fire was direct; that Martin's wood lot was nearly a mile and a half distant from the point where the fire began, and that the fire burnt rapidly.

Held, that the sparks or cinders were the proximate cause of Martin's loss and that he could recover.

That the fact that the lands of other persons were passed over by the fire before those of Martin's were reached was not material.

That the rule applicable to fires negligently set by the owner of a house in a village or city, and running from it to another house, had no application to a fire where the surroundings were of the character appearing in the case at bar. *Martin v. The New York, O. & W. R. Co.*, 62 Hun, 181, aff'g judg't for pl'ff.

In an action brought to recover damages for the burning of a sawmill, alleged to have been caused by sparks from a locomotive, there are but two grounds on which a defendant, which has used upon its locomotives the best known appliances for arresting sparks, can be held liable, viz., negligence in permitting such appliances for arresting sparks to be out of repair, and negligence in the manner of using the same, the burden of proof in respect to which is upon the plaintiff. *Van Nostrand v. New York, Lake Erie & Western R. Co.*, 78 Hun, 549.

Defendant not liable for a fire set by sparks from an engine in some unexplained way, where there was no evidence that the engine was in any way defective. *Miller v. New York &c. R. Co.*, 92 Hun, 282.

See, also, *Brown v. Buffalo &c. R. Co.*, 4 App. Div. 465.

Sparks thrown out by heavy puffing of engine in good order does not show negligence where the grade was not extraordinary nor the load excessive. *First National Bank v. Lake Erie &c. R. Co.*, 65 Ill. App. 21.

Negligence, not to use a new device for arresting sparks which is the best and in general use. *Chicago &c. R. Co. v. American Strawboard Co.*, 91 Ill. App. 635.

A complaint in an action for the death of plaintiff's intestate, which was caused by the burning of the building in which he was at work for the defendant, alleged that the fire originated in the dynamo room by reason of defects in the appliances and machinery, and that by reason of defective insulation the wires set fire to the woodwork, and further alleged that the fire and the burning of the building was due wholly to the carelessness of the defendant. Held, that such allegations made out a cause of action for negligence against the defendant, and that the same was not weakened by the further allegation of negligence of its employes in failing to attempt to put out the fire.

In such an action it is proper to allege and prove that the windows of the room in which the decedent was at work were screwed down. White, J., dissents. *Pzepka v. American Glucose Co.*, 11 Misc. 131.

FIRE-ARMS.

A person discharging fire-arms unlawfully, or if lawfully, in a negligent manner, is liable for damages for injuries resulting therefrom. If such person be authorized to use such arms he should observe care proportioned to the dangers, that a prudent man might expect to result, considering the place where the act is to be done, its surroundings, uses, and its proximity to persons or animals likely to be injured thereby, and if it be in the proximity of other persons a high degree of care should be employed.

When one does an illegal or mischievous act likely to prove injurious to others, or in such a careless and improper manner that injury to third persons will probably ensue, he is answerable, in some form of action, for all the consequences which may directly and naturally result from this conduct.

A very high degree of care is required from all persons using fire arms in the immediate vicinity of other people, no matter how lawful or even necessary such use may be.

When one makes use of loaded weapons, he is responsible as he might be for any negligent handling of dangerous machinery, that is to say, for a care proportioned to the danger of injury from it.

The complaint in an action charged the defendant with having wrongfully and negligently caused injury to the plaintiff by shooting him. There was no claim upon the trial that the defendant's act in so doing was intentional, and a recovery was sought only on the ground of his negligence.

Held, that evidence of the intent of the defendant was inadmissible.

Upon the trial of the action, the defendant was asked: "Did you handle your gun that morning in a careful, prudent and cautious manner?" and also, "Have you had considerable experience in handling a gun, and were you careful in handling your gun upon the morning in question?"

Held, that such questions were properly excluded. *Hankins v. Watkins*, 77 Hun, 360.

Citing *Vandenburgh v. Truax*, 4 Den. 464; S. & R. on Neg., sec. 866; *Weaver v. Ward*, Hob. 134; *Moody v. Ward*, 13 Mass. 299; *McClenaghan v. Brock*, 5 Rich. Law. (So. Car.) 17; *Haack v. Fearin*, 5 Rob. 528; *Cooley on Torts*, 705.

A colonel commanding and ordering a regiment was held liable in damages for injuries sustained by the plaintiff, in consequence of a discharge of cartridges. Firing at all toward a crowd of people, within musket range, where it could not be positively known that no one musket in the whole regiment contained anything more than a blank

cartridge, was negligence. *Castle v. Duryee*, 2 Keyes, 169; 1 Abb. Ct. App. Dec. 327.

One hunting in a wilderness need not expect the presence of another within range of his gun, and if such be the case and unintentional injury result, the huntsman is not liable. *Bizzell v. Booker*, 16 Ark. 308.

When defendant fired a pistol, and ball glanced and hit plaintiff, and it was found that the injury was unintentional, but was the result of gross and culpable carelessness on defendant's part, the action of trespass was maintainable. *Welch v. Durand*, 36 Conn. 182.

Citing *Morris v. Platt*, 32 Conn. 75.

Trespass would lie against a defendant who was guilty of wanton misconduct in shooting at a mark. Shooting at a mark is lawful, but not necessary, and may be dangerous, and the law requires extraordinary care to prevent injury to others, and if the act is done where there are objects from which the balls may glance and endanger others, the act is wanton, reckless, without due care, and grossly negligent. *Welch v. Durand*, 36 Conn. 182.

Citing 21st Henry VII. 28a, where in shooting at butts the archer's arrow glanced and struck another, and it was held to be trespass; *Bullock v. Babcock*, 3 Wend. 391.

Accidental discharge was no defense, where defendant flourished a pistol to frighten a boy from his premises. *Seltzer v. Saxton*, 71 Ill. App. 229.

Child was employed in a mill with rough employés. Lack of father's consent did not charge defendant with its death by the careless use of firearms in the hands of such employés. *Harris v. Kentucky &c. Lumber Co.*, (Ky.) 43 S. W. Rep. 462.

Defendant discharged a gun at the door of his shop about one rod from highway. The plaintiff's horse in his chaise was fastened by his bridle to the fence on the opposite side of the highway, and, frightened by the discharge, broke his bridle and ran away. The defendant was liable either in trespass or case, depending upon his knowledge of the proximity of the horse. The court said generally: "The party injured, either in his person or property, by the discharge of a gun, even when the act is lawful, at a military muster and parade, and under the orders of a commanding officer, is entitled to redress in a civil action, to the extent of his damage; and when the act is unnecessary, a matter of idle sport and negligence, and still more when the act is accompanied with the purpose of wanton or deliberate mischief, and any hurt or damage ensues, the guilty party is liable," etc. *Cole v. Fisher*, 11 Mass. 137.

Belief that the gun was not loaded was no defense. *Bahel v. Manning*, 112 Mich. 24.

Plaintiff was unlawfully engaged in removing the tracks of defend-

ant's company, and the gun was pointed at him, to intimidate him. Accidental discharge was a defense. *Shriver v. Bean*, 112 Mich. 508.

Where two persons were gunning together, and while one was sitting on the fence his gun was discharged by pointing it, or the turning of the rail, whereby the other was wounded, the court properly left it to the jury to say whether there was negligence. *Moebus v. Becker*, 46 N. J. L. 41.

From opinion.—"The duty which a person, lawfully carrying fire-arms, owes to others is not different from that which is imposed on all who have control of any hurtful thing, except in the degree of care to be exercised. As fire-arms are more than ordinarily dangerous when loaded, those who handle them are bound to use more than ordinary care to prevent injury to others. The cases cited in the plaintiff's brief of actions for injuries caused by the explosion of fire-arms, and many others, are found in the notes to *Morgan v. Cox*, 22 Mo. 373; collated in 1 Thompson. on Neg. 238. Beginning with the case of *Weaver v. Wood*, Hob. 134, all hold a strict rule of accountability for the want of extraordinary care in their use; but in no case is it said that where persons are gunning voluntarily together, each may be held responsible for every accident or mishap that may occur to the other while thus engaged; or that it is necessarily negligence to carry a gun cocked when in pursuit of game, or that in passing through brush, crossing ditches, climbing fences, or resting upon them, the gun must be uncocked. Nor if one should pass in front of the other by his request or on his own motion, and by stumbling or falling, the gun of the other is discharged and a wound inflicted, that the only question to be considered by the jury is the amount of damages to be paid, and that negligence will be inferred as a presumption of law. Each case must stand upon his own peculiar facts, and rational rather than distinctively legal conclusions must usually be drawn from them."

Plaintiff was not contributorily negligent in preceding sportsmen in guiding them out of a swamp. *Winans v. Randolph*, 169 Pa. St. 606.

Evidence of depredations by rabbits was admissible on the question of reasonableness of excuse for shooting within city limits. *Chesterfield v. Ratliff*, 52 S. C. 563; s. c., 41 L. R. A. 503.

"If this be done (exercise in shooting) by soldiers in a camp, where such shooting is customary, then there is no liability if a person passing in the neighborhood is non-negligently hit. * * * But a person who shoots at a thoroughfare, without notice to travelers, he not being required by official duty to shoot, is liable for the consequences arising if a person passing on the thoroughfare is hit." Wharton on Neg. sec. 110.

Where one makes use of loaded weapons, he is responsible only as he might be for any negligent handling of dangerous machinery, that is to say for a care proportioned to the danger of injury from it. The firing of guns for sport or exercise is not unlawful if suitable place is chosen for the purpose, but in the streets of a city, or in any place where many persons are congregated it might be negligence. *Cooley on Torts*, p. 593; citing *Conklin v. Thompson*, 29 Barb. 218.

FIREWORKS.

The explosion of fireworks, or fire crackers, in a public street without proper legislative or municipal authority is wrongful, and the wrongdoer is liable for any injury happening therefrom to persons or property. If a municipality by ordinance assume to authorize the display of fireworks at places and under circumstances dangerous to persons and property, it may be liable for damages resulting therefrom to persons not participating therein, without other evidence of negligence or wrong. A person placing himself in proximity to an unlawful display to watch the same may recover for injury without evidence of negligence in the conduct of the same or in the use of dangerous materials. There is contrary holding.

Where fireworks are exploded on grounds not set apart for the purpose, their explosion is lawful, and makes the parties concerned liable for injuries sustained by others not participants. Wharton on Neg., sec. 181, citing *Scott v. Shepard*, 2 W. Bl. 892.

An ordinance of the common council of the city of Brooklyn, after prohibiting the explosion of fireworks within the city limits, provided that this should not be construed as extending to fireworks exhibited by one authorized by a permit from the mayor to exhibit the same. Assuming an act under this ordinance, which had for a long time without question been construed as authorizing the mayor to grant permits to private persons to use the public streets for the discharge of fireworks, that officer issued a permit to one "A." to discharge fireworks at the junction of two narrow streets of the city, which were completely built up. A copy of the permit was sent from the mayor's office to the chief of police, and in consequence the police did not interfere with the display; this was an extensive one, and large and powerful rockets were used. One of these entered the window of plaintiff's house on the street near the point where the fireworks were discharged and set it on fire. In an action to recover the damages, held, that the discharge of the rockets at the place and under the circumstances was a nuisance, and that the city was liable. *Speir v. The City of Brooklyn*, 139 N. Y. 6.

See, *contra*, *Fifield v. Phoenix*, (Ariz.) 24 L. R. A. 430; 36 Pac. 916, where the ordinance prohibited display of fireworks without permit, but the charter negatived liability for malfeasance, neglect, &c., of duty by any officer of the city, and the permit was granted by such officer.

See *Wyllie v. Palmer*, 137 N. Y. 248. Agency, p. 15.

The act of exploding fire crackers in the public streets of a city is wrongful, and if person or property be injured thereby the wrongdoer is liable. Horse died of sudden fright from the explosion of a fire

cracker. Verdict of jury for plaintiff sustained. *Conklin v. Thompson*, 29 Barb. 218.

Although a person was present and designated the place on his grounds where fireworks might be displayed, he was not liable for an injury to a spectator, arising from the quality of the fireworks or the manner of conducting the display. *Waixel v. Harrison*, 37 Ill. App. 323.

A person during a pyrotechnic display was not negligent in standing in the midst of a crowd where spectators were expected to stand; and the discharge of a bomb in such a way that it fell and injured him was negligence on the part of those conducting the display. *Colvin v. Peabody*, 155 Mass. 104.

A voluntary spectator of fire-works accidentally injured without negligence on the part of those conducting the display, cannot recover, although the display was unauthorized, as he took the risk. *Scanlon v. Wedger*, 156 Mass. 462.

See dissenting opinion. Citing Pollock on Torts, 138-141.

Plaintiff not allowed to recover for injury from fright of horse at exhibition, where he voluntarily drove in the vicinity. *Frost v. Josselyn*, 180 Mass. 389.

Fireworks were displayed from a court house in the centre of a public square, and the display was so arranged that the rockets would pass over the witnesses of the display. The same was neither prohibited by statute nor ordinance, and was not *per se* unlawful; nor was a person, present simply as a spectator, who was injured thereby, guilty of contributory negligence. *Dowell v. Guthrie*, 99 Mo. 653.

That a city's officers consent to display of fireworks was not sufficient to charge it with liability. *Bartlett v. Clarksburg*, 45 W. Va. 393; s. c., 43 L. R. A. 295.

GAMES AND SPORTS.

An injury to one person by another while both are engaged in a game, or sport, is an actionable assault if it exceed what is usually deemed admissible in sports of the kind, or is intentional. Cooley on Torts, sec. 163.

Where a person is injured in a known game, played according to usual rules, there is no liability; but one who introduces a new and dangerous game is liable to a person injured therein provided such person is not aware of the danger. Wharton on Negligence, sec. 111.

Bodily injury inflicted in good faith and within the rules in games, which are exercises of strength, is not a subject of recovery. Wharton on Negligence, sec. 111; see, also, sec. 406.

The plaintiff and defendant were schoolmates. The boys attending the school were assembled near the schoolhouse. One of them had a bow and arrow with which he and the defendant had been shooting at a mark. Some remark was made by the plaintiff, when the defendant said, "I will shoot you," and took the bow and arrow from another boy who then held it. The plaintiff ran into the schoolhouse and hid behind the fire-board standing before the fire place in the schoolroom.

The defendant followed to the door of the schoolroom, and saying, "See me shoot that basket," discharged the arrow. At that moment the plaintiff raised his head above the fire-board, and the arrow struck him. There was a basket standing on a desk in the direction that the arrow was aimed. When the arrow was shot, there were a number of boys in the schoolroom. There had been no quarrel between the boys. The plaintiff, however, on entering the schoolhouse was frightened, and said he was afraid he would be shot. A verdict for the plaintiff was sustained. *Bullock v. Babcock*, 3 Wendell 391.

From opinion.—"In ordinary cases, if the injury is not the effect of an unavoidable accident, the person by whom it is inflicted is liable to respond in damages to the sufferer. Where, in shooting at butts, the archer's arrow glanced and struck another it was holden to be a trespass. Year Book, 21 H. 7, 28a. So where a number of persons were lawfully exercising themselves at arms, one whose gun accidentally went off was held liable in trespass for the injury occasioned by the accident. *Weaver v. Wood* (Hobart, 134). In this case the action was assault and battery; and the plea was, that while the parties were skirmishing by order of the lords of the council, by way of military exercise, the defendant *casualiter et per unfortunium et contra voluntatem suam* in discharging his musket, did the injury complained of. To this plea there was a demurrer, and judgment was given to the plaintiff. In giving their opinion, the court say, "If two men tilt or tourney in presence of the king, or if masters fence, and the one kills the other, or if a lunatic kills a man, it is not *felony*; yet, in trespass, which tends only to give damages according to the hurt or loss, it is not so. Therefore, if a lunatic hurt a man, he shall be answerable in damages; and

no man shall be excused of a trespass, except it may be adjudged utterly without his fault.' Where, in a dark night, the defendant got on the wrong side of the road, and an injury ensued to the person of the plaintiff, trespass for the damage was sustained. 3 East, 593. It was decided in the case of *Wakeman v. Robinson*, (1 Bing. 213) if the accident happened entirely without the fault of the defendant, or any blame being imputable to him, an action will not lie. In that case, the blame imputable to the defendant was, that his horse being young and spirited, he used him without a curb rein; that in his alarm, he probably pulled the wrong rein; and that he ought to have continued on in a straight course. The blame fairly imputable to the defendant, it will be perceived, must have been slight indeed, as it certainly was in the case of the injury done by the glancing of the arrow when shooting at a mark, (a lawful act,) and by the accidental discharge of a musket at a training; and yet, in each of these cases, an action for the injury was maintained. Unless a rule is to be applied in this case different from that applicable to a transaction between adults, the proof was most abundant to charge the defendant with the consequences of the injury. Infants, in the same manner as adults, are liable for trespass, slander, assault, etc. Bing. on Infancy, 110; 8 T. R. 335; 16 Mass. Rep. 389; 2 Inst. 328. Where infants are the actors, that might probably be considered an unavoidable accident which would not be so considered where the actors are adults; but such a distinction, if it exists, does not apply to this case. The liability to answer in damages for trespass does not depend upon the mind or capacity of the actors; for idiots and lunatics, as we see by the case reported in *Hobart*, are responsible in the action of trespass for injuries inflicted by them. 1 Chit. Pl. 66."

A student was passing peaceably along a sidewalk, when his fellow students, forming a line, each pushed the one in advance until he was reached. He took no part, but was injured, and recovered against the one delivering the immediate push. His rights were the same as if he had been a stranger. *Markley v. Whitman*, 95 Mich. 236.

Plaintiff recovered for being subjected to a severe hazing. *Hirschman v. Emme*, 81 Minn. 99.

When, in an action for tort, the defendant defends upon the ground that the injury arose from a practical joke, it is for the jury to decide whether the parties had been perpetuating practical jokes upon each other in such a way that the defendant had a right to believe that the plaintiff would accept this act as a joke.

The practical joke consisted in carrying off the plaintiff's lines while his horse was standing in the street, so that the owner could not drive him away, and refusing to return them upon demand. *Wartman v. Swindell*, 54 N. J. L. 589.

Defendant had sufficiently protected its patrons from unruly horses while racing, where it had not only provided a grand stand but erected a substantial railing about the course. *Hallyburton v. Burke County Fair Asso.*, 119 N. C. 526; s. c., 38 R. R. A. 156.

INDEMNITY.

When a person, through no fault of his own, has been compelled to pay a sum of money on account of the negligence of another, he is entitled to be indemnified by the latter, whether a contractual relation exists between them or not. The amount for which the person was held liable in the first instance, is presumptive evidence of the amount of the indemnity, at least when the wrongdoer had notice of the first action, and opportunity to defend the same. Although the person claiming the indemnity has been found jointly with another guilty of legal negligence, the former may, in an action against the latter for the indemnity, show that he was not an actual participant in the wrong, but was subjected to liability therefor through the wrong of the other. The judgment roll in the first action does not establish which party was guilty of the wrong causing the injury.

Where a city was compelled to pay damages, caused by the obstruction of a street by the negligence of its contractor, it may recover from the latter the sum so paid. *City of Rochester v. Montgomery*, 72 N. Y. 65, aff'g 9 Hun, 394 and judg't for pl'ff.

Distinguishing *City of B. v. Holloway*, 7 N. Y. 497; citing *Robbins v. City of Chicago*, 4 Wall. 657; *City of Lowell v. Short*, 4 Cush. 275; *City of Troy v. R. Co.*, 49 N. Y. 657; *People ex rel. Van Keuren v. Board &c. of Town of Esopus*, 74 id. 310.

Where a municipality has been obliged to pay damages caused by the negligent obstruction of a street by a third person, it may maintain an action over against such person to recover the same. Notice to such third person of the first suit was not necessary, but, without such notice the actionable facts must be proved.

The consent of a municipality that an individual may make an excavation, does not preclude such action, based upon negligence or wrongful exercise of the authority, for the license impliedly agrees to protect the public from danger and the municipality from liability. The notice to the president of the bank of the action against the municipality was held to be a notice to the bank. Evidence of the condition of the barricades after the accident was properly excluded. *Village of Port Jervis v. First Nat. Bank of Port Jervis*, 96 N. Y. 550, aff'g 31 Hun, 107 and judg't for pl'ff.

From opinion.—“In all cases where one stands in the position of indemnitor to others who are also immediately liable to a third party, his liability may be fixed and determined in the action brought against his indemnitee by notice of the pendency of such action, and an opportunity afforded to him to defend it. *Aberdeen v. Blackmar*, 6 Hill, 324; *Chicago City v. Robbins*, 2 Black. 423. In such case it has been held that it is unnecessary that he should have notice in writing, or even express notice, but that notice may be implied from his knowledge of the pendency of the action, and his participation in its defense. *Barney*

v. Dewey, 13 Johns. 226; Beers v. Pinney, 12 Wend. 309; Heiser v. Hatch, 86 N. Y. 614.

If he has notice of the pendency of the action, and of the intention of the defendant therein to look to him for indemnity in case of a recovery, and it is not denied an opportunity to defend, he is bound by the result of such action. *City of Rochester v. Montgomery*, 72 N. Y. 67; *Heiser v. Hatch*, *supra*; *Robbins v. City of Chicago*, *supra*. In the latter case it was said by Justice Gifford, that 'persons notified of the pendency of a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if, instead of doing so, they willfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently be allowed to turn around and evade the consequences which their own conduct and negligence have superinduced.'

Whenever the law requires notice to be given to a moneyed corporation, it is well served by being communicated to its chief financial officer (*New Hope & Del. Bridge Co. v. Phenix Bank*, 3 N. Y. 166), and when his agency is of a continuous character, and the duty rests upon him to communicate information acquired by him to his principal, his knowledge, however and wherever acquired, becomes the knowledge of his principal, and it is bound thereby. *Holden v. N. Y. & E. Bank*, 72 N. Y. 286; *Fulton Bank v. N. Y. & S. Canal Co.*, 4 Paige, 127.

A corporation can acquire knowledge or receive notice only through its agents, and if they should be thus debarred from receiving it, it would be deprived of an essential and important function of its corporate existence.

Numerous cases are cited by the appellant to the effect that knowledge acquired by a director of a corporation, when engaged in business transactions outside of his official duty, is not chargeable to the corporation of which he is a director, as its knowledge. These cases obviously have no application to the facts of this case. A director of a corporation is an agent with limited powers, and had no original and independent capacity to represent or act for the corporation of whose governing body he is a mere factor. He may, of course, be delighted by the corporation to act for it in any special transaction, or may even be given general authority to act as its agent; but in the absence of such special authority, he can act for his principal only as a member of its board of directors, in conjunction with his associates. *Nat. Bank v. Norton*, 1 Hill, 572; *Fulton Bank v. N. Y. & S. Canal Co.*, *supra*."

One who, without his fault, has been and is held liable for the negligence of another, is entitled to indemnity from the latter whether a contractual relation exists between them or not. This right does not depend upon the fact that the wrongdoer owed to the one charged with the liability a special or particular duty not to be negligent, and it does not matter that the person held in the first instance to be liable was so charged in a federal court, while under the rules in the state court he would not have been so charged. The amount for which the person was held liable, in the first instance, is presumptive evidence of the amount of the indemnity, at least where the wrongdoer had notice of the first action. *Oceanic S. Co. v. Campania Trans. Espanola*, 134 N. Y. 461, rev'g 26 J. & S. 425. and judg't for def't.

See *City of Buffalo v. Holloway*, 7 N. Y. 493; *ante*, "Contractor."

From opinion.—"There are many reported cases of recoveries of sums which persons have been compelled by judgments to pay for the neglects of others, and the general rule is that there may be a recovery had in such cases unless the parties are concerned in the wrong which caused the damages. *Rochester v. Montgomery*, 72 N. Y. 67; *Village of Port Jervis v. First Nat. Bank*, 96 id. 550; *Chicago City v. Robbins*, 2 Black. 418; s. c., 4 Wall. 657; *Lowell v. Boston & Lowell R. Co.*, 22 Pick. 24.

The foregoing cases were brought by cities to recover sums which they had been compelled to pay to travelers on the streets for injuries caused by the negligent conduct of the defendants. In those cases the liability of the defendants to indemnify the municipalities is not placed on the ground that persons causing injuries in highways owe a higher or different duty to the public or to a city than to individuals, nor upon the ground that the liability over is peculiar to neglects to use due care in public streets. The same duty to exercise care for the safety of the public and all having occasion to use piers would seem to be due from those in control of public piers as from those using a public street, for both are public ways. * * *

In *Gray v. Boston Gas Light Co.*, 114 Mass. 149, the defendant fastened a telegraph wire to the plaintiff's chimney without having obtained permission. The weight of the wire pulled the chimney into the street, injuring a traveler, who began an action to recover his damages against the owner of the building. Notice of the suit was given to the gas-light company, but it refused to defend. Subsequently, Gray, the owner of the building, paid the traveler \$335 for damages and in settlement of the action, and then sued the gas-light company to recover that sum and the expenses of the litigation. It was held, the sum paid in settlement having been found to be reasonable, that it and the expenses of the action could be recovered. The court, in discussing the question, said: 'When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible for the act cannot have indemnity or contribution from the other, because both are equally culpable of *particeps criminis*, and the damage results from their joint offense. The rule does not apply when one does the act or creates the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act had thus exposed him. In such cases the parties are not *in pari delicto* as to each other, though to third persons either may be held liable.'

In *Churchill v. Holt*, 127 Mass. 165, a judgment had been recovered against the occupant of a building for damages sustained by a traveler who had fallen through a hatchway in a sidewalk. The owner paid the judgment and sought to recover the amount from Holt, alleging that his servant, in the course of his business, opened and negligently left the hatchway uncovered and so caused the accident. On the trial the evidence to prove this allegation was rejected but it was held on review that it was competent. It was said: 'The rule that one of two joint tort feors cannot maintain an action against the other for indemnity or contribution, does not apply to a case when one does the act or creates the nuisance and the other does not join therein but is thereby exposed to liability. In such case the parties are not *in pari delicto* as to each other though as to third persons either may be held liable.'

In that case, as in the one at bar, the defendant took the position that the judgment in favor of the traveler against the owner was conclusive against his right to maintain the action. This position was not sustained, and in discuss-

ing the question the court said: 'Under the pleadings in that suit the judgment may have been rendered upon the ground that the plaintiffs were liable as occupants of the building, without any regard to the question whether they or a stranger to the suit removed the cover or negligently left it unguarded. It conclusively shows that they were guilty of negligence in law as to the person injured, but it does not show that they were *particeps criminis* with the defendants, and is not inconsistent with their right to maintain this action.' This case was retired and the jury found that the parties were joint tort feasons and the plaintiff was defeated. 131 Mass. 67. The principle was again asserted in *Simpson v. Mercer*, 144 id. 413; *Old Colony R. Co. v. Slavens*, 148 id. 363.

In *City of Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 487, the rule of liability was thus stated: 'When the parties are not equally criminal, the principal delinquent may be held responsible to a co-delinquent for damages paid by reason of the offense in which both were concerned in different degrees as perpetrators.' This was said in an action founded upon a covenant to keep the street upon which the accident occurred in repair, but reference was made to *City of Lowell v. Boston & Lowell R. Co.*, *supra*, a leading case, laying down a rule that where one has been compelled by a judgment to pay the damages occasioned by another's negligence, the amount paid may be recovered against the principal wrongdoer, though contractual relations do not exist between the parties to either action. See, also, *Bishop's Non-Contract Law*, sec. 535.

When damages have been recovered by a judgment against a master for injuries sustained by a servant's negligence, the master not having contributed, the sum so paid by the latter may be recovered from the servant. *Smith v. Foran*, 43 Conn. 244; *Grand Trunk R. Co. v. Latham*, 63 Me. 177; *Green v. New River Co.*, 4 T. R. 589; *Pritchard v. Hitchcock*, 6 M. & G. 154; *Smith's M. & S.* 134; 2 *Thomp. Neg.* 1061; *Whart. Neg.* sec. 246.

Sufficient cases have been cited to show that one who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter, no matter whether contractual relations existed between them or not, and that the right to indemnity does not depend upon the fact that the defendant owed the plaintiff a special or particular legal duty not to be negligent. The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and if another person has been compelled (by the judgment of a court having jurisdiction) to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him."

Under charter it is not primary duty of defendant's trustees to make and repair sidewalks, but if owner does not repair pursuant to ordinance the village is bound to do so. If individual be liable for injuries he is liable over to municipality, against which recovery has been made. *Haskell v. Village of Penn Yan*, 5 Lansing, 43, aff'g judg't for pl'ff.

Defendant had a tram-way, over and twelve feet above the Erie canal, and the city assumed the bank as a public street, and raised the grade, so that the tram-way was but ten feet above. A person driving on such bank was hit by a tram-way, and suing the city recovered. The city sued the defendant and put in judgment-roll in first action. Held,

1. Judgment-roll did not show that the defendant was the author of the injury, but that the city must show it.

City of Rochester v. Montgomery, 72 N. Y. 65; *Village of Port Jervis v. First National Bank*, 96 id. 556; *The Mayor of Troy v. Troy & L. R. R. Co.*, 49 id. 657; *City of Chicago v. Robbins*, 2 Black. 418, and 4 Wall. 657.

2. The city had not taken the bank for a street before the tram-way was erected, hence the city's right was subject to the tram-way;

3. That judgment did not estop defendant from showing that the bank was not a public street; that the state could relinquish its own rights in the bank, but not defendant's to go over it;

4. The city should not invite the public to travel in an unsafe place. *City of Cohoes v. Morrison*, 42 Hun, 216, aff'g judg't for def't on non-suit.

A municipality was, by suit, adjudged to pay damages to a person, who was injured by stepping into a hole in the sidewalk, which it was the duty of the adjoining owner to keep in repair. Such owner had actual notice of the action, and appeared and assisted in the defence, and was liable to the municipality for the sum paid by it on account of such injury. The remedy over against the owner survived his death; the obligation imposed upon a land owner by statute to keep the sidewalk in front of his premises in repair, is in the nature of a tax on the property of the owner, and imposes a contract obligation as between the land owner and the public. *City of Rochester v. Campbell &c.*, 55 Hun, 138, overruling demurrer to complaint.

The plaintiff and its contractors agreed that the latter should, while building a sewer, guard the work and indemnify the former against all suits and damages to which it might be subjected by reason of injury to anyone, resulting from negligence of the latter in doing or guarding the work.

A person was injured through the carelessness of such contractors, and brought an action against the two contracting parties; whereupon the attorney for the plaintiff herein gave notice to the defendants herein, who were the bondsmen of the contractors, of the pendency and purpose of such former action, and asked them to defend the same, which they did not do. Whereupon, trial being had, plaintiff recovered damages which plaintiff herein paid, and brought the present action for indemnity. On trial of this action, the plaintiff put in evidence the contract, the bond, judgment-roll, proof of payment of the judgment, and amount expended contesting former action; a verdict was directed for plaintiffs for such amount and interest. The judgment-roll showed,

1. That defendant in first action and plaintiff in second action was liable for the damages;

2. That the damage was the amount found in the first action. But such judgment did not show that the contractors or their bondsmen were primarily liable to pay such damages, as the negligence may have been that of the plaintiff in second action; hence, a new trial was granted.

This holding is predicated upon terms of the contract which gave plaintiff herein a right to supervise and direct the work, and to own and leave in street all refuse material. *Mayor &c. of City of N. Y. v. Brady & Hollweg*, 70 Hun, 250, rev'g judg't for pl'ff.

Upon the trial of an action, brought by a city against the sureties upon a contractor's bond, to recover back the amount of damages recovered against the city by a person injured by the alleged negligence of such contractor, where the question is as to which of the parties was primarily liable, as between themselves, for the accident, it is competent to introduce evidence, *aliunde* the record of the suit brought against the city, showing what was litigated in that action, such as the cause of such accident, and that a certain state of the sidewalk of the city constituted the subject-matter upon which the plaintiff in that action relied to sustain his claim therein.

The consent by a municipal corporation that a person do a lawful act merely permits it to be done in a careful, prudent and lawful manner, and when it is performed in any other manner, and an injury to third persons ensues, the author of the injury is liable therefor. *The Mayor, Aldermen and Commonalty of the City of New York v. Brady*, 81 Hun, 440.

One who was bound to return goods in good order, and had paid the owner recovered for their negligent destruction by fire. *Illinois C. R. Co. v. Schenk*, 64 Ill. App. 24.

Upon payment of a loss, an insurance company may be subrogated, to the extent of the amount paid, to the rights of the insured against the party negligently causing the loss. *Atchison &c. R. Co. v. Neet*, 7 Kan. App. 495.

See, also, *Sun Oil Co. v. Ohio Farmers' Ins. Co.*, 15 Oh. C. C. 355.

Workmen recovered against subcontractor for the fall of a scaffold erected by a contractor. Subcontractor did not recover over against the latter, under no duty to furnish such scaffolding. *Sincer v. Bell*, 47 La. Ann. 1548.

That a city is a joint tortfeasor does not prevent its recovering over against the party actively causing injury by permitting the accumulation of ice on its sidewalk. *Holyoke v. Hadley Co.*, 174 Mass. 424.

See, also, *Chester v. First Nat. Bank*, 9 Pa. Super. Ct. 517.

Plaintiff was liable for failing to inspect and discover a defect in a

boiler and had to pay for the resulting damages. But, as he had contracted with the defendant for a boiler to stand a certain pressure, and relied on his skill and judgment in the matter, he was entitled to recover over what he was compelled to pay. *Boston Woven-Hose Co. v. Kendall*, 178 Mass. 232; s. c., 51 L. R. A. 781.

Where a judgment had been recovered against a railroad company and another as joint wrongdoers, the former in suing the latter must show that it was not also negligent. *Boston &c. R. Co. v. Sargent*, 70 N. H. 299.

Gregg v. Page Belting Co., 69 N. H. 247.

See other cases under "Parties Jointly Liable." See, also, *Gulf &c. R. Co. v. Powell*, (Tex. Civ. App.) 60 S. W. Rep. 979.

City was not allowed to obtain indemnity because of the negligent construction of sidewalk accepted by it. *Wilhelm v. Defiance*, 58 Oh. St. 56; s. c., 40 L. R. A. 294; aff'g s. c., 12 Oh. C. C. 246.

The owner of property may recover from a contractor the sum paid his tenants for damages caused by negligence of the contractor. *Maloney v. Brady*, 18 S. C. 757.

Cattle strayed on the track of a railway company and such company paid damages for the killing of same, but was not allowed to recover such damages against the one who removed the fence. *Louisville &c. R. Co. v. Guthrie*, 10 Lea, (Tenn.) 432.

Street railroad company, bound to keep the streets in repair, cannot avoid indemnifying city by leasing to another. *Ft. Worth Street R. Co. v. Allen*, (Tex. Civ. App.) 39 S. W. Rep. 125.

Where the abutting owners are not obliged to keep the sidewalks in repair, they are not ultimately liable. *Dallas v. Meyers*, (Tex. Civ. App.) 55 S. W. Rep. 742.

That city had consented to digging ditches in the street which were left insufficiently guarded, was not a defense to an action over by the city. *Corsicana v. Tobin*, (Tex. Civ. App.) 57 S. W. Rep. 319.

See, also, *Boston v. Coon*, 175 Mass. 283.

But a carrier, wrongfully delivering goods to another, which converted them, was not liable over to it. *Liefert v. Galveston &c. R. Co.*, (Tex. Civ. App.) 57 S. W. Rep. 899.

So in case of joint negligence in inspection of cars. *Galveston &c. R. Co. v. Nass*, (Tex. Civ. App.) 57 S. W. Rep. 910.

In the absence of an obligation on the part of the lessees of a city's sewer farm to prevent the escape of sewage, it was liable with them as joint wrongdoers and was not allowed to recover over on the ground of their negligence. *San Antonio v. Pizzini*, (Tex. Civ. App.) 58 S. W. Rep. 635.

Otherwise, however, where the city had provided proper filter beds, but the tenants, upon their own responsibility, diverted the sewer into the creek without the knowledge of the city. *San Antonio v. Smith*, (Tex. Civ. App.) 59 S. W. Rep. 1109; rev'g s. c., 57 id. 881.

After accepting a contractor's work, without the guarded approaches to the bridge, as provided, and acquiescing in such performance of the contract for ten years, a city was not permitted to recover over for damages paid. *Gulf &c. R. Co. v. Sandifer*, (Tex. Civ. App.) 69 S. W. Rep. 461.

Where it was a gas company's duty to repair a gas box in the sidewalk, a city, required to pay for injuries caused by its failure to do so, recovered over. *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316.

Where bailee of floating bath house, contrary to instructions, endangered its safety, he was required to make indemnity for salvage charges. *Tebo v. New York*, 61 Fed. Rep. 692.

INSURANCE.

- I. DAMAGES FROM BREACH OF CONTRACT OR DUTY BY WHICH INSURANCE IS NOT EFFECTED OR LOST.
- II. RIGHT OF INSURER TO BE SUBROGATED TO CLAIM AGAINST A COMMON CARRIER.
- III. NEGLIGENCE CAUSING LOSS WILL NOT DEFEAT RECOVERY ON POLICY.
 - (a) Construction of stipulations for exemption from loss by negligence.
- IV. NEGLIGENCE IN EFFECTING THE INSURANCE OR OBSERVING THE TERMS OF THE CONTRACT.
 - (a) In effecting insurance.
 - 1. Of insurance agent.
 - 2. In description of property.
 - 3. Careless omission or misstatement as a "misrepresentation" or "concealment."
 - 4. Careless omission or misstatement as a breach of warranty.
 - 5. Acceptance of conditional policy in ignorance of the condition.
 - (b) In observing the terms of the contract.
 - 1. Giving notice.
 - 2. Allowing premises to remain vacant.
 - 3. Keeping and producing books.
 - 4. Keeping books in iron safe.
 - 5. Payment of premiums.

I. Damages from Breach of Contract or Duty by Which Insurance Is not Effected or Lost.

When a person neglects a duty to effect or continue in force insurance for the benefit of another, and in consequence the property is destroyed, he is liable for the damages resulting from such negligence, not exceeding the amount of such insurance. If the person to be benefited by the insurance knew of the neglect endangering his insurance, and have an opportunity to preserve the same, it would seem to be his duty to do so and charge the expense thereof to the one in default.

The defendants, commission agents, undertook to effect an insurance on the plaintiff's goods, but neglected to perform their agreement, and, the goods being lost, they were liable for their value. *Smith v. Price*, 2 F. & F. 748.

The defendant assigned a policy of insurance on his life for one

thousand pounds, to trustees for the creditors, and covenanted that he would do nothing by which the policy should be forfeited. He broke the covenant, and the measure of damages was held to be the value of the policy at the time of the breach. *Hankins v. Coulthurst*, 5 B. & S. 343.

The owner of a saw-mill received timber to be converted into lumber, and agreed to keep it insured from damage by fire and to pay the value of the timber in case it should be burned. The measure of damages was the value of the timber burned. *Ex parte Bateman—In Re Routledge*, 8 De Gex M. & G. 263.

An agent of a principal, who neglects his duty to insure the property of the principal, which is lost, is liable for its value, not exceeding the amount for which it should have been insured. *Miner v. Taggart*, 3 Binney, 205.

French v. Read, 6 Binney, 308.

The measure of damages for the breach of a contract by a tenant to insure, is the loss sustained by the landlord, not exceeding the amount of the policy, which the tenant covenanted to obtain. *Douglass v. Murphy*, 16 U. C. Q. B. 113.

The damages recoverable for the breach of an agreement to insure property, which is destroyed, is the value of the property, not exceeding the amount for which it should have been insured. Biddle on Insurance, secs. 1400 and 1401; May on Insurance (3d ed.), 399 b., where cases are collected.

So as to an agent neglecting to insure the property of his principal. Arnold on Marine Insurance, Vol. 1 (6th ed.), 185.

See, also, *Parsons Marine Ins.* 430.

The plaintiff obtained a policy on the life of her husband and assigned sixty per cent. thereof to the defendant, who agreed to keep the policy alive for the benefit of the plaintiff, but failed to perform his engagement, and the policy was forfeited. In an action brought for damages by the wife during the lifetime of her husband, it was held, that the refusal to allow the plaintiff to show that the policy was worth \$250 was an error, for which a new trial was granted. *Ainsworth v. Backus*, 5 Hun, 414.

An agreement was entered into between two persons whereby one leased from the other a building for a period of years, with the right to purchase upon complying with the conditions therein named, and the lessee therein covenanted "to keep in force insurance on said property for the benefit of said bank (the lessor) in the sum of \$10,000, in such companies as said bank shall approve." No policy of fire in-

surance was issued covering such building, and the same was thereafter destroyed by fire.

The measure of the damages of the lessor was not the sum of \$10,000, but the cost of procuring a policy of fire insurance in that amount, covering the premises in question.

Upon the failure of the lessee to take out the policy of insurance as provided by such agreement, the lessor should have taken out the same and charged the lessee with the cost thereof. *National Mahaiwe Bank v. Hand*, 80 Hun, 584; s. c., 153 N. Y. 655.

The defendant agreed to procure and keep in force during the life of a third person, an insurance on the life of Mott, for \$55,000, which was for the benefit of the plaintiff. The defendant obtained a policy, and paid the premium for one year, but neglected to pay the subsequent premiums. Mott died within the time during which the defendant agreed to keep the policy alive, and in an action to recover damages for the breach of the agreement it was held: "The bank, under these facts, must be considered, as insurer, and liable to the same extent as the insurance company would have been if the policies had been continued by payment of the premium for the succeeding year." *Soule v. Union Bank*, 45 Barb. 111; s. c., 30 How. Pr. 105.

An agent neglected his duty to insure the property of his principal, which was destroyed. The agent was liable for the loss, not exceeding the amount for which he should have insured. *Perkins v. Washington Ins. Co.*, 4 Cow. 645.

The defendant, as the agent of Gray, obtained a policy on his life for £3,000 for ten years, and paid the premium for the first year. Thereafter, the defendant ordered the policy cancelled, and took out a new one for £450 on the life of Gray, who died within the year. The defendant was held liable for the amount insured by the original policy, after deducting the premium. *Gray v. Murray*, 3 Johns. Ch. 167.

Reasonable diligence required of brokers to insure in responsible companies. *Shepard v. Davis*, 42 App. Div. 462.

Failure of a broker to exercise the usual skill and diligence in affecting insurance makes him liable to his customer for his negligence. *Milliken v. Woodward*, 64 N. J. L. 444.

Failure of insurance agents to cancel and return a policy as instructed, made them liable to the company for their negligence. *Germania Fire Ins. Co. v. Harraden*, 90 Ill. App. 250.

See, also, *London &c. Corp. v. Russell*, 1 Pa. Super. Ct. 320.

In an action for breach of an agreement to assign a policy of insurance upon a house sold by the defendant to the plaintiff, by reason of which the policy became void, the measure of damages (the plaintiff having

procured no new insurance) is the cost of insurance for the unexpired term of the policy, and not the amount of the injury resulting from the subsequent burning of the house. *Dodd v. Jones*, 137 Mass. 322.

From opinion.—"The agreement was not a contract of insurance, but of sale; and the measure of damages for the breach of it was the value of the thing sold. A sum that would procure a similar policy, and thus place the plaintiff in a position she would have been in had there been no breach of the contract, would indemnify her, and she cannot elect to go without insurance, and hold the defendant as insurer. Damages resulting from the burning of the building are not the direct and natural consequence of the breach of the defendant's contract, and could not have been contemplated by the parties as included in it. The natural consequence of the failure of the defendant to perform his contract would be that the plaintiff would procure another policy of insurance, and she cannot charge the defendant with the consequences of her neglect to do that. *Loker v. Damon*, 17 Pick. 284; *Miller v. Mariner's Church*, 7 Greenl. 51; *Grindle v. Eastern Express Co.*, 67 Me. 317; *Hoadley v. Northern Transportation Co.*, 115 Mass. 304.

Defendants, warehousemen, received from plaintiff, for storage, certain goods, she to bear the risk from fire; and she had the goods insured in the warehouse where they were. In contemplation of their removing the goods, at some indefinite time, to another warehouse, they agreed with her to give her notice when the goods were removed, so that she might have the insurance continued upon them in such other warehouse. They removed the goods, and failed to give her notice. By the removal the insurance became void. The goods were destroyed by fire. They had no authority from her to make any arrangement for the insurance. Defendants testified, but it was denied by the agent for the insurance company, that they informed such agent of the removal, and he promised to make the necessary change in the policy. Held, that, conceding plaintiff might, when informed of this, after the fire, have adopted or ratified what defendants so testified to, as an agreement by the insurer to continue the policy, she was not bound to do so, and that, though found by the jury to be as defendants testified, it is no defense to an action for neglecting to give notice of the removal. The plaintiff recovered the value of her goods. *Conover v. Wood*, 48 Minn. 438.

While a broker is bound to notify his principal of his failure to effect insurance he has reasonable time, depending upon peculiar nature of the goods, in which to seek an insurer. *Backus v. Ames*, 79 Minn. 145.

Agent held liable for failure to attempt to secure a reduction in a policy as instructed. *Halsey v. Adams*, 64 N. J. L. 724.

And for failure of a broker to correctly state plaintiff's interest in a policy. *Milliken v. Woodward*, 64 N. J. L. 444.

The plaintiff consigned books to the defendant for sale on commis-

sion, the latter agreeing to cause them to be insured, but neglected to do so, and the books were destroyed while in his possession. The plaintiff was entitled to recover the value of the books lost. *Ela v. French*, 11 N. H. 356.

Where a bailee agreed to keep the thing insured, and neglected to do so, he was liable for loss by fire. *Smith Am. Organ Co. v. Abbott*, 1 Pa. Dist. R. 174; 11 Penn. Co. Ct. 319.

A merchant, who is directed to insure the goods of his correspondent and neglects to do so, is liable in case of loss as an insurer. *Morris v. Summerl*, 2 Wash. C. C. 202, aff'd in U. S. Sup. Ct.

Failure of an insurance agent to keep insurance effected for his customer does not render the agent's company liable for his negligence. *Wood v. Prussian Nat. Ins. Co.*, 99 Wis. 497.

II. Right of Insurer to be Subrogated to Claim against a Common Carrier.

The insurer usually, upon paying the loss, in the absence of stipulation between the carrier and the owner defeating the right, is entitled to be subrogated to the rights and remedies of the owner against the carrier. *Hall v. R. Co.*, 13 Wall. 367; *C. F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399; *Sheldon on Sub.* 329.

Plaintiffs shipped a cargo under a bill of lading, providing that the carrier should have the full benefit of any insurance that may have been effected on the goods. The goods having been injured through the negligence of the carrier, the plaintiff brought this action upon a policy issued thereon by defendant, which provided that in case of loss defendant should be subrogated to the rights of plaintiffs as to all claims against the carrier, and that the plaintiffs would make no agreements or do any act whereby this right of action against the carrier for losing or injury to the goods should be released or cut off; held, that the provision in the bill of lading cut off the insurer's right to be subrogated, and that thereby plaintiff's rights to recover upon the policy were defeated. *Fayerweather v. Phoenix Ins. Co.*, 118 N. Y. 324; aff'g 22 J. & S. 545, and judg't for def't, distinguishing *Jackson Co. v. B. M. Ins. Co.*, 139 Mass. 508; *Inman v. S. C. R. Co.*, 109 U. S. 128.

Insurer of building, who has paid owner for burning thereof, through defendant's negligence, may, under the doctrine of subrogation, recover sum paid of defendant, but not with interest on such sum. *Home Ins. Co. v. Pennsylvania R. R. Co.*, 11 Hun, 182, rev'g judg't for pl'ff.

Insurer of goods is entitled to be subrogated to the rights of the owner upon paying for the loss of the same through negligence of a common carrier. *London &c. Ins. Co. v. Rome &c. R. Co.*, 68 Hun, 598.

An insurance company cannot recover against the carrier by subrogation upon taking an assignment of the claim of the shipper against the carrier where the contract of carriage binds the shipper to give the carrier the benefit of whatever insurance he obtains. *North British &c. Co. v. Central V. R. Co.*, 9 App. Div. 4.

Insurance company entitled to subrogation against a common carrier. *Chicago &c. R. Co. v. Glenny*, 175 Ill. 238; aff'g s. c., 70 Ill. App. 510.

Though unauthorized to do business in the state. *Lumberman's &c. Co. v. Kansas City &c. R. Co.*, 149 Mo. 165.

And settlement by carrier with insured for excess of insurance is no bar. *Atchison &c. R. Co. v. Home Ins. Co.*, 59 Kan. 432.

See, also, *Hartford Fire Ins. Co. v. Wabash R. Co.*, 74 Mo. App. 106; *Omaha &c. R. Co. v. Granite State &c. Ins. Co.*, 53 Neb. 514; *Norwich &c. Ins. Co. v. Stang*, 9 Oh. C. D. 576; *Texarkana &c. R. Co. v. Hartford &c. Ins. Co.*, 17 Tex. Civ. App. 498.

Carrier gave a guaranty of the quantity of grain carried. It was allowed to have the rights of the consignee against a public elevator responsible for a deficiency. *Vega S. Co. v. Consol. Elevator Co.*, 75 Minn. 308.

See, also, *Cleveland Iron Min. Co. v. Eastern R. Co.*, 75 Minn. 505.

Intervention allowed insurance company paying loss pending suit. *Lake Erie &c. R. Co. v. Falk*, 62 Oh. St. 297.

No right of subrogation where the bill of lading gives the carrier the benefit of insurance. *Roos v. Philadelphia &c. R. Co.*, 13 Pa. Super. Ct. 563.

Holder of claim by subrogation allowed to sue in his own name or name of insured. *Pacific Coast &c. Co. v. Bancroft-Whitney Co.*, 94 Fed. Rep. 180.

But he cannot maintain an action in his own name unless he has paid for the whole loss. *Fairgrieve v. Marine Ins. Co.*, 94 Fed. Rep. 686.

Holder of claim by subrogation is subject to defense of contributory negligence. *The Livingston*, 104 Fed. Rep. 918.

See, also, *Traveller's Ins. Co. v. Mitchell*, 78 Fed. Rep. 754.

III. Negligence Causing Loss Will not Defeat Recovery on Policy.

Negligence alone on the part of the master of a vessel, resulting in the loss of the cargo, will not defeat recovery of insurance on it. A shipper is not responsible for the negligence of a competent master. *Sturm v. Atlantic Ins. Co.*, 63 N. Y. 78, aff'g 6 J. & S. 281 and judg't for pl'ff.

Insurance company is liable on contract, although party's own negli-

gence has been the primary cause of loss. *Champlin v. Ry. Pass. Association Co.*, 6 Lansing 71, aff'g judg't for pl'ff.

Gates v. Madison Ins. Co., 1 Seld. 478; *Matthews v. Howard Ins. Co.*, 1 Kern. 9; *Breasted v. Farmers' L. & F. Co.*, 4 Seld. 299.

See *Am. Ins. Co. v. Ogden*, 20 Wend. 287.

By inserting a mortgage clause, the insurer undertakes a new obligation with the mortgagee which is unaffected by any act or neglect of the mortgagor unknown to the mortgagee. *Insurance Co. &c. v. International Trust Co.*, 71 Fed. Rep. 88.

(a). CONSTRUCTION OF STIPULATIONS FOR EXEMPTION FROM LOSS BY NEGLIGENCE.

Increasing risk.—The risk is not increased by merely setting fire to some rubbish with no intention that it should be communicated to an adjoining building. *Des Moines Ice Co. v. Niagara &c. Ins. Co.*, 99 Iowa, 193.

Whether there was an increase of risk in using gasoline to burn old paint from a brick and stone building was for the jury upon evidence that such was the customary method. *Smith v. German Ins. Co.*, 107 Mich. 270.

Safe mooring.—Stipulation in a policy to safely moor a boat satisfactorily to the defendant, during the winter, does not require that the boat be moored with absolute safety, but in a proper place and with reasonable care and safety. Notice to the insurer of place of mooring is not required. *Allison v. Corn Ex. Ins. Co.*, 57 N. Y. 87, reversing judg't of gen. term and aff'g judg't for pl'ff.

Voluntary and unnecessary exposure.—Does not apply to a case of mere negligence. *Lehman v. Great Eastern Casualty & I. Co.*, 7 App. Div. 424.

See, also, *Matthes v. Imperial Acc. Ass'n*, 110 Iowa, 222.

Nor where insured had no actual knowledge of the danger. *Commercial &c. Asso. v. Springsteen*, 23 Ind. App. 657.

See, also, *Fidelity &c. Co. v. Sittig*, 79 Ill. App. 245.

There was no voluntary exposure in making an assault, where the insured did not appreciate the danger he was subjecting himself to in making it. *Campbell v. Fidelity &c Co.*, (Ky.) 60 S. W. Rep. 492.

Nor in going on the top of boilers unaware of danger from escaping steam. *Travelers' Ins. Co. v. Clark*, (Ky.) 59 S. W. Rep. 7.

The requirement that insured shall use due diligence for his safety is not violated where he is no more careless than people usually are in their affairs. *Kentucky &c. Ins. Co. v. Franklin*, 102 Ky. 511.

No voluntary exposure in attempting to drive a bull out of a pasture. *Johnson v. London &c. Co.*, 115 Mich. 86.

There was no violation of the condition in a policy against unnecessary lifting and voluntary over-exertion, where insured, to test the weight of dumb-bells, attempted to lift one. *Rustin v. Standard &c. Co.*, 58 Neb. 792.

But attempting to lift the cover of a sewer manhole weighing 100 to 125 pounds rusted in place and then, feeling the effects of the exertion, to pry up a stone weighing 250 or 300 pounds constituted a violation. *Rose v. Commercial &c. Co.*, 12 Pa. Super. Ct. 394.

There was no voluntary exposure, where insured, though warned not to approach, had no reason to suppose that his assailant was armed with a deadly weapon. *United Casualty &c. Co. v. Harroll*, 98 Tenn. 591.

There was no voluntary risk in heating pitch for caulking purposes where the insured did not know that thereby he was entering into any dangerous occupation. *Ashenfelter v. Employer's &c. Corp.*, 87 Fed. Rep. 682.

IV. Negligence in Effecting the Insurance or Observing the Terms of the Contract.

(a). IN EFFECTING INSURANCE.

1. OF INSURANCE AGENT.

Where an agent, authorized to take application for insurance, within the scope of his authority, by his negligence makes a material misstatement not authorized by the party who signed it, the wrong should be imputed to the company and not to the insured. *Raleigh v. Empire Ins. Co.*, 36 N. Y. 350.

Where the insured was feeble in mind and could not read the defendant was not permitted to claim as warranties, answers set down by its agent and known to be mistakes. *Singleton v. Prudential Ins. Co.*, 11 App. Div. 403.

Omission of a trivial fact did not avoid the policy, where the agent making the mistake in writing the application was the agent of the insurer and had not been made, by the terms of the policy, the agent of the insured. *Tooker v. Security Trust Co.*, 26 App. Div. 372.

But otherwise, where such a provision is inserted. *Woehrl v. Metropolitan L. Ins. Co.*, 21 Misc. 88.

But see *Rosencrans v. Insurance Co.*, 66 Mo. App. 352; *Omaha &c. Ins. Co. v. Crighton*, 50 Neb. 314.

Misstatements are not misrepresentations where they are made by the insurance agent without the knowledge or authority of the insured. *Yoch v. Home &c. Ins. Co.*, 111 Cal. 503.

Where the insured engages the agent to procure insurance for him he makes him his agent and is bound by his representations. *Lennox v. Greenwich Ins. Co.*, 2 Pa. Super. Ct. 431.

Where the insured has given the requisite information to the agent of the insurer he may rely on the latter's having performed his duty. *Fireman's Fund. Ins. Co. v. Norwood*, 69 Fed. Rep. 71.

But, where an affidavit is short and plain, the fact that it was prepared by the insurance agent, will not excuse failure to read it. *Dumas v. Northwestern Ins. Co.*, 12 App. D. C. 245.

2. IN DESCRIPTION.

Negligence alone will not avoid a policy of insurance upon a vessel where the parties had in view the same vessel, and the underwriter knew the true name or intended to insure the particular vessel lost; but when there is a mistake as to the vessel sought to be insured, and the policy is upon another vessel than that for which application was made, no contract exists, even though the underwriter was put upon inquiry, and by the exercise of diligence and care could have prevented the mistake. *Hughes v. Mercantile Ins. Co.*, 55 N. Y. 265.

An anti-mortgage clause did not prevent recovery, where insured never knew of the existence thereof, formal application being dispensed with by reason of the agent's knowledge of the premises. *Georgia Home Ins. Co. v. Holmes*, 75 Miss. 390.

Failure to examine a policy and have an omission of part of the property to be insured filled in, did not prevent recovery, where omission was a mere clerical error. *Shanahan v. Agricultural Ins. Co.*, 6 Pa. Super. Ct. 65.

An inaccuracy of description did not prevent recovery, where the subject matter intended was sufficiently identified. *Hartford Fire Ins. Co. v. Moore*, 13 Tex. Civ. App. 644.

3. CARELESS OMISSION OR MISSTATEMENT AS A "MISREPRESENTATION" OR "CONCEALMENT."

An inadvertent representation or failure to represent a fact is not a fraud or concealment within the meaning of the policy. *American C. Ins. Co. v. Ware*, 65 Ark. 336.

German-American &c. Co. v. Farley, 102 Ga. 720; *Atherton v. British America Assur. Co.*, 91 Me. 289; *Penn Mut. &c. Co. v. Mechanics' &c. T. Co.*, 72 Fed. Rep. 413; s. c. aff'd, 73 id. 653; *Thomas v. Grand Lodge &c.*, 12 Wash. 500.

Knowledge of falsity is essential under a policy based on the truth of the facts to the best of one's knowledge and belief. *O'Connell v. Supreme Conclave &c.*, 102 Ga. 143.

Where information as to incumbrances upon the property insured is not sought, omission to give it will not, in the absence of fraud, prevent recovery. *Seal v. Farmers & Merchants' Ins. Co.*, 59 Neb. 253.

Citing *Ins. Co. v. Bachler*, 44 Neb. 549; *Hanover &c. Ins. Co. v. Bohn*, 48 id. 743; *Slobodsky v. Phenix Ins. Co.*, 53 id. 816.

Where the incumbrance was a trust deed entirely satisfiable out of other property and the omission to disclose it not fraudulent, recovery was allowed. *McCarty v. Imperial Ins. Co.*, 126 N. C. 820.

Innocent failure to voluntarily disclose mechanic's liens was not a "concealment" of such fact and did not prevent recovery. *Arthur v. Palatine Ins. Co.*, 35 Or. 27.

Where no questions are asked, failure to disclose material facts does not constitute a concealment, unless they are intentionally withheld. *Johnson v. Scottish &c. Ins. Co.*, 93 Wis. 223.

4. CARELESS OMISSION OR MISSTATEMENT AS A BREACH OF WARRANTY.

Where insured executes a chattel mortgage including the property insured contrary to the terms of the policy he cannot excuse himself by asserting that he did not know that it was so included. *Fireman's Fund Ins. Co. v. Barker*, 6 Colo. App. 535.

One deliberately making false statements cannot avail himself of the plea that he did not see the written answer which he was at liberty to examine. *National Union v. Arnhorst*, 74 Ill. App. 482.

Inadvertence or mistake is no defense, where insured has warranted that she has not omitted any fact material to the risk. *Davis v. Aetna &c. Ins. Co.*, 67 N. H. 335.

See, also, *Lennox v. Greenwich Ins. Co.*, 2 Pa. Super. Ct. 431; *McGowan v. Supreme Court &c.*, 107 Wis. 462.

Failure to keep water barrels in the mill did not prevent recovery where it did not contribute to the loss. *Delaware Ins. Co. v. Harris*, (Tex. Civ. App.) 64 S. W. Rep. 867.

5. ACCEPTANCE OF CONDITIONAL POLICY IN IGNORANCE OF THE CONDITION.

The mere acceptance of a conditional policy does not make the terms thereof conclusive against the applicant, where he is ignorant of its existence and the breach of the condition is unsubstantial. *Miotke v. Milwaukee &c. Ins. Co.*, 113 Mich. 166.

Ignorance of the conditions in a policy, due to failure to read it, is no defense, when it has been accepted and retained without objection. *Ramer v. American Cent. Ins. Co.*, 70 Mo. App. 47.

(b). IN OBSERVING THE TERMS OF THE CONTRACT.

1. GIVING NOTICE.

If a policy requires notice of subsequent insurance to be given with reasonable diligence, unexplained delay for twenty days to give such notice, where the parties live in the same city, avoids the policy. *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609.

Where a warranty required telegraphing at once "in case of sickness," failure to telegraph at once prevented recovery, though not reasonably possible before loss occurred. *Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis. 337.

2. ALLOWING PREMISES TO REMAIN VACANT.

Policy had elapsed for a violation of the 30 days' vacancy clause. Attachment of a clause making the loss payable to mortgagee without a new consideration did not revive it. *Baldwin v. German Ins. Co.*, 105 Iowa, 379.

The clause against leaving a house vacant is not complied with by merely leaving furniture therein and watching it in the daytime, where the watch is not extended into the night. *Hanscom v. Home Ins. Co.*, 90 Me. 333.

A house was vacant and unoccupied within such a clause, where it remained in that condition with a door unlocked for over a month. *Mooney v. Glens Falls Ins. Co.*, 4 Pa. Dist. 639.

Policy required keeping a watchman "on duty at night." It was complied with, where he was on duty, though found asleep when the fire began. *Phoenix Assur. Co. v. Coffman*, 10 Tex. Civ. App. 631.

3. KEEPING AND PRODUCING BOOKS.

Failure to keep books avoids the policy, where it expressly provides that such a failure shall work a forfeiture. *Farmers' Fire Ins. Co. v. Bates & Co.*, 60 Ill. App. 39.

Failure to enter matters of slight consequence is an immaterial deviation from the requirements of the policy and does not prevent recovery. *Meyer Bros. v. Insurance Co.*, 73 Mo. App. 166.

Inability to produce part of the books, vouchers, etc., did not excuse failure to produce the rest. *Seibel v. Lebanon &c. Co.*, 197 Pa. St. 106.

The effect of failure to enter the sales on the day of the fire was for the jury; it did not *per se* work a forfeiture. *Brown v. Palatine Ins. Co.*, 89 Tex. 590.

Record of "all purchasers, etc.," is sufficiently kept, where it is intelligent to one of ordinary comprehension. Failure to produce a book did

not work forfeitures, where its loss in the confusion was not due to the lack of ordinary care. *Liverpool &c. Ins. Co. v. Kearney*, 180 U. S. 132; aff'g s. c., 94 Fed. Rep. 314.

4. KEEPING BOOKS IN IRON SAFE.

Mere inconvenience in getting at the books if necessary to use them, the place being open all night, does not excuse failure to comply with the policy provision requiring them to be kept in a safe place at night. *Southern Ins. Co. v. Parker*, 61 Ark. 207.

There was no material breach of the safe clause, where only a small book containing a small part of an invoice entered elsewhere is inadvertently left out. *Merchants' &c. Ins. Co. v. Dunbar*, 88 Ill. App. 574.

See, also, *Niagara &c. Ins. Co. v. Hoefflin*, (Ky.) 60 S. W. Rep. 393; *McNutt v. Virginia &c. Ins. Co.*, (Tenn.) 45 S. W. Rep. 61.

Such provision not effective, where agent of insurer knew that insured had no safe. *Citizens' Ins. Co. &c. v. Crist*, (Ky.) 56 S. W. Rep. 658.

See, also, *Mitchell v. Mississippi &c. Ins. Co.*, 72 Miss. 53.

Three and a half boxes of "squibs" weighing about a pound, was allowed to come within the terms of a policy permitting gunpowder not exceeding 25 pounds, and other merchandise not "more hazardous." *Mechanics' &c. Co. v. Floyd*, 49 S. W. Rep. 543.

Insured made no attempt to comply with the safe clause. No recovery. *Gibson v. Missouri &c. Ins. Co.*, 82 Mo. App. 515.

Covenant to keep books and secure them against fire, held a warranty subject to forfeiture and not a representation. *Roberts &c. Co. v. Sun &c. Ins. Co.*, 19 Tex. Civ. App. 338.

Failure to put away the blotter containing the sole record of the last credit sales avoided the policy under such a warranty. *Palatine Ins. Co. v. Brown*, (Tex. Civ. App.) 34 S. W. Rep. 462.

But such a warranty only requires substantial performance and the failure to secure a blotter did not violate a policy, where it only showed the sales for the day previous to the loss. *Brown v. Insurance Co.*, 89 Tex. 591.

See, also, *Sun &c. Ins. Co. v. Brown* (Tex.), 36 S. W. Rep. 591.

The question of substantial compliance was taken from the jury where there was negligence in failing to preserve an inventory. *Western Assur. Co. v. Kemendo*, (Tex.) 60 S. W. Rep. 661; rev'g s. c., 57 S. W. Rep. 293.

See, also, *Lozano v. Palatine Ins. Co.*, 78 Fed. Rep. 278.

Ordinary care to furnish an ordinarily secure safe is sufficient. Attempt to remove books from safe during fire, not *per se* negligent. *Liverpool &c. Co. v. Kearney*, 180 U. S. 132.

5. PAYMENT OF PREMIUMS.

Neglect to pay premiums induced by misinformation from insurer did not bar recovery. *Kenyon v. National Asso.*, 39 App. Div. 276.

So, as to delay caused by action of insurer. *Greenwald v. United &c. Asso.*, 18 Misc. 91.

See, also, *Baker v. Michigan &c. R. Co.*, 118 Mich. 431 (collector failed to call); *Sick v. Covenant &c. Ins. Co.*, 79 Mo. App. 609 (custom to send collectors revoked); *Benton v. Drum*, (D. C.) 26 Wash. L. Rep. 146 (use of the mails).

Failure of agent to turn over premiums charged to the insurer and not the insured. *Gaysville Man. Co. v. Phoenix &c. Co.*, 67 N. H. 457.

LANDLORD AND TENANT.

- I. WHEN LESSOR IS LIABLE TO LESSEE.
 - (a) What is negligence.
 - (b) What is not contributory negligence.
- II. WHEN LESSOR IS NOT LIABLE TO LESSEE.
 - (a) What is not negligence.
 - (b) What is contributory negligence.
- III. WHEN LESSOR IS LIABLE FOR NEGLIGENCE OF LESSEE.
- IV. WHEN LESSOR IS NOT LIABLE FOR NEGLIGENCE OF LESSEE.
- V. WHEN LESSOR IS LIABLE FOR NEGLIGENCE OF RAILWAY LESSEE.
- VI. WHEN LESSOR IS LIABLE TO LICENSEES AND THE PUBLIC.
 - (a) Negligence.
 - (b) Contributory negligence.
- VII. WHEN LESSOR IS NOT LIABLE TO LICENSEES AND THE PUBLIC.
 - (a) Negligence.
 - (b) Contributory negligence.
- VIII. WHEN LESSEE IS LIABLE TO LESSOR.
- IX. WHEN LESSEE IS NOT LIABLE TO LESSOR.
- X. WHEN LESSEE IS LIABLE TO LICENSEES AND THE PUBLIC.
- XI. WHEN LESSEE IS NOT LIABLE TO LICENSEES AND THE PUBLIC.
- XII. WHEN ONE LESSEE IS LIABLE TO ANOTHER LESSEE.
- XIII. WHEN THIRD PERSON IS LIABLE TO LESSOR OR LESSEE.
- XIV. FIRE ESCAPES.
- XV. WORKING ON SHARES.

The demise of premises is a conveyance of lands, and during the continuance of the estate, the lessor is absolved from injuries happening thereon either to his tenant or third persons, and the tenant is liable therefor to the same extent as if he were the owner thereof, that is, for his culpable negligence causing damage. *Clancy v. Byrne*, 56 N. Y. 129; *Swords v. Edgar*, 59 id. 28; *Ahern v. Steele*, 115 id. 203; *Kirby v. Boylston*, 14 Gray, 249.

The tenant is liable for any nuisance erected on the premises by him, or existing by his sufferance, and also for a nuisance retained by him although existing thereon before the demise of the premises to him. *Davenport v. Ruckman*, 37 N. Y. 568; *Timlin v. Standard Oil Co.*, 54 Hun, 44.

A lessor of buildings, in absence of fraud, or any agreement to that effect, is not liable to the tenant or others lawfully on the premises, by his authority, for their condition, or that they are tenantable and may be safely and conveniently used for the purpose for which they were apparently intended. *Jaaffe v. Harteau*, 56 N. Y. 400; *Edwards v. N. Y. &c. R. Co.*, 98 id. 245; *Leavitt v. Fletcher*, 10 Allen, (Mass.) 119; *Hazlett v. Powell*, 30 Pa. St. 293; hence the landlord is presumptively absolved from liability for injuries either to his tenant or third persons. *Clancy v. Byrne*, 56 N. Y. 129; *Ahern v. Steele*,

115 id. 203; *Fow v. Roberts*, 108 Pa. St. 489; *City of Lowell v. Spaulding*, 4 Cush. 277.

Such presumption may be overcome and the lessor's liability established under the following circumstances. He may be liable to tenant for injuries suffered

(1) Through the lessor's failure to exercise reasonable care to keep the premises in a state of reasonable repair and safety, when he has covenanted or promised to do so. *Phillips v. Erhman*, 8 Misc. (N. Y.) 39; *Ahern v. Steele*, 115 N. Y. 203.

(2) Through his failure to use ordinary and reasonable care to keep in a reasonable state of safety any way, path or passageway, appurtenant to said premises, which the tenant is entitled to use, but under the control of the lessor. *Lydecker v. Brintall*, (Mass.) 33 N. E. Rep. 399; *Bremker v. Cummings*, (Ind.) 33 N. E. Rep. 732.

See *Phillips v. Library &c.*, 55 N. J. L. 307.

Or to so keep any premises, which the tenant is entitled to use to reach the demised premises. *Totten v. Phipps*, 52 N. Y. 354; *McDermott v. N. Y. C. & H. R. Co.*, 28 Hun, 325; *Powers v. Harlow*, 53 Mich. 507.

(3) Through failure of lessor to use like care to keep in due repair any part of the premises reserved for his own use or controlled by him or in his possession. *Priest v. Nichols*, 116 Mass. 401; as coal holes in walk. *Jennings v. Van Schaick*, 108 N. Y. 530; *Canavan v. Steyvesant*, 7 Misc. 113; but need not remove natural accumulation of snow from steps or walk. *Little v. Wirth*, 6 Misc. 301; *Woods v. Cotton Co.*, 134 Mass. 357; *Purcell v. English*, 86 Ind. 34; *Fuchs v. Schmidt*, 8 Daly, 317; *Moore v. Godsen*, 93 N. Y. 12; *City v. Campbell*, 123 id. 405.

Or to so keep any part reserved for the common use of tenants, as in the case of tenement or apartment houses. *Peil v. Reinhart*, 127 N. Y. 381; *Ahern v. Steele*, 115 id. 203; *Dollard v. Roberts*, 130 id. 369.

As halls; *Dollard v. Roberts*, 130 N. Y. 269; *Muller v. Minken*, 5 Misc. (N. Y.) 444; *Henkel v. Murr*, 31 Hun, 26; *Jennings v. Van Schaick*, 108 N. Y. 530.

Or stairways; *Peil v. Reinhart*, 127 N. Y. 381 *Wasson v. Pettit*, 49 Hun, 166; *Williams v. Gardiner*, 58 id. 508; *Walther v. Am. Dist. Tel. Co.*, 11 Misc. (N. Y.) 71; *Looney v. McLean*, 129 Mass. 33; but need not light halls; *Eyre v. Jordan*, 111 Mo. 424; *Hilsenbeck v. Guhring*, 131 N. Y. 674; *Finnay v. Hall*, 156 Mass. 225; *Muller v. Minken*, 5 Misc. (N. Y.) 444; *Halpen v. Townsend*, 2 City Ct. Rep. 417; 107 N. Y. 683.

Or hatchways; *Atkinson v. Abraham*, 45 Hun, 238;

Or air shaft; *Canavan v. Steyvesant*, 7 Misc. (N. Y.) 113.

But master must have actual or constructive notice of defects. *Henkel v. Murr*, 31 Hun, 28; *Spellman v. Bannigan*, 36 id. 174; *Alperin v. Earle*, 55 id. 211; *Jaaffe v. Harteau*, 56 N. Y. 398; *Sinton v. Butler*, 40 Oh. St. 158.

(4) Through failure to use like care to avoid injury to a tenant or his property in making repairs on the premises. *Butler v. Cushing*, 46 Hun, 521; *Gill v. Middleton*, 105 Mass. 477; *McHenry v. Marr*, 39 Md. 510; *Lampartner v. Wallbaum*, 45 Ill. 444.

(5) Through defects of a dangerous character, amounting to a nuisance, the existence of which the lessor knew, or in the exercise of ordinary care should have known when the demise was made. *Swords v. Edgar*, 59 N. Y. 28; *Edwards v. N. Y. &c. R. Co.*, 98 id. 245; *Kneiss v. Brua*, 107 Pa. St. 85;

Nugent v. B. C. & M. R. Co., 80 Me. 62, 77; Joyce v. Martin, 15 R. I. 558; Albert v. State, 66 Md. 325.

The same would be the case if lessor demise the premises to be used as a nuisance.

Or for a business or in a way so that they will necessarily become a nuisance. Ahern v. Steele, 115 N. Y. 203; Owens v. Jones, 9 Md. 108.

A grantee of property on which there is already a nuisance is not liable therefor until asked to abate it. Ahern v. Steele, 115 N. Y. 203. But no request is necessary where he himself erected it.

Third Person.—The lessor in like manner may become liable to a third person for injuries received through his culpable negligence in any one of the above instances, when he would be liable to a tenant, provided he would have been liable to a person injured had he been in possession of said premises. Hilsenbeck v. Guhring, 131 N. Y. 674.

Visitor to a tenant has a tenant's rights. Swords v. Edgar, 59 N. Y. 28; Timlin v. Standard Oil Co., 126 id. 514; Back v. Carter, 68 id. 283; Learoyd v. Godfrey, 138 Mass. 315.

The lessor is liable only to third persons for radical defects existing at the time of the lease, and not for those that are superficial or capable of remedy. Godley v. Hogarty, 20 Pa. St. 387; Robbins v. Jones, 15 C. B. N. S. 221.

Although the lessor be liable, the tenant may also be liable, provided he is negligent in the conduct and management of the premises to such an extent as to injure one lawfully on the premises. The injured person is not required to settle the equities between the lessor or lessee, but may demand his compensation of both, if the culpable negligence of each in any part contributed to the injury. Swords v. Edgar, 59 N. Y. 28; Leonard v. Decker, 22 Fed. Rep. 741.

Contributory Negligence.—If the person injured knew of the neglect of the duty of the party, whose duty it was to keep the premises in repair, and knew of its defective condition, it would be his duty to use care to avoid injury therefrom, and if his neglect to avoid such danger contributed to the accident he cannot recover. Camp v. Wood, 76 N. Y. 92; Dollard v. Roberts, 130 id. 269; Vroman v. Rogers, 132 id. 167; Atkinson v. Abraham, 45 Hun, 238; Williams v. Gardiner, 58 id. 508; Town v. Armstrong, 75 Mich. 580.

If master duly employ a competent person to repair, the former is not liable for his neglect in doing the work; but otherwise, if the carpenter failed to do the work at all. Brennan v. Ellis, 70 Hun, 472.

I. When Lessor is Liable to Lessee.

(a). WHAT IS NEGLIGENCE.

"T." was the lessee of three or four floors of a building, a portion whereof was used by the defendant, who had a hatchway, covered by a trap door, occupying all the hallway, and which was used in the day time until 6 or 8 o'clock at night. Between 8 and 9 P. M., "T.," going to his floors, fell in. Negligence and contributory negligence were for the jury. *Totten v. Phipps*, 52 N. Y. 354, aff'g judgt for pl'ff.

The plaintiff was a tenant in the defendant's house, and fell by trip-

ping, on account of the defective condition of the carpet on the stairway, provided by the defendant, for the common use of his tenants. There had been holes in the carpet for several months, such as to justify apprehension of tripping, and the defendant's attention had been called to it. The motion of nonsuit was properly denied, as it could not be held, that the plaintiff was *per se* negligent, and it was the defendant's duty to use reasonable care to keep the stairway in repair, and suitable condition for the safe passage of his tenants over it. The evidence of the condition of the stair carpet after the accident occurred was properly received. *Peil v. Reinhart*, 127 N. Y. 381, aff'g judg't for pl'ff.

See *Meyer v. Miller*, 19 J. & S. 386.

The plaintiff's minor daughter was injured by the falling of plaster in the hallway of a tenement house, the upper floors of which were leased by the plaintiff. Some time previous thereto the water had leaked through the plaster at the place where it fell, and the attention of "H.," who, as agent, rented the premises, collected the rents, and attended to repairs, had been called to the condition of the ceiling and the danger of the plaster falling, and he had promised to have it repaired, but did not. The defendant owed the tenant the duty of exercising reasonable care in keeping the hallway in suitable repair, and the knowledge of "H." was sufficient notice to the defendant. (*Donohue v. Kendall*, 18 J. & S. 386; 98 N. Y. 635; *Palmer v. Dearing*, 93 id. 7; *Looney v. McLean*, 129 Mass. 33; *Lindsay v. Leighton*, 150 id. 285; *Peil v. Reinhart*, 127 N. Y. 381.) Whether the falling of the plaster was reasonably to be apprehended was a question for the jury. The fact that the plaintiff and his daughter had knowledge of the condition of the ceiling, and apprehended the fall of the plaster, did not render them *per se* guilty of contributory negligence. It was the duty of the daughter to use care, but the fact that she did not constantly have in mind the condition of the ceiling when passing through the hallway did not make her *per se* negligent. *Dollard v. Roberts*, 130 N. Y. 269, aff'g judg't for pl'ff.

Weed v. Ballston Spa, 76 N. Y. 329; *Bassett v. Fish*, 75 id. 303, 307.

A party who assumes to maintain a dock and slip to supply wharfage for hire is bound to keep them in suitable condition for that purpose, and is liable for any injury or loss resulting to a person properly using them, occasioned by the failure to perform this duty. (*Leary v. Woodruff*, 4 Hun, 99; 76 N. Y. 617; *Barber v. Abendroth*, 102 id. 466; *Carleton v. Franconia &c. Co.*, 99 Mass. 216.) If, however, one hiring wharfage, by the exercise of ordinary care, can discover the defect causing the injury, he is guilty of contributory negligence. The defendants, leasing wharfage to the plaintiffs, were claimed to have represented

to them that the place was all right. If such statement were made the plaintiffs were justified in assuming it to be true, and negligence could not be imputed to them. in placing a barge at the wharf, without determining whether the slope of the bottom made it a suitable place for wharfage, but the inference was justified that when at low water the barge rested on the bottom it could easily have been ascertained whether the ground beneath it was suitable to rest upon, and the question of contributory negligence was for the jury. *Vroman v. Rogers*, 132 N. Y. 167, aff'g judg't for def't.

Defendant rented houses, which could only be approached across its tracks, and the lessee's boarder, crossing the tracks, was struck by an engine, without lights or signal. Held, that the defendant must use reasonable care in running trains, as the occupants of houses had the right to cross tracks to enter them. *McDermott v. N. Y. C. & H. R. Co.*, 28 Hun, 325, aff'g judg't for pl'ff.

Plaintiff's intestate, defendant's lessee of the sixth floor, fell through a hatchway three feet nine inches from the foot of the stairs, which he was descending in the dark, while the defendant's servants were using the hatchway. There had been a railing to protect the hatchway, but the defendant had taken it away, and had refused to replace it. Contributory negligence for jury; it was the duty of the defendant to protect the hatchway (chap. 625, L. 1871; sec. 487, chap. 410, L. 1882; chap. 547, L. 1874). *Atkinson v. Abraham*, 45 Hun, 238, granting new trial after nonsuit.

Although the landlord has a right to repair a building, which has settled, yet he takes the risk, and if while doing it, with whatsoever skill, it falls and injures tenant's goods by fire, resulting therefrom, the landlord is liable therefor. The fall of the building is the evidence of negligence. *Butler v. Cushing*, 46 Hun, 521, aff'g judg't for pl'ff.

Some slats had been placed on a roof of tenement house, for the purpose of enabling the tenants to dry their clothes, and by the breaking thereof a tenant was injured. To render the landlord liable for the dangerous condition of that part of the building, reserved for the common use of the tenants, and over which he retained control, he must be proven guilty of actual negligence; or an answerable omission to ascertain the condition of the appliances, or to have had notice thereof, and failure to make the necessary repairs. There was no evidence of the defendant's negligence under the rule stated. *Alperin v. Earle*, 55 Hun, 211, rev'g judg't for pl'ff.

The defendant leased premises, the closet to which was reached by a stairway, leading from a shed in the rear. The mother sent to the closet a child of about five years old, in charge of her sister, who was nine

years of age, and on returning the elder sister went ahead into the hall, leaving the younger two steps from the top of the stairway, and upon returning for her found that she had fallen into the cellar and had been killed. The mother was accustomed to leave the child in charge of the elder sister. The court erroneously refused to charge, as requested, that if the mother selected the elder sister to accompany the younger one, and the elder sister was negligent in her care of the deceased, the plaintiff, the father, could not recover. *Williams v. Gardiner*, 58 Hun, 508, rev'g judg't for pl'ff.

Where a portion of premises which a tenant was entitled to use became out of repair, the landlord could not defend against his neglect to repair the same by showing that he had made a contract with a carpenter to make such repairs, and that the contractor had failed to do the same. If the injury happened from neglect of the contractor in doing the work, he, and not the master, would be liable, but where the neglect consists in failure to do the work at all, the master is liable. *Brennan v. Ellis*, 70 Hun, 472, rev'g judg't for def't.

Citing *Sturges v. The Theological Education Society*, 130 Mass. 414; *Gorham v. Gross*, 125 id. 232; *Pickard v. Smith*, 100 Eng. Com. L. R. 470, 479; *Worthington v. Parker*, 11 Daly, 545, 546.

Tenant was permitted to erect a second story on the premises in such a way that its removal by him at the end of the term weakened the floor below it, and endangered the safety of those remaining. Negligence. *Quigley v. H. W. Johns Man. Co.*, 26 App. Div. 434.

A defective condition of stairs in a hallway had existed for a week. The landlord should have known of it. *Nadel v. Fichten*, 34 App. Div. 188.

Tank did not have the usual and necessary ball-cock attachment so as to prevent its overflow. *Citron v. Bayley*, 36 App. Div. 130.

Landlord failed to protect his tenant during the course of repairs. *O'Rourke v. Feist*, 42 App. Div. 136.

See, also, *Blumenthal v. Prescott*, 70 App. Div. 560; *Holmes v. Feist*, 35 Misc. 863; aff'g s. c., 33 Misc. 808; *Northern Trust Co. v. Palmer*, 171 Ill. 383; aff'g s. c., 70 Ill. App. 93; *Aldag v. Ott*, (Ind. App.) 63 N. E. Rep. 480; *Robbins v. Atkins*, 168 Mass. 45; *Herbst v. Hafner*, 7 Pa. Super. Ct. 363; *Wertheimer v. Saunders*, 95 Wis. 573; and liability does not depend upon notice. *Wilbur v. Follensbee*, 97 Wis. 577.

Tenant slipped on a stairway as a consequence of landlord's failure to comply with the statutory requirement to light hallways after sunset. *Brown v. Wittner*, 43 App. Div. 135.

Evidence was conflicting and indefinite as to whether there was such an insufficiency of daylight as to require lamplight in the day time as required by statute. *Lendle v. Robinson*, 53 App. Div. 140.

Defendant's negligence was for the jury where evidence tended to show

that he had been notified of the condition of the stairway. *Lendle v. Robinson*, 53 App. Div. 140; *Wessel v. Gerken*, 36 Misc. 221; *Stack v. Harris*, 111 Ga. 149.

Landlord retained control of the closets maintained for the benefit of the tenants in common and knew of their worn out and defective condition. *Harris v. Boardman*, 68 App. Div. 436.

Notice of the defectiveness of stairs to a storehouse was imputed after three months of ownership. *Feinstein v. Jacobs*, 15 Misc. 474.

Exemption as to leakage does not include injuries through negligent reroofing. *Randolph v. Feist*, 23 Misc. 650.

Ceiling fell while janitress was doing her own work. She was entitled to recover however, as tenant. *Anderson v. Steinreich*, 36 Misc. 845; rev'g s. c., 32 id. 680; rev'g id. 237.

Landlord knowingly let premises subject to sewer gas as free therefrom. *Sunasack v. Morey*, 196 Ill. 569; rev'g s. c., 98 Ill. App. 505.

Defective fastenings of a sign board. *Payne v. Irwin*, 44 Ill. App. 105; affirmed in 144 Ill. 482.

Rubbish left where it rendered sidewalk unsafe. *Brunker v. Cummins*, 133 Ind. 443.

See *Phillips v. Library &c.*, 55 N. J. L. 307.

Landlord was a volunteer in repairing, but his workmen were negligent. *Mann v. Fuller*, 63 Kan. 664.

See, also, *Wilber v. Follensbee*, 97 Wis. 577.

Tenant was evicted under a judgment reversed on appeal. *Mengelle v. Abadie*, 48 La. Ann. 669.

Negligence was in designing the repairs. Employment of an independent contractor was no defense. *Evans v. Murphy*, 87 Md. 498.

Loss of tenant's goods by escaped water through negligence of landlord chargeable to landlord. *Priest v. Nichols*, 116 Mass. 401.

See, failure to repair carriage house, *Leavitt v. Fletcher*, 10 Allen 119; *Moulton v. Phillips*, 10 R. I. 218.

Defective stairway. *Looney v. McLean*, 129 Mass. 33.

See, *Leavitt v. Fletcher*, 10 Allen 119; *Watson v. Kane*, 4 Misc. (N. Y.) 296; *Miller v. Hancock*, 2 Q. B. 177 (1893); *Lewin v. Pauli*, 19 Pa. Super. Ct. 447.

Defective approach to tenement. *Leydecker v. Brintnall*, (Mass.) 33 N. E. Rep. 399.

Landlord by permitting his roof to be used for the purposes to which a yard is usually put, (e. g. drying clothes) assumed the obligation of keeping it safe. *Wilcox v. Zane*, 167 Mass. 302.

So where landlord retained control of hoisting apparatus used in the business of tenants. *O'Malley v. Twenty-five Associates*, 170 Mass. 471.

When tenant has right of way over landlord's premises, landlord must

keep the same in safe condition; and if tenant's child is injured by a dynamite cartridge found on the premises landlord is liable. *Powers v. Harlow*, 53 Mich. 507.

Tenant was evicted for non-payment of rent after tender pursuant to statute, of arrears in rent. *Wacholz v. Griesgraber*, 70 Minn. 220.

Tenant was compelled to pay taxes for the benefit of the landlord. *Walker v. Harrison*, 75 Miss. 665.

Plaintiff leaned against a stair railing which was rotting away to allow another to pass. *McGinley v. Alliance Trust Co.*, 168 Mo. 257.

Stand pipe was negligently constructed and maintained; tenant was an employé. *Defiance Water Co. v. Olinger*, 54 Ohio St. 532.

Landlord knowingly misrepresented to a milliner that a show window was in proper condition. *Sacks v. Schimmel*, 3 Pa. Super Ct. 426.

Landlord negligently managed the portion of the premises remaining in his control. *Railton v. Taylor*, 20 R. I. 279.

See, also, *Levy v. Korn*, 30 Misc. Rep. 199; *Trower v. Wehner*, 75 Ill. App. 655; *Burns v. Solomon*, 3 Oh. N. P. 185; *Kneeland v. Beare*, (N. D.) 91 N. W. Rep. 56; *Michaelson v. Cautley*, 45 W. Va. 533.

But see *Golob v. Pasinsky*, 72 App. Div. 176.

A landlord failed to fulfill promise to repair. *Wilcox v. Hines*, 100 Tenn. 538.

See, also, *Neglia v. Lielouka*, 32 Misc. 707; *Roley v. Crabtree*, 72 Ill. App. 581.

Landlord procured the issuance of a distress warrant for rent in excess of the rent due, and an excessive levy thereunder. *McKee v. Sims*, (Tex. Civ. App.) 45 S. W. Rep. 37.

(b). WHAT IS NOT CONTRIBUTORY NEGLIGENCE.

Tenant descended stairs without a light in a state of intoxication when he knew that the carpet on them was torn and ragged. Negligence was for the jury. *Kenney v. Rhinelander*, 28 App. Div. 246; s. c., aff'd, 163 N. Y. 576.

Plaintiff's negligence in sweeping down hall stairs, facing them, knowing of the existence of nails protruding therefrom was for the jury. *Idel v. Mitchell*, 5 App. Div. 268.

Less caution is acceptable in case of a tenant than in case of a landlord. *Quigley v. H. W. Jones Mfg. Co.*, 26 App. Div. 434.

See, also, *Wilcox v. Hines*, 100 Tenn. 538.

Knowledge that some of the slats in a roof, the only place provided for drying clothes, were rotten and broken did not make a tenant *per se* negligent in using it. *Karlson v. Healy*, 38 App. Div. 486.

Use of stairways in the dark was not *per se* negligent. *Brown v. Wittner*, 43 App. Div. 135.

See, also, *Fenstein v. Jacobs*, 15 Misc. 474.

Though it was known that the carpet was torn and in a dangerous condition. *Lendle v. Robinson*, 53 App. Div. 140.

Nor was tenant's failure to cover goods left exposed by uncovered roof, as he was entitled to assume that landlord would do so in case of necessity. *Blumenthal v. Prescott*, 70 App. Div. 560.

Contributory negligence of tenant, not amounting to lack of ordinary care, may go toward the mitigation of damages. *Miller v. Smythe*, 95 Ga. 288.

That tenant did not object to entry to make repairs was no defense. *Northern Trust Co. v. Palmer*, 171 Ill. 383; aff'g s. c., 70 Ill. App. 93.

Entry, with a small child upon premises, upon which there was an open and unprotected cistern, where landlord has agreed to repair it at once. *Stillwell v. South Louisville Land Co.*, (Ky.) 58 S. W. Rep. 696.

Tenant remained upon premises, knowing of the looseness of a ceiling, in reliance upon a promise to repair. *Mason v. Howes*, (Mich.) 81 N. W. Rep. 111.

II. When Lessor Is Not Liable to Lessee.

(a). WHAT IS NOT NEGLIGENCE.

A lessor of buildings, in the absence of fraud or any agreement to that effect, is not liable to the lessee or others lawfully upon the premises for their condition, if they are tenantable and may be safely and conveniently used for the purposes for which they were apparently intended.

In the following cases it was held that no such liability existed: *Cleves v. Willoughby*, 7 Hill 83; *O'Brien v. Capwell*, 59 Barb. 497; *Hart v. Windsor*, 12 M. & W. 68; *Keates v. Cadogan*, 10 Com. Bench 591; *Robbins v. Jones*, 15 Com. B. (N. S.) 221; *Leavitt v. Fletcher*, 10 Allen (Mass.) 119. *Godley v. Hagerty*, 20 Penn. 387, cited by the counsel for the appellant, as sustaining a contrary doctrine, was disposed of upon the peculiar facts of the case. It has not been understood by the courts of that state as holding the doctrine contended for by counsel. See *Hazzlett v. Powell*, 30 Pa. St. 293.

A tenant's wife was injured by the explosion of the kitchen boiler, and there was evidence that the safety valve would have prevented it, but no evidence that the defendant (the landlord) knew or had reason to suspect any defect, or that the danger was to be apprehended was shown. The defendant was not liable. *Jaffe v. Harteau*, 56 N. Y. 398, aff'g judg't for nonsuit.

Defendant, landlord, agreed to keep the leased premises in repair; during the term the cellar stairs fell, and a tenant was injured. Defendant was not notified of the defect, and hence not liable for negli-

gence, nor breach of covenant to repair. *Spellman v. Bannigan*, 36 Hun, 174, aff'g judg't for def't.

Citing *Woods' Land. & Ten.* p. 620; *Henkel v. Murr*, 31 Hun, 28; *Flynn v. Hatton*, 43 How. 333, 338, 351.

From opinion.—"Nor would a landlord be liable to his tenant for a breach of his contract to repair unless he had notice of the necessity for such repair, and then only after a reasonable time for him to make such repair. *Woods' Land. & Ten.* secs. 377, 379; *Moak's Van Sant. Pl.* (3d ed.) 364; *Jaffe v. Harteau*, 56 N. Y. 398."

Tenant testified that she had driven in all the nails she could find, that projected on a stairway in the hall. The court refused to allow the jury to conjecture whether she had overlooked some or whether some one had pulled some out thereafter whereby it might be concluded that they had been there long enough to charge the owner with notice and nonsuit was granted for failure to show notice. *Idel v. Mitchell*, 158 N. Y. 134; rev'g s. c., 5 App. Div. 268.

Clothes pole had been in the ground only half of its ordinary length of time and did not raise a suspicion of its unsoundness. Landlord was not bound to do more than give it a casual examination. *Lenz v. Aldrich*, 6 App. Div. 178.

In the absence of agreement landlord was not liable for injury from defective condition arising through non-repair. *Laird v. McGeorge*, 16 Misc. 70.

See, also, *Myer v. Laux*, 18 Misc. 671; *Klausner v. Herter*, 36 Misc. 869; *Hailzip v. Rosenberg*, 63 Ark. 430; *Hefling v. Van Zandt*, 60 Ill. App. 662; *Szathmary v. Adams*, 166 Mass. 145; *Roehrs v. Timmons*, (Ind. App.) 63 N. E. Rep. 481; *Beneteau v. Stubler*, 79 Minn. 259; and so he is not liable for expense tenant is put to in repairing. *Felton v. Cincinnati*, 95 Fed. Rep. 336; *Murphy v. Illinois T. & C. Co.*, 57 Neb. 519.

Nor where an agreement was invalid. *Bronner v. Walter*, 15 App. Div. 295.

See, also, *Quinn v. Crowe*, 88 Ill. App. 191; *Dowling v. Neubling*, 97 Wis. 350.

So, where, pursuant to such an agreement, he attempted to repair, but failed to do so thoroughly. *Wynne v. Haight*, 27 App. Div. 7.

Danger of a stick of wood being placed on the stairs of a tenement was not to be anticipated. *Gorman v. White*, 19 App. Div. 324.

So failure to fulfill a contract to repair does not permit recovery for injuries sustained thereby. *Schick v. Fleischauer*, 26 App. Div. 210.

From opinion.—"The only relation between the parties is that of landlord and tenant. It is well settled in this state that no duty rests upon the landlord to repair premises which he has demised, or to keep them in tenantable condition; and that there can be no obligation to repair except such as may be created by the agreement of the landlord to do so. *Witty v. Matthews*, 52 N. Y. 512. Where such agreement has been made, the measure of damages for the breach of

the contract is the expense of doing the work which the landlord agreed to do but did not. A contract to repair does not contemplate, as damages for the failure to keep it, that any liability for personal injuries shall grow out of the defective condition of the premises; because the duty of the tenant, if the landlord fails to keep his contract to repair, is to perform the work himself and recover the cost in an action for that purpose, or upon a counterclaim in an action for the rent, or, if the premises are made untenable by reason of the breach of the contract, the tenant may move out and defend in an action for the rent as upon an eviction. (*Myers v. Burns*, 35 N. Y. 269; *Sparks v. Bassett*, 49 New York Super. Ct. 270; *Taylor on Landl. & Ten.* 8th Ed. 380). The tenant is not at liberty, if the landlord fails to keep his contract to repair the premises, to permit them to remain in an unsafe condition and to stay there at the risk of receiving injury on account of the defects in the premises and then recover as for negligence for any injuries that he may suffer. Where the sole relation between two parties is contractual in its nature, a breach of the contract does not usually create a liability as for negligence. In such a case the liability of one of the parties to the other, because of negligence is based either on the breach of some duty which is implied as the result of entering into the contractual relation, or from the improper manner of doing some act which the contract provided for; but the mere violation of a contract, where there is no general duty, is not the subject of an action of tort. (*Courtenay v. Earle*, 10 C. B. 83; *Tuttle v. Gilbert Man. Co.*, 145 Mass. 169). As the result of this principle, we conclude that the plaintiff cannot maintain an action against the defendant to recover the damages which she has suffered on the ground of the defendant's negligence in failing to keep his contract to repair. Such is the weight of authority in this country. (*Miller v. Ronaldo*, 21 Misc. 470; *Tuttle v. Gilbert Man. Co.*, *Supra*; *Flynn v. Hatton*, 43 How. Prac. 333; *Spellman v. Bannigan*, 36 Hun, 174). The cases relied upon by the plaintiff are easily distinguishable. In *White v. Sprague*, (9 N. Y. St. Rep. 220) the plaintiff was employed by the defendant as janitor of an apartment house belonging to the defendant, and she was injured by the falling of the plastering while at work in a portion of the building. For these injuries she was permitted to recover. In the opinion it was suggested that the landlord might have been liable by reason of his failure to perform his agreement to put the premises in repair, yet it is evident that the liability in that case might well have stood upon the duty of the landlord as an employer to the plaintiff as his servant. And upon that theory only could the case be sustained. The plaintiff also relies upon the case of *Edwards v. The New York & Harlem Railroad Co.*, (98 N. Y. 245). In that case the defendant had leased premises to be used for an exhibition. A gallery had been placed in the hall to accommodate a few people for special purposes, but it was not intended to permit the audience generally to occupy it. The lessee of the premises removed fixtures which had been put in the balcony, and allowed it to be crowded with a miscellaneous audience, and, as the result, the balcony fell, injuring plaintiff. The court held, that as the balcony was intended only to be used for a special purpose and as there was no proof that it was not sufficient for the purpose for which it was intended, the landlord was not liable for an accident which was caused by a different use. It is true that in that case Judge Earle said that if the landlord lets premises and agrees to keep them in repair, and fails to do so in consequence of which any one lawfully upon the premises suffers injury, he is responsible for his own negligence to the party in-

jured. But the liability of the landlord in that case was not claimed to exist upon any such ground and it was said by the court that if any responsibility could attach to the landlord, it could not be based upon the contract obligation, but must rest entirely upon his *delictum*."

Especially where it does not appear that the injury therefrom arose during the occupancy of the premises. *Van Tassel v. Read*, 36 App. Div. 529.

Before making of lease, the landlord promised to repair a cooler which suffered the water accumulating from the ice placed in it to run down upon the floor, thence down the side planks of a cellar stairway. The promise to repair was also made several times during the term of the lease. While the tenant, who knew more of the condition of the stairway than did defendant, was using the same, it fell and she was injured. In an action to recover for her injuries, the complaint did not allege a cause of action as for a nuisance, nor did it allege any cause of action on a promise to pay all damages caused by the falling of the stairway. Held, that defendant was not liable.

Plaintiff's only cause of action was for breach of contract to repair, and the damages sued for were not the proximate result of the breach. *Sanders v. Smith*, 5 Misc. 1, aff'g nonsuit. (N. Y. Sup. Ct.) See *Eschback v. Hughes*, 7 Misc. 172.

Landlord of a tenement is not liable to a tenant for injuries from slipping upon ice upon the walk or stoop. Remedy, if any, is against the municipality. *Little v. Wirth*, 6 Misc. 301. (N. Y. Supr. Ct.)

From opinion.—"The authorities are uniform that there is no duty on the part of an owner to a tenant, or the public, to remove from the steps or walk the ice and snow which naturally accumulates thereon. *Woods v. Cotton Co.*, 134 Mass. 357; *Watkins v. Goodall*, 138 id. 533; *Purcell v. English*, 86 Ind. 34; 44 Am. Rep. 255; *Shindelbeck v. Moon*, 32 Ohio St. 264; 30 Am. Rep. 584. And in our state, see *Fuchs v. Schmidt*, 8 Daly 317; *Moore v. Gadsden*, 93 N. Y. 12; 87 id. 84; *Wenzlick v. McCotter*, id. 122; *City v. Campbell*, 123 id. 405."

Accident caused by falling into unprotected air shaft, tenant having an easement in the yard. *Canavan v. Stuyvesant*, 7 Misc. 113.

No liability where there is no nuisance, fraud or culpable neglect. *Reissman v. Jacobowitz*, 22 Misc. 551.

Landlord must have notice. Of the test of the flooring in question a week before the accident. held to be the exercise of reasonable care. *Flood v. Huff*, 29 Misc. 351.

See, also, *Kennedy v. Fay*, 31 Misc. Rep. 776.

So landlord's negligence is not shown where the only evidence as to the source of a leak was the choking up of a drain pipe by a structure built on the roof by tenant himself. *Weinkrantz v. Callahan*, 32 Misc. Rep. 715.

Landlord need not light hall or stairways of a private dwelling. *Brancato v. Kors*, 36 Misc. 776.

Defective rope in a dumb waiter. *Blake v. Fox*, 17 N. Y. Supp. 508.
See *Gregor v. Cady*, 82 Me. 131.

Entry without excessive force by landlord after the expiration of the lease. *Vinson v. Flynn*, 64 Ark. 453.

Falling of woodshed roof when defect was not known to the owner. *Daley v. Quick*, 99 Cal. 179.

Defects were latent and landlord's assumption was reasonably supported by the facts. *Toner v. Meussdorffer*, 123 Cal. 462.

See, also, *Thum v. Rhodes*, 12 Colo. App. 245.

No recovery, where tenant is given by statute the right to vacate or apply rent to remedy the defect. *Gately v. Campbell*, 124 Cal. 520.

In the absence of agreement there is no guaranty as to safety; lessee accepts premises at his own risk. Fire escape fell while tenant was using it to climb up and fasten blind. *Gallagher v. Button*, 73 Conn. 172.

See, also, *Davis v. George*, 67 N. H. 393; *Cate v. Blodgett*, (N. H.) 48 Atl. Rep. 281; *Hanley v. Banks*, 6 Okla. 79.

Warranty as to safety and suitability did not extend to unforeseen contingencies such as violent storms. *Brunswick Grocery Co. v. Spencer*, 97 Ga. 764.

Chandelier negligently hung. *Reichenbacher v. Pahmeyer*, 8 Bradw. (Ill.) 217.

See *Scott v. Simons*, 54 N. H. 426; *Godley v. Hagerty*, 20 Penn. St. 387.

Walls of a cistern, which had been open for six months, caved in. *Hamilton v. Feary*, (Ind.) 35 N. E. Rep. 48.

Premises infected with small pox. *Minor v. Sharon*, 112 Mass. 477.

Cesspool, old and out of repair. *Booth v. Merriam*, 155 Mass. 521.

Distinguishing *Cowen v. Sunderland*, 145 Mass. 363.

Stairway known to a tenant to be defective. *Town v. Armstrong*, 75 Mich. 580.

Bowe v. Hunking, 135 Mass. 380.

Plaintiff surrendered premises in consideration of reasonable time to sell out but was prevented from doing so. He subsequently, however, sold out at an advantage and was allowed to remain in possession for two months without pay. He was not allowed to recover. *Baker v. Anglim*, 74 Minn. 246.

Acts of a stranger undermining a wall. *McCarthy v. Fagan*, 42 Mo. App. 619.

Acts of a trespasser caused injury. *Huiest v. Marx*, 67 Mo. App. 418.

Breaking of elevator rope, of defect in which owner had no notice. *Sinton v. Butler*, 40 Oh. St. 158.

Failure to provide fire escapes, under statute. *Rose v. King*, (Oh.) 30 N. E. Rep. 267.

Tenant cannot complain that landlord failed to inform him of a concealed defect. *Schmalzried v. White*, 97 Tenn. 36.

Snowslide crushed house. *Doyle v. Union Pac. R. Co.*, 147 U. S. 413.

Ice had formed on steps within half an hour, but washing had taken place several hours before. *Lumley v. Backus Man. Co.*, 73 Fed. Rep. 767.

(b). WHAT IS CONTRIBUTORY NEGLIGENCE.

Tenant proceeded along a walk knowing of its condition without looking where she was going, carrying a clothes basket in front of her so as to obstruct her view. *O'Dwyer v. O'Brien*, 13 App. Div. 570.

Privilege given as an inducement to rent but not as a right under the lease gave the rights of licensee only. *Speckman v. Boehm*, 36 App. Div. 262.

Rooms were safe for the use for which they were designed, the smaller of the two being furnished with a wash basin and also a place for heating or connection for heat with the larger room by a door. The danger of the pipes freezing was created solely by the tenant, in closing the door to the large room and opening the window in the smaller one. *Leonard v. Gunther*, 47 App. Div. 194.

Tenant knew that his property would be exposed to danger in leaving it where it was. He assumed the risk. *Huber v. Ryan*, 57 App. Div. 34.

See, also, *Reiner v. Jones*, 38 App. Div. 441; *Klausner v. Herter*, 74 N. Y. Supp. 924.

Tenant had exclusive control of the premises and knew of the liability of the ceiling to fall. Agent told her that there was no danger, but did not agree to repair. *Schwartz v. Apple*, 21 Misc. 513.

As to how far a tenant is bound to inspect a defect in a foundation wall where he occupies an upper story, see *Thum v. Rhodes*, 12 Colo. App. 245. See, also *Railton v. Taylor*, 20 R. I. 279.

Court instructed that in the case of a tenant occupying from month to month, the condition of the premises should be regarded as that at the beginning of the last month. Opportunity, during her actual occupancy, of observing the danger and guarding against its effects should have been considered. *Gallagher v. Button*, 73 Conn. 172.

Tenant knew the veranda railing was defective but sat on it. *Balch v. Carling*, 102 Ga. 586.

See, also, *Hahn v. Roach*, 7 Northampton Co. Rep. (Pa.) 21.

So, where tenant knew of removal of steps during the course of repairs. Emergency was no excuse, as landlord could not be expected to foresee such a contingency. *Alexander v. Rhodes*, 104 Ga. 807.

Parents of a small child knew of the danger from an unbarricaded pit dug on the premises but failed to see that it was properly guarded. They were contributorily negligent. *Wiese v. Remme*, 140 Mo. 289.

Girl of twelve, knowing the counterbalancing weights to a cellar door were out of order attempted to hold it up in going down the stairs. *Vor-rath v. Burke*, 63 N. J. L. 188.

Tenant knew of the defects and had been warned not to turn the gas on until it had been repaired or to enter the place with a lighted lantern. *Mitchell v. Stewert*, 187 Pa. St. 217.

Tenant assumed the risk in continuing occupation for a year, where she might have repaired at trifling expense. *McGinn v. French*, 107 Wis. 54.

III. When Lessor Is Liable for Negligence of Lessee.

Tenant failed to keep shafting in repair. *Poor v. Sears*, 154 Mass. 539.

IV. When Lessor Is Not Liable for Negligence of Lessee.

When a coal hole has been put in a sidewalk by authority and correctly, the landlord is not liable for the tenant's negligent use of the same.

Where, however, the building is rented in flats or apartments and the owner remains in control to some extent, employs a janitor to take care of the premises, who in the discharge of his duty as such, controls the coal-vault and the opening in the sidewalk thereto, and through his negligence in leaving the opening unguarded an injury happens, the owner is liable, and this although the coal for the occupants of the apartments is received through the coal-hole.

Where such an opening has been made with the consent of the municipality it is not in and of itself a nuisance, but the consent being conditioned upon certain modes of use if the opening is left unguarded, it becomes a nuisance. *Jennings v. Van Schaick*, 108 N. Y. 530, aff'g 13 Daly, 438, and judg't for pl'ff.

The lessor of a railroad company is not liable for the negligence of its lessee. The lessor of a railway, according to an agreement, paid for a trestle, constructed by the lessee, which was operated for a time, and then filled up with earth by the lessee, but at the expense of the lessor. The fall of snow, and debris in times of rains, caused the injuries complained of.

Held, that the lessor was not bound to build the embankment, but the lessee was bound to keep the railway in repair and the lessor was not liable. *Miller v. N. Y., L. E. & W. R. Co.*, 125 N. Y. 118, rev'g judg't for pl'ff.

From opinion.—"The lessor was not bound by statute or contract to build this embankment, nor was it bound to keep the trestle in repair. There was no proof or claim at the trial that the trestle was not adequate at the time of the lease, or that it was then a nuisance. The lessee was bound to keep it in repair and to protect those who had occasion to use it from any injury in consequence of its dilapidated condition. The lessor out of possession was under no such obligation. *Wasmer v. D., L. & W. R. Co.*, 80 N. Y. 216; *Edwards v. N. Y., & H. R. R. Co.*, 98 N. Y. 245; *Ahern v. Steele*, 115 N. Y. 203.

The lessor of a railroad is not liable for the negligence or torts of the lessee. This has been so frequently decided that an extended citation of authorities is not needed. *Pierce on Railroads* 283; *Mayor &c. of New York v. Twenty-third Street R. Co.*, 113 N. Y. 311.

* * * In doing the work, the lessee was in no way working under the lessor, and in reference thereto, the lessor was in no way bound to respond for the acts of the lessee. *McCafferty v. S. D. & P. M. R. Co.*, 61 N. Y. 178; *Ferguson v. Hubbell*, 97 id. 507."

Where one company lawfully leases its road to another it is not liable for negligence of lessee's servants. *Fisher v. Met. Elevated R. Co. & Man. R. Co.*, 34 Hun, 433, aff'g judg't for pl'ff as to first and rev'g it as to second def't and Manhattan R. Co.

Owner of land and cattle leased the same to tenant, and while in his possession they committed trespass. Owner not liable. If in possession of agister the rule would probably be different. *Atwater v. Lowe*, 39 Hun, 150, affirming order granting new trial to defendant following *Van Slyke v. Snell*, 6 Lansing, 299.

From opinion.—"It is said in *Cooley on Torts*, at page 340, that 'the liability for the trespasses of animals is imposed not because of ownership but because of possession and the duty to care for them. Therefore, if they are in the hands of an agister, or of any one who by agreement with the owner has the care and custody of them for the time being, and are suffered to escape and do mischief, he and not the owner is the party responsible.'

In the case of *Kennett v. Durgin* (59 N. H. 560), it was held that the owner of cattle kept on land of another, but remaining in his own care and control, is liable for their trespasses on land of a third person, but if the occupant of the land has the custody, he and not the owner of the cattle is liable.

In the case of *Russell v. Cottom* (31 Penn. 525), it was held that where cattle are placed in the possession of another for agistment, the person having the absolute ownership is not liable in trespass for injuries done by them.

In the case of *Ward v. Brown* (64 Ill. 307), it was held that an action of trespass will not lie against the owner of cattle for trespasses committed by them while they are in the hands of an agistor or bailee.

In the case of *Moulton v. Moore* (56 Vt. 700), it was held that one having the care and custody of cattle as a lessee of a farm and the stock thereon, is under

the same liability for the damage done by the cattle as if he were the owner. See, also, *Tewksbury v. Bucklin*, 7 N. H. 518; *Gordon v. Harper*, 7 Durnf. East. 9; *Hall v. Pickard*, 3 Camp. Nisi Prius 187.

We are aware that in Massachusetts and Maine there are conflicting decisions. See, *Weymouth v. Gile*, 72 Me. 446; *Sheridan v. Bean*, 8 Metc. 284. But in each of these cases the cattle were in the possession of an agister."

The defendant contracted, that a farm and sheep, including ram, should be in control and possession of one "C," who traded the ram for another vicious one and kept it without the defendant's knowledge, and it trespassed on the plaintiff's land and injured him. Defendant was not liable on the ground that "C," had absolute control and possession. *Marsh v. Hand*, 40 Hun, 339, rev'g judg't for pl'ff.

Injury did not arise from any defect of condition or construction of the elevator furnished, but solely from the act of the tenant's employes in operating it. *Denenfeld v. Baumann*, 40 App. Div. 502.

Landlord knew that her tenant intended to use the premises as a shooting gallery, but did not know or have reason to believe that the necessary permit had not been obtained or that the premises were being used in a negligent manner. *Leonard v. Hornellsville*, 41 App. Div. 106.

Tenant had exclusive control of the basement steps and left the door cover thereto open. *Schroeck v. Reiss*, 46 App. Div. 502.

Premises were in the possession and entire control of the tenant including the iron grating projecting into the sidewalk. Landlord did not agree to repair and had no notice of the defective condition. *Curran v. Flammer*, 49 App. Div. 293.

In a similar case owner was allowed to show that tenant was in possession under a lease whereby the tenant became responsible for repairs. *Finigan v. Biehl*, 30 Misc. 735; *Dodd v. Rothschild*, 31 Misc. 721.

Overflow of water from an upper tenant was not caused by landlord's personal negligence. *Becker v. Bullowa*, 36 Misc. 524.

Lessee made alterations in premises whereby injuries arose. *Bard v. N. Y. &c. R. Co.*, 10 Daly, 520.

See, *Mellou v. Merrill*, 126 Mass. 545; *Ploen v. Staff*, 9 Mo. App. 309.

Tenant without license closed a cut in a levee so as to overflow the land of an adjoining owner. *Baker v. Allen*, 66 Ark. 271.

Tenant allowed offensive matter to accumulate on the premises where it was washed onto the land of an adjoining owner. *Edgar v. Walker*, 106 Ga. 454.

Landlord was not liable to a mere trespasser, for his removal of a fence, erected by the latter on his land, simply because it was the tenant's right to so remove it. *Ebersol v. Trainor*, 81 Ill. App. 645.

The lessor, pursuant to an agreement to suspend work on a floor,

fastened up a door leading to a porch not yet erected. Tenants of employé unfastened it and left it so. *DeGraffenried v. Wallace*, (Ind.) 53 S. W. Rep. 452.

Duty to properly protect the public from a defect in premises belongs to the tenant having actual control thereof. *DeTarr v. Ferd-Heimm Brewing Co.*, (Kan.) 61 Pac. Rep. 689.

See, also, *Texas Loan Agency v. Fleming*, 92 Tex. 458.

Properly constructed water appliances were overflowed. *Allen v. Smith*, 76 Me. 335.

Act of the tenant was not necessarily embraced within the purposes for which the premises were leased. Landlord not implicated. *Metropolitan Sav. Bank v. Manion*, 87 Md. 68.

Blind fell from the portion of the premises in the possession of tenant. *Szathmary v. Adams*, 166 Mass. 145.

Cover to a coal hole, not in itself defective, was left unsecured. *Frischberg v. Hurter*, 173 Mass. 22.

Stone fell three years after the tenant took possession with the obligation to repair. *Monroe v. Carlisle*, 176 Mass. 199.

A rock fell in a mine injuring lessee's workman. *Samuelson v. Cleveland &c. Min. Co.*, 49 Mich. 164.

The lessees erected a wall which fell. *Grogan v. The Broadway Foundry Co.*, 87 Mo. 321.

Landlord rented the same pasture to two different persons. He was not liable, however, to the former for the act of the latter in expelling her cattle therefrom. *McAllister v. Sanders*, (Tex. Civ. App.) 41 S. W. Rep. 388.

Obstructions arising subsequent to the lease, of which the landlord had no knowledge or notice, did damage. *Moore v. Oceanic &c. Co.*, 24 Fed. Rep. 237.

Tenant failed to repair fences which were out of repair when he took possession. *Blood v. Spaulding*, 57 Vt. 422.

Injury resulted solely from the manner in which the tenant fitted up the premises to suit his own purposes. *Glass v. Coleman*, 14 Wash. 635.

V. When Lessor Is Liable for Negligence of Railway Lessee.

If the lessee of a railway agrees to keep it in good condition, the lessee and not the lessor is liable for negligence in failure to keep the fence in repair, if the fence was in good order when the lease was made.

The rule is well settled that an action for not repairing fences, by reason whereof another party is injured, can only be maintained against the occupier, and not against the owner of the fee, who is not in possession. *Cheetham v. Hampson*, 4 Term. R. 318; *The Mayor &c. v. Corlies*, 2

Sandf. S. C. R. 301; *Sands v. Edgar*, 59 N. Y. 28. *Ditchett v. S. D. & P. M. R. Co.*, 67 N. Y. 425, rev'g 5 Hun, 165.

In this case defendant built a substantial fence along the line of the excavation, and across said avenue. In 1871, defendant leased its road, with the fences in good order, &c., to the New York Central and Hudson River Railroad Company for ninety-nine years; the lessee covenanting to see that the demised property was properly cared for and to surrender in good condition. The lessee took possession under the lease, and has, since that time, had possession and control, operating the road. A section of the fence across Macomb avenue had fallen down, and, as the evidence tended to show, deceased on a dark night, going along the avenue, went through the opening and fell into the excavation and was killed.

If fault is in failure to maintain or use structure properly and rightly constructed and in proper order when lessee took under lease, the lessee and not the lessor is liable, as in cases of fences. *Ditchett v. Spuyten Duyvel &c. R. Co.*, 67 N. Y. 425, rev'g 5 Hun, 165.

Wasmer v. D., L. & W. R. Co., 80 N. Y. 212; *Edwards v. N. Y. & H. R. Co.*, 25 Hun, 634; *Mahoney v. Atlantic &c. R. Co.*, 63 Me. 68.

One railway corporation cannot lease its road to either a private person or another corporation without legislative authority. *People v. A. &c. R. Co.*, 77 N. Y. 232.

T. & B. &c. R. Co. v. B. H., &c. R. Co., 86 N. Y. 107.

By a statute (1850), lease of a railway to individual is unauthorized; a railway company is liable for such lessee's negligence. *Abbott v. J., G. & K. H. R. Co.*, 80 N. Y. 27.

Durfee v. Johnstown &c. R. Co., 71 Hun, 279; *Fisher v. Met. El. R. Co.*, 34 id. 433.

It seems that lessee cannot claim that lease was invalid. *Woodruff v. Erie R. Co.*, 93 N. Y. 609; 25 Hun, 246.

Company has no right to grant its franchise except upon competent public authority. *Ogdensburg &c. R. Co. v. Vermont &c. R. Co.*, 4 Hun, 268.

Woodruff v. Erie &c. R. Co., 25 Hun, 246; *Wood v. Bedford &c. R. Co.*, 8 Phila. 94; *Great Northern R. Co. v. Eastern &c. R. Co.*, 9 Hare (Ch.) 306; 12 Eng. L. & Eq. 224; *Winch v. B. L. &c. R. Co.*, 13 Eng. L. & Eq. 506; *Beeman v. Rufford*, 6 Eng. L. & Eq. 106; *Nelson v. Vermont R. Co.*, 26 Vt. 717; *M. & R. Co. v. Mayes*, 49 Ga. 355; *McAllister v. Plant*, 54 Miss. 106; *quære*; *Hinckly v. Gildersleeve*, 19 Grant Ch. (Upper Can.) 212; *Pittsburg &c. R. Co. v. Bedford &c. R. Co.*, 81 1-2 Pa. St. 104; *Thomas v. R. Co.*, 101 U. S. 71; see, also, *Midland R. Co. v. Great Western R. Co.*, L. R. 8 Ch. App. 841; see, also, *Wallace v. Long Island R. Co.*, 12 Hun, 460.

The defendants had leased their road for a fixed share of the gross earnings, but reserved the right to approve all passenger conductors and to supervise the receipts and sell the tickets, and were not liable to per-

sons injured by the operation of the road by the lessees. See *Norton v. Wiswall*, 26 Barb. 618, 621-623; *Blake v. Ferris*, 5 N. Y. 53-61; *Ditchett v. S. D. & P. M. R. Co.*, 67 id. 425; *Fisher v. Met. El. R. Co.*, 34 Hun. 433; *Abbott v. Johnstown &c. Horse R. Co.*, 80 N. Y. 27; *Philips v. N. R. Co.*, 62 Hun. 233.

Where the road was under the control and operation of lessee at the time of injury lessor is not liable for acts of lessee, but the property itself is subject to the satisfaction of the judgment against the lessee. *Little Rock &c. R. Co. v. Daniels*, 68 Ark. 171.

Lessee of a railway operated it negligently. *McCaffrey v. Georgia &c. R. Co.*, 69 Ga. 622.

Company owning road is liable for injury to a passenger through negligence of lessee's or another company permitted to use the road. *Peoria &c. R. Co. v. Lane*, 83 Ill. 448.

See, also, *Central Trust Co. v. Denver &c. R. Co.*, 97 Fed. Rep. 239; *Highland Avenue &c. R. Co. v. South*, 112 Ala. 642.

Lesh v. Wabash Nav. Co., 14 Ill. 85; *Wabash Nav. Co.*, 15 id. 72; *Chicago &c. R. Co. v. McCarthy*, 20 id. 385; *Ohio &c. R. Co. v. Dunbar*, 20 id. 623; *Sidders v. Riley*, 22 id. 109; *Illinois Cent. R. Co. v. Finnigan*, 21 id. 646; *Illinois Cent. R. Co. v. Konause*, 39 id. 272; *Toledo &c. R. Co. v. Rumbold*, 40 id. 143; *Smith v. Pacific R. Co.*, 61 Mo. 17; *R. Co. v. Brown*, 17 Wall. 445.

Illinois roads can be leased under the act of 1855. *Illinois Midland R. Co. v. People*, 84 Ill. 426.

Cannot lease to foreign corporation. *Archer v. Terre Haute &c. R. Co.*, 102 Ill. 493.

Though the accident at a crossing may have been caused by a defect in the track and not by negligence in the operation of a train, defendant was liable, though it was only a lessee having a trackage agreement with the owner of the road. *St. Louis &c. R. Co. v. Rawley*, 90 Ill. App. 653.

Lessor is liable if lessee be operating its railway in lessor's name. *Bower v. B. & S. W. R. Co.*, 42 Iowa, 546.

R. Co. v. Brown, 17 Wall. 445.

Where injury arises from fault in construction lessor is liable, as for absence of cattle guards. *St. Louis &c. R. Co. v. Curl*, 28 Kas. 622.

Cook v. Milwaukee &c. R. Co., 36 Wis. 45.

Lessor railroad was liable for injury at crossing. *Freeman v. Minneapolis &c. R. Co.*, 28 Minn. 443.

A railroad is not liable to an employé of its lessee for injuries from the use of defective machinery. *Buckner v. Richmond &c. R. Co.*, 72 Miss. 873.

But, see, *Smith v. Atlanta &c. R. Co.*, (N. C.) 42 S. E. Rep. 139.

Joint operation of a train creates a joint liability for negligent operation. *Moling v. Barnard*, 65 Mo. App. 600.

Lessor of a railroad is liable jointly with the lessee for the latter's negligence. *Tillett v. Norfolk &c. R. Co.*, 118 N. C. 1031; *Logan v. North Carolina R. Co.*, 116 id. 940; *Pierce v. Railroad Co.*, 124 id. 83.

See *Stottz v. Baltimore &c. R. Co.*, 7 Oh. N. P. 129; *Railroad Co. v. Kanouse*, 39 Ill. 272; *Railroad Co. v. Gerber*, 82 Ill. 632.

Where lessor and lessee of depot grounds, etc., use the same in common, each owe the same duty to the passengers, so far as the use of the depots, etc., is concerned. *Philadelphia &c. R. Co. v. Anderson*, 94 Pa. St. 351.

See, also, *Central R. Co. v. Brinson*, 64 Ga. 475.

A lease was no defense where the road was still operated by lessor's own servants or agents. *Chesapeake &c. R. Co. v. Howard*, 178 U. S. 153; aff'g s. c., 14 App. D. C. 262.

Lease in Indiana valid in absence of prohibiting statute, and if not against public policy. *Pittsburg &c. R. Co. v. Columbus &c. R. Co.*, 8 Bliss. (U. S.) 456.

So in Minnesota, under Sp. Laws, 1870, C. 57, sec. 4, and Sp. Laws, 1871, C. 71, sec. 1. *Pence v. St. Paul &c. R. Co.*, 28 Minn. 488.

So if charter permit. *Flagg v. Man. El. R. Co.*, 20 Blatch. (U. S.) 142.

VI. When Lessor Is Liable to Licensees and the Public.

(a). NEGLIGENCE.

The owner of a pier is liable to a laborer thereon, in the business for which the pier is used, for defective condition. A laborer may assume that the pier is in good condition and notice to his foreman is not notice to him. If the owner let the pier to a tenant while in defective condition, he is liable although the tenant agrees to repair. *Swords v. Edgar*, 59 N. Y. 28, aff'g 1 N. Y. S. C. (T. & C.) Ad. 23.

From opinion.—"The keeping of such a pier is likened to the keeping of an inn; and a general license is given to all persons to occupy it for lawful and accustomed purposes. *Heaney v. Heaney*, 2 Den. 625. One prime purpose is for the vessel to discharge its cargo thereupon. As it may not discharge its cargo without the aid of laborers, all persons hired and acting as such, are upon the pier by right for a lawful purpose. The owner or occupant of a pier may terminate his general license, or may withhold permission to enter from a particular person. *Id.*; *Bogert v. Haight*, 20 Barb. 251. There is no pretense that in this case there had been such action. The piers in New York City are not different in these respects from those elsewhere. *Murray v. Sharp*, 1 Bosw. 539; see, also, *Stevens v. Rhinelander*, 5 Robt. 285. * * * There was a license and invitation to

plaintiff's intestate to come and go over this pier, and to remain thereon in the following of his employment. And thus, when the injury occurred to him, he was lawfully there in his avocation. *Crosby v. Hill*, 4 C. B. (N. S.) 556, which was the case of an obstruction negligently put in a private way, over which plaintiff had invitation to pass; *Frees v. Cameron*, 4 Rich. 228, which was the case of a negligent omission by a shop-keeper, by which a customer was injured; and see, *Indermaur v. Dames*, L. R. 1 Com. Pl. 274; s. c., in error, 2 id. 311. Though the pier be private property, and though it be granted that the owner or occupant thereof might at any time close it and refuse entrance upon it to any and all persons, yet so long as it was kept open to that portion of the public of which the intestate was one, for the profit of the defendant's lessees, there was upon such lessees primarily, the duty of taking care, so long as it was thus kept open, that those who had lawful right to go there, could do so without incurring danger to their persons. *Lan. Canal Co. v. Parnaby*, 11 Ad. & Ell. 223; *Thompson v. N. E. Railway Co.*, 3 Best & S. 106. *Smith v. London & St. Kath. Docks Co.* L. R. 3 Com. Pl. 326, is directly in point. There the defendants were the owners of docks. It was held, that as they carried on the business of a dock company, and that as that business consisted partly in providing access to the ships lying at the docks, they were liable for a defect in the gangway, known to their servants, by which the plaintiff, visiting a ship in the exercise of his calling, was injured. * * *

There was testimony that the stevedore in whose employ the intestate was, or that the foreman under whom the intestate was laboring, was warned that the pier was becoming too heavily loaded. There was no proof that this warning came to the knowledge of the intestate. *Godley v. Haggerty*, 20 Penn. St. 387. * * *

We have shown that it was of such nature that there was, as to him, a duty resting somewhere, to keep this pier in a reasonably sound and secure condition. Primarily, this duty is upon the occupants of the pier, and, in the absence of any covenant from their lessors to keep the same in repair, their duty, as to all defects arising after their tenancy began, would altogether rest upon them, and there would be no liability upon the lessors. But there may be a state of facts that will cast a liability upon the lessors also. The neglect of this duty, the suffering the pier to fall into such a state of decay, as to become dangerous, to those lawfully coming upon it, is the creation of a nuisance. For a private nuisance is anything unlawfully or tortiously done to the hurt or annoyance of the person, as well as the lands, tenements and hereditaments of another. 3 Blk. Com. by Sharswood 215. Where there has been a nuisance of continued existence upon demised premises, the lessor and the lessee may both be liable for damages resulting therefrom. The lessee in the actual occupation of the premises, if he continues the nuisance after notice of its existence and request to abate it, and the lessor, if he at first created it, and then demised the premises with the nuisance upon them, is receiving a benefit therefrom by way of rent or otherwise. *Roswell v. Prior*, 2 Salk. 459; s. c., more fully reported, 12 Mod. 635; *Staple v. Spring*, 10 Mass. 72; see *Rich v. Basterfield*, 4 Man., Gr. & Scott, 783, and cases there cited. * * * See, also, *House v. Metcalf*, 27 Conn. 631. * * * The defendants urged that an absolute deed would put an end to the former owner's liability and that a lease is *pro tanto* as effectual as a deed, inasmuch as for a space it prevents the lessor from entering upon the premises to make repairs. This leaves out of view that, by a lease reserving rent, the owner and lessor de-

rives a profit from the continuance of the nuisance; which is one of the grounds on which went *Roswell v. Pryor*, *supra*. Inability to enter and remove the nuisance, except as trespassers, is not an excuse, as the defendants urge. *Thompson v. Gibson*, 7 M. W. 456; *Waggoner v. Jermain*, 3 Denio 306. In 12 Modern 635-639, the court say, 'The putting it out of one's power to abate a nuisance, is as great a tort as not to abate it when it is in your power to do it.' "

The defendant let a hall for a dance. The plaintiff went, and on going home walked out of an open door upon the roof of an awning and off into the street. The defendant was held liable.

The question of the plaintiff's contributory negligence caused by intoxication was for the jury. *Camp v. Wood*, 76 N. Y. 92, aff'g judg't for pl'ff.

The occupant or lessee of a dock or pier, to which vessels are allowed or invited to make fast for the purpose of discharging or receiving passengers or freight, is bound to keep and maintain the same in a reasonably safe condition and free from defects as regards those engaged or employed in carrying on such business. *Leary v. Woodruff*, 4 Hun, 99; aff'd 76 N. Y. 617; *Swords v. Edgar*, 59 id. 28; *Wendell v. Baxter*, 78 Mass. 494-496; *Barber v. Abendroth*, 102 N. Y. 406; *Coughtry v. Globe Woolen Co.*, 56 id. 124.

An employé of a steamer, carrying in baggage on the defendant's pier where the steamer stopped, according to contract, was killed by a sliding door falling. It was for the jury to say whether the door was reasonably safe. *Newall v. Bartlett*, 114 N. Y. 399, aff'g judg't for pl'ff.

The fact, that the title of land, on which a portion of a dock stood, whereon was a derrick, which was so unsafe and dangerous, that it fell and injured an employé of the person leasing it, was in another person. was not a defense for the person who owned the remaining land on which the dock stood. The dock was built by the defendant's son for his own purpose, but the employés of "M.," the lessee, and others using the dock had the right to assume that the whole dock was in the possession of, and under the control of the defendant. *Thomas v. Henges*, 131 N. Y. 453, aff'g judg't for pl'ff.

Landlord must repair grate in sidewalk though the tenant has an exclusive right to a part thereof as a beneficial appurtenance. *Trustees v. Foster*, 156 N. Y. 354, 360; aff'g s. c., 81 Hun, 147.

From opinion.—"The question before us did not arise between the owner and his tenant, or the patrons of the tenant, but between the owner and the plaintiffs, as representatives of the general public entitled to free and safe passage over the sidewalk as a part of the highway. While the owner cannot be held liable in this action for failing to repair the entire sidewalk in front of his premises, was he properly held liable for failing to keep in repair the grate itself, which was his own structure? This depends upon the duty that he assumed when he cut a hole in the sidewalk and covered it with the grate. That

duty included proper construction in the first place, and reasonable care on the part of the owner to keep the grate in repair thereafter, as long as he continued in possession. The duty sprang from the necessity of having safe sidewalks, and as the necessity is continuous, so is the duty. Upon no other ground can the construction of a grate in a sidewalk, which is an interference with a public highway, be justified, even when permission is duly granted. Upon the transfer of the entire interest and possession to another, as the duty runs with the land, it would be cast upon the grantee. So a lease of the entire premises and possession thereof by the tenant, would doubtless throw the burden upon the latter. (Shearman & Redfield on Negligence, 5th Ed., sec. 710, 713.) The conveyance of an undivided interest, however, would not have that effect, and the demise of a part of the premises should not. The obligation goes with the land and cannot be discharged by a partial alienation of the land at least, unless the alienation, if for a fixed term, carries with it the exclusive possession of the premises for that term. Entire possession by a tenant from the foundation to roof doubtless involves the duty of keeping a grate in front of the premises in repair, which otherwise rests on the owner of the fee. But whoever, even by due permission, cuts a hole in the sidewalk for the benefit of his adjoining property must use reasonable care to protect the public from danger on account thereof. Reasonable care requires that he should provide a proper covering, inspect it from time to time and repair it when necessary as otherwise passers-by, for whose benefit the sidewalk is maintained, may be injured. If he parts with the premises, or parts with the possession thereof for a period, the burden falls on his successor in title or possession. If he transfers either title or possession in part only, he does not escape the burden. The implied duty assumed when the hole was cut and the grate placed over it requires reasonable precaution on the part of the owner to protect the public as long as he remains the owner and is in possession of any part of the building on the abutting land. He cannot cast the burden of maintenance on the public any more than he could have cast upon them the burden of original construction, for the grate is wholly for the benefit of his property. Nor can he relieve himself of the duty without parting with entire possession of the property benefited, for the safety of the public requires that the owner, as long as he is in possession of any part of the property, be compelled to keep his structure in the sidewalk in a suitable condition for use as a part of the sidewalk. As the duty is imposed by law for the public safety, its extent is measured by whatever public safety requires, anything less than the alienation of the entire property, either permanently, as by deed, or temporarily, as by lease, would leave the public without adequate protection. A person injured by a defective grate should not be subject to the hazard of ascertaining the precise relation existing between owner and one of his tenants with reference to the control of the grate, but a simple rule resting upon the ownership and possession, in whole or in part, on the adjacent structure, is required by sound public policy. The argument that the defendant had no right of access, to repair the grate, except by consent of the tenant, is without force, for the law imposing the duty was a part of the lease and impliedly excepted from its provisions such necessary access at reasonable times as would enable the owner to discharge that duty. The lease covered the grate by implication only, the same as it embraced the rights of the owner in the entire sidewalk in front of his premises. That would not prevent him from rebuilding or repairing the sidewalk proper, when required by municipal ordinance, nor does it prevent him from rebuilding or repairing the grate when required by the common law."

Lessee of a wharf who, for his benefit, induces people to come thereon, is bound to make reasonable examination to keep same in repair.

A bank or mound had accumulated under the water in front of and adjacent to defendant's wharf, and, as the tide went out, the vessel carcened and sunk. *Leary v. Woodruff*, 4 Hun, 99, granting new trial after nonsuit; s. c., aff'd, 76 N. Y. 617.

Citing *Carleton v. Franconia &c. Co.*, 99 Mass. 216; *Sweeny v. Old Colony R. Co.*, 10 Allen (Mass.) 372.

Insecure condition of a coal hole in sidewalk due to general deterioration gave recovery, though the premises were in the possession of a tenant who covenanted to make repairs. *Matthews v. De Groff*, 13 App. Div. 356.

See, also, *Spaine v. Stiner*, 51 App. Div. 481; s. c., aff'd 168 N. Y. 666.

Liability for injuries received from a hole in a floor, was held to inure to such persons as would probably, in the ordinary use of the premises, approach the hole. *Binney v. Carney*, 20 App. Div. 621.

Liability for defect in a grand stand inured to patron of lessee, the lessee overcrowded it. *Fox v. Buffalo Park*, 21 App. Div. 321.

From opinion.—"In *Camp v. Wood*, (76 N. Y. 92) the defendant had let a hall for a dance, to which all who applied were admitted upon payment of the entrance fee. Plaintiff, who paid the fee, went out of a door that had been improperly left open, upon an awning and was injured. Judge Andrews says: 'In this case the defendant, by letting the hall for public purposes, held out to the public that the hall was safe and he was bound to exercise care to provide safe arrangements for the entrance and departure of people who came there upon his invitation.' The principle thus asserted and sustained is a correct one and is founded on a wise public policy. Structures that are reared for public exhibition, such as the one in question, are erected for the purpose of accommodating great numbers of people at times and under conditions often of excitement, when the numbers, activity and demonstrations of the people may subject the structure to great weight and strain, and these conditions must be regarded as within the contemplation of the builders of the structures when they were created. These builders must be held responsible for the highest degree of care in constructing such concerns, and where it is clearly established by the evidence as in the case at bar, that the structure was unsafe for the purpose for which it was created, and dangerous, the inference is irresistible of the want of such care on the part of such builders, and it was not error in the trial court to charge the jury, under the circumstances of this case, that if they find that the grand stand, when built, was unsafe and dangerous, the defendant was liable." * * * "Assuming that there is no implied undertaking on the part of the defendant that due care and skill had been used by the persons whom it employed as independent contractors, to erect the stand, and that it is not responsible for the negligent manner of its original construction, still when it is considered that it was erected for the accommodation of large numbers of people, the defendant was bound to use extra precaution in testing and inspecting the structure, at reasonable intervals of time, to protect them from loss of life and limb. The defendant owed this duty

to the public, and it could not absolve itself from its performance, nor escape its liability for the consequences resulting so disastrously to the people invited there, by letting it for hire for a temporary purpose. In *Edwards v. N. Y. & H. R. Co.* (98 N. Y. 245) 'there was no proof even that any of the timbers in the gallery were too small or weak and that they broke, or that they were not properly joined together, and supported or that the gallery was in any respect negligently constructed.' The court held that negligence was not imputable to defendant for not foreseeing that the contemplated use of the place for a pedestrian match would result in filling the gallery with a large and unusual number of people. The decision in that case did not involve the question we consider here, to wit, the duty of the owner of a structure erected for public entertainments or amusements, to examine and inspect the same for the purpose of determining whether its safety and security for the accommodation of the public has been in any manner weakened or impaired by previous use."

Stairs in a hallway were so peculiarly built as to be dangerous without a light. Question of negligence went to the jury. Injury was to tenant's visitor. *Brugher v. Buchtenkirch*, 29 App. Div. 342.

Barn door was originally constructed so that it swung out over the sidewalk. It was no defense that tenant had left it unfastened. *Holroyd v. Sheridan*, 53 App. Div. 14.

Plaintiff leaned against chain guarding an elevator shaft, when either the hook straightened or the bolt holding it pulled out. Compliance with statute as to the sufficiency of chain was for the jury, who rendered a verdict in favor of the plaintiff. *Weinberger v. Kratzenstein*, 71 App. Div. 155.

A landlord cannot recover for rent if it appears that after covenant made, and before tenancy was to have commenced, landlord rendered house unfit for use by the removal of a cistern for catching rain water. *Cleves v. Willoughby*, 7 Hill, (N. Y.) 83.

The plaintiff and his sister, whom he was visiting and who was a tenant in a tenement house, were not aware of the dangerous condition of the bannister of the stairs, nor that the step from the top of the flight had worn so thin as to make it liable to spring and break off under the pressure of a foot, but all of which the defendant, the owner of the house, knew. The plaintiff, while coming down stairs, put his foot upon this step and it broke under the pressure, whereupon he caught hold of the bannister which gave way and he was thrown down the stairs. For the jury. Action was against landlord. *Brady v. Valentine*, 3 Misc. 20, aff'g judg't for pl'ff; s. c. aff'd, 144 N. Y. 698.

Citing *Peil v. Reinhart*, 127 N. Y. 381; L. 1888, ch. 583, title 14, sec. 26; *Willey v. Mulledy*, 73 N. Y. 310; *McRickard v. Flint*, 114 N. Y. 222.

It is the duty of the landlord of a tenement house to keep the yards, hallways, coal holes, etc., in proper repair and reasonably safe condition, and he is chargeable in damages to anyone injured for a failure to do so.

Plaintiff's parents occupied the ground floor of a tenement house, the yard of which was used by the tenants to dry clothes, and for a place for the children to play. While the plaintiff's mother was hanging out clothes, he was playing ball with other children, and fell into an air shaft, the covering of which had been off for two months, and was then in the cellar, and defendant's collector had knowledge of its condition. Held, that the tenants had an easement in the yard for the aforesaid purposes; and that it was a proper place for the children to play, and that defendants were guilty of negligence in allowing the cover of the shaft to be off; that it was their duty to keep the cover in place or secure it that it could not easily be moved. *Canavan v. Stuyvesant*, 7 Misc. 113; see s. c., 12 id. 74.

From opinion.—"It is different, however, as to the second cause of action. While it is true that the parents of the child hired only the six rooms on the ground floor, and did not in terms hire either the front or rear yard, yet for the nine years they had been on the premises they were in the habit of drying their clothes there, and all the children in the house, including plaintiff, had been in the habit of playing in that yard, and these uses of it had never been forbidden by the defendants or any one in their employ. Respondents contend that neither the hiring nor the uses stated made the rear yard appurtenant to the rooms hired by plaintiff's father, and in this we think they are correct. But it is conceded that the house contained or was calculated to contain six other families, thus making it a tenement house within the meaning of chapter 84, Laws of 1887, as it contained more than three families; and the defendants had the right at all times to enter and make repairs, and were in duty bound to keep the premises in reasonably tenantable order and condition and free from nuisances. *Henkel v. Murr*, 31 Hun, 28; 2 *McAdam Land. & Ten.* 185, 191, 193, and cases cited. Although the use of the yard permitted by the defendants did not make it appurtenant to the premises occupied by plaintiff's father, yet the free access to it through the hallway on the first floor provided by the defendants, and its use by all the families in the building, did create an easement in the yard, and such, we think, in the absence of restrictive words in the lease of plaintiff's father, was the manifest intention of the parties. There were no other apparent purposes to which it could be subjected than the uses made of it. *Doyle v. Lord*, 64 N. Y. 436.

The air shaft was built against the wall of the house, and extended out from the rear wall three feet into the yard and was about six feet deep; it was surmounted by a stone coping, and an iron grating, weighing somewhere between thirty and fifty pounds, had been provided to cover it. At the time of the second accident, on the 4th of November, 1891, this was not in place, and had not been for two months, but was lying in the cellar; the plaintiff's mother was hanging out clothes in the yard; the plaintiff, then about three years old, was playing ball with his sister, who, at the time, was about four or four years and a half old; while running after the ball, plaintiff accidentally fell into the air shaft. It cannot be denied that, under the circumstances, this rear yard was a proper place for the children to play in, and they were playing under the immediate supervision of the mother; it was impossible for her to do her work and keep her eye upon the children at all times. We think it was the clear duty of the

defendants to have kept the grating over the air shaft in place, or so secured it that it could not easily have been moved. It had been off so long that a jury could reasonably have inferred from that fact that the defendants were guilty of negligence in that they either allowed it to be off after actual knowledge of it, or could have ascertained that fact by reasonable diligence. *Driscoll v. Mayor &c.*, 11 Hun, 101; *Timlin v. Standard Oil Co.*, 126 N. Y. 514; *Embler v. Town of Walkill*, 132 id. 222. Besides, it appears from the evidence that both the defendant's janitor and collector had actual notice or knowledge of its dangerous condition. A landlord of a tenement house is bound to keep the yards, hallways, coal holes, &c., in proper repair and reasonably safe condition, and is chargeable in damages to any one injured for a failure to do so. *Dollard v. Roberts*, 28 N. Y. St. Repr. 569; 130 N. Y. 269; *Henkel v. Murr*, 31 Hun, 26; *Palmer v. Dearing*, 93 N. Y. 7; *Jennings v. Van Schaick*, 108 id. 530; *Peil v. Reinhart*, 127 id. 381; *Ahern v. Steele*, 115 id. 203. We think the court erred in dismissing this cause of action, but should have submitted it to the jury."

Landlord promised to repair the roof, but failed to do so, and tenant's furniture having suffered damage, was liable. *Phillips v. Ehrmann*, 8 Misc. (N. Y.) 39.

Plaintiff, the janitress of an apartment house, while taking in clothes upon the roof, was called by one of the tenants, and, in answering the call, was injured by tripping over a fallen wire. The evidence tended to show that but one wire ran from the building, in which was a messenger call, and that such wire ran to the building occupied by defendant's office, in which building there was no other messenger call office. Held, that such evidence, unexplained, was sufficient to justify a finding that the wire was owned and controlled by the defendant, and that it was negligent in permitting the wire to remain in a defective and unsafe condition. *Walther v. The American District Telegraph Co.*, 11 Misc. 71.

Owner of a building retained control of passageways renting only the rooms. Guest was injured. *Harkin v. Crumie*, 14 Misc. 439.

Trustee of an estate failed to repair shelving of a store, as he had promised, and was liable. *Miller v. Smythe*, (Ga.) 18 S. E. Rep. 46.

Approach to a storehouse was defective. Customer fell. *Archer v. Blalock*, 97 Ga. 719.

A third person was injured by the fall of a smoke stack erected by the landlord for his own use partly on land leased to a tenant and partly on tenant's own land. *Boyce v. Snow*, 187 Ill. 181; aff'g s. c., 88 Ill. App. 402.

Liability extends to members of tenant's family. *Sontag v. O'Hare*, 73 Ill. App. 432.

Landlord retained control of an elevator. Employé of a tenant using it was injured. An exemption in favor of landlord did not bind the employé. *Springer v. Ford*, 88 Ill. App. 529.

See, also, *Anderson v. Hayes*, 101 Wis. 538; also, *Harrison v. Jelly*, 175 Mass. 292 in case of a stairway.

Landlord did not exempt himself from liability to the public by agreeing with the tenant that the latter should be responsible for the condition of the sidewalk. *Helbig v. Slaughter*, 95 Ill. App. 623.

In an action by a third party it is proper to inquire into the relations of the landlord and tenant to see who would bear the responsibility for the defect. *De Tarr v. Ferd. Heim Brewing Co.*, (Kan.) 61 Pac. Rep. 689.

Premises were leased for the purpose of a hotel and restaurant. Guest fell into an unguarded excavation. *Copley v. Balle*, 9 Kan. App. 465.

Premises rented for purposes of business must not subject tenant's customers to risk of injury from dangerous pitfalls in passageways. *Foren v. Rodick*, 90 Me. 276.

Well next to a path to an out house, was left open and unguarded at night. Guest was injured. *Barnam v. Spencer*, (Md.) 49 N. E. Rep. 9.

Police officer stepped into an open well in the natural approach to premises, and lessor was liable. *Learoyd v. Godfrey*, 138 Mass. 315.

Approach to the entrance of the premises designed for show purposes was defective. Lessee's patron received injury. *Oxford v. Leathe*, 165 Mass. 254.

The liability in reference to a platform maintained for the use of the tenants in common, inured to an invitee of a tenant. *Coupe v. Platt*, 172 Mass. 458.

An excavation under nearly the whole breadth of the sidewalk and covered only with a wooden door was a nuisance. Fact of possession of tenant was immaterial. *Memphis v. Miller*, 78 Mo. App. 67.

Tenant for 999 years was held so far the owner as to be chargeable with the duty of repairing a similar defect. *Meyer v. Harris*, 61 N. J. L. 83.

Sewer arrangements were out of repair when premises were leased, and lessor was liable. *Knauss v. Brua*, 107 Pa. St. 85.

Premises were leased for the purpose of a boarding house. Liability ran to a boarder. *Sternberg v. Wilcox*, 96 Tenn. 163.

Liability of landlord for defective ceiling, inured to the child of a tenant. *Moore v. Steljes*, 69 Fed. Rep. 518.

Landlord failed to disclose to employes of tenant defects which were concealed to them but known to him. *Anderson v. Hayes*, 101 Wis. 538.

(b). CONTRIBUTORY NEGLIGENCE.

Cover of a cellar opening was raised a few inches above the surface of the sidewalk. Contributory negligence was for the jury. Plaintiff was not *per se* negligent. *Sturmwald v. Schrieber*, 69 App. Div. 476.

VII. When Lessor Is Not Liable to Licensees and the Public.

(a). NEGLIGENCE.

If premises are in good repair when demised but afterwards become ruinous and dangerous, the landlord is not responsible therefor either to the occupant or the public, during the continuance of the lease, unless he has expressly agreed to repair or has renewed the lease after the need of repair has shown itself; and this rule applies to a lessee out of possession, who has sublet to another who is in possession.

Such a lessee, therefore, is not liable for an injury to the property of a person lawfully upon the premises therewith, resulting from a neglect to keep them in repair; and this is so although, by his covenant with his landlord, he is bound to make all ordinary repairs. The covenant does not give a right of action or impose a liability in favor of a stranger. *Clancy v. Byrne*, 56 N. Y. 129; rev'g s. c., 65 Barb. 344, and judg't for pl'ff.

A pole was placed at the intersection of the traveled part of two streets. The defendant bought the abutting lot, which, by its description, excluded the spot where the pole stood. A club hiring a room in the defendant's house caused the pole to be erected without participation of the defendant beyond his acquiescence. The pole fell on a passer-by and killed him. If the pole were a nuisance and were on the defendant's land the landlord would have been liable; as it was, he was not. *English v. Brennan*, 60 N. Y. 609, aff'g judg't for def't.

Under statute for the city of Brooklyn a landlord must, as between him and the tenants, keep fire escapes in repair in the absence of contract, but need not keep them for a balcony. A child visiting a tenant went on to the fire escape and was hurt. Landlord was not liable. *McAlpin v. Powell*, 70 N. Y. 126, rev'g judg't for pl'ff.

Distinguishing *Lynch v. Nordin*, 1 Ad. & El. (N. S.) 29; *R. Co. v. Stout*, 17 Wall. 657; *Keefe v. Milwaukee*, 21 Minn. 209.

The defendant owned a building and machinery therein, run by steam power, and rented a floor to "L.," who put a partition through the floor near a shaft. The plaintiff, "L.'s" employé, was hurt in passing between the door and the shaft by latter. The defendant was not liable therefor. *Ryan v. Wilson*, 87 N. Y. 471, affirming 13 J. & S. 273, and judg't for def't on nonsuit.

Distinguishing *Swords v. Edgar*, 59 N. Y. 28; and citing *Mellen v. Morrill*, 126 Mass. 545.

When the owner leases premises in an unfit condition, he is liable for injury to a third person, but if he has created no nuisance, if he is guilty of no wrong or fraud or culpable negligence, he is not liable for injury

during the term. There is no difference between dwelling and business places. *Edwards v. N. Y. & H. R. Co.*, 98 N. Y. 245; aff'g s. c., 25 Hun, 634, and judg't for nonsuit.

A tenant leased rooms and the right to hang clothes on the flat roof of an extension, and was warned not to let children go on the roof, which a visitor's child did and fell through a defective skylight. The lessor was not liable. *Miller v. Woodhead*, 104 N. Y. 471, rev'g judg't for pl'ff.

Generally and *prima facie*, where lands are in the occupation of a tenant he alone is responsible for any nuisance thereon arising from their being out of repair. The landlord is only liable where he demised the premises with the nuisance thereon, or covenanted to repair.

The defendant took title, subject to lease, without a covenant for repairs by the landlord, and was not liable for injuries to a third person for nuisance, of which he had no notice, and caused by the neglect of the predecessor in the estate to repair. *Ahern v. Steele*, 115 N. Y. 203; rev'g s. c., 48 Hun, 517, and judg't for pl'ff.

Distinguishing *Brown v. S. & S. R. Co.*, 12 N. Y. 486; *McCarthy v. Syracuse*, 46 id. 194; *Irvine v. Wood*, 51 id. 224; *Swords v. Edgar*, 59 id. 28; *Beck v. Carter*, 68 id. 283; *Clifford v. Dam*, 81 id. 52; *Bellows v. Sackett*, 15 Barb. 96; *Grandy v. Jubber*, 5 Best & Smith, 76.

From opinion.—"It is not the general rule that an owner of land is, as such, responsible for any nuisance thereon. It is the occupier, and he alone to whom such responsibility generally and *prima facie* attaches. *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Kirby v. Boylston Market Assn.*, 14 Gray 249; *City of Lowell v. Spaulding*, 4 Cush. 277; *Inhabitants of Oakham v. Holbrook*, 11 id. 299. The owner is responsible if he creates a nuisance and maintains it; if he creates a nuisance and then demises the land with the nuisance thereon, although he is out of occupation; if the nuisance was erected on the land by a prior owner, or by a stranger, and he knowingly maintains it; if he has demised premises and covenants to keep them in repair, and omits to repair, and thus they become a nuisance; if he demises premises to be used as a nuisance, or for business, or in a way so that they will necessarily become a nuisance.

In all such cases I believe there is now no dispute that the owner would be liable. But an owner who has demised premises for a term during which they become ruinous, and thus a nuisance, is not responsible for the nuisance unless he has covenanted to repair. It has even been held in some cases that an owner may demise premises so defective and out of repair as to be a nuisance, and if he binds his tenant to make repairs he is not responsible for the nuisance during the term. *Pretty v. Bickmore*, *supra*; *Gwinnell v. Eamer*, L. R., 10 C. P. 658; *Leonard v. Storer*, 115 Mass. 86. But these cases are not in entire harmony with the decisions in our own state, and probably would not now be generally received as authority in this country or in England.

A grantee or devisee of premises, upon which there is a nuisance at the time the title passes, is not responsible for the nuisance until he has had notice thereof, and in some cases until he has been requested to abate the same. The authorities to this effect are so numerous and uniform that the rule which they establish

ought no longer to be open to question. One of the earliest, if not the earliest, case in which this rule was announced, is Pennruddock's case (5 Coke, 100b), where it was resolved that an action lies against one who creates a nuisance without any request made to abate it, but not against the feoffee unless he does not remove the nuisance after request; and in *Pierson v. Glean*, 14 N. J. L. 37; Chief Justice Hornblower said: 'The law, as settled in Pennruddock's case, has never, I believe, been seriously questioned since.' In *Plumer v. Harper*, 3 N. H. 88; Richardson, Ch. J., said: 'When he who erects the nuisance conveys the land he does not transfer the liability to his grantee, for it is agreed in all the books that the grantee is not liable until upon request he refuses to remove the nuisance.' In *Woodman v. Tufts*, 9 N. H. 88, it was held that where a dam was erected, and land flowed by the grantor of an individual, the grantee will not be liable for damages in continuing the dam and flowing the land as before, except on notice of damages and request to remove the nuisance or withdraw the water. In *Eastman v. Company*, 44 N. H. 144, it was held that no notice or request to abate the nuisance is necessary before bringing suit against the original wrongdoer in such cases for the damage done; but that the grantee of the nuisance is not liable to the party injured until, upon request made, he refuses to remove the nuisance. * * * To the same effect is *Carleton v. Redington*, 21 N. H. 291. In *Johnson v. Lewis*, 13 Conn. 303, where it appeared, in an action for the obstruction of a water-course by raising a dam, that the dam creating the obstruction was erected by the defendant's grantor, it was held that the plaintiff could not recover without proving a special request to the defendant to remove the obstruction. * * * And so also it was held in *Noyes v. Stillman*, 24 Conn. 15. In *Pillsbury v. Moore*, 44 Me. 154, it was held that a purchaser of property, on which a nuisance is erected, is not liable for its continuance unless he has been requested to remove it. In *Pierson v. Glean*, *supra*, it was held that an action for continuing a nuisance cannot be maintained against him who did not erect it without a previous request to him to remove or abate it. In *Beavers v. Trimmer*, 2 N. J. L. 97, it was held that when the action is not brought against the original erector of a nuisance, but against a subsequent owner or tenant, a special request to remove it must be alleged. In *McDonough v. Gilman*, 3 Allen 264, it was held that a tenant for years is not liable for keeping a nuisance as it used to be before the commencement of his tenancy if he had not been requested to remove it or done any new act which of itself was a nuisance. And the same rule has repeatedly been laid down in this state. In *Hubbard v. Russell*, 24 Barb. 404, an action against the continuator of a private nuisance, originally erected by another, to recover damages for the injury sustained thereby, it was held that the plaintiff must prove a notice to the defendant of its existence and a request to remove it. In *Miller v. Church*, 2 T. & C. 259, in an action to recover damages for the overflow of a mill pond, it was shown that the defendant, the owner of the pond, was not in possession, having leased the same to a third party, and it was held that the owner of the premises overflowed could not recover for such overflow without showing that the defendant had notice or knowledge of the existence of the same before the action was brought. And the same rules, without any variation, are laid down by all the text writers. In *Chitty on Pleadings*, 71, it is said that every occupier is liable for the continuance of a nuisance on his own land, though erected by another, if he refuses to remove the same after notice. And in 2 *Chitty on Pleadings*, 333, note c, the author adds that if the action is not brought against the original erector of the nuisance, but against

his feoffee, lessee, &c., it is necessary to allege a special request to the defendant to remove it. In *Cooley on Torts*, 611, the learned author says:

'A party who comes into possession of land as grantee or lessee, with a nuisance already upon it, is not in general liable for the continuance of the nuisance until his attention has been called to it and he has been requested to abate it.' In 1 *Hilliard on Torts* (3d ed.) 574, it is said: 'That any person who continues a nuisance erected by another, is liable therefor at the suit of any party damaged thereby, if he had knowledge of its hurtful tendency, or more especially if notified or requested to remove it.' In *Moak's Underhill on Torts* (253, 254, 255), the learned editor, with many citations of authorities to sustain him, says: 'Where premises are out of repair at the time they are leased, in particulars which the landlord is bound as against third persons not to allow, the landlord is liable for any injuries sustained by a third person from such want of repair. But not even in such case if the tenant's *use* is what produces the injury.' 'A landlord who negligently or improperly constructs his premises—as a dam—or where they become defective, after notice suffers them to remain so, is liable to his tenant or a stranger who, being himself free from fault, is injured thereby.' 'Where a lessee or grantee continues a nuisance of a nature not especially unlawful, he is liable to an action for it only after notice to reform or abate it.' In *Addison on Torts* (Wood's Am. ed.) sec. 240, it is said: 'And so an action will lie against the landlord for a permanent nuisance, although the nuisance was created before the reversion came to him, i. e., if he knew of it and might have determined the tenancy before the injury happened, as in the case of a tenancy from year to year.' 'If an action is brought against the originator of a nuisance, it is not necessary to demand the abatement or discontinuance of the nuisance before commencing the action, but if the action is brought against the mere continuance of a preceding nuisance, a request to remove the nuisance must be made before the action is commenced.' (Sec. 280.) 'The occupier of lands is in general responsible for the continuance of a nuisance upon them; and so is the landlord if the nuisance existed at the time he demised them or created the tenancy, after he had the power of determining it.' (Sec. 283.)

* * * * *

But the position of these defendants is stronger than the one we have just been dealing with. This pier came to them, not only with this nuisance existing thereon, but subject to an outstanding lease for some years which they had no power to terminate. * * * In *Rosewell v. Prior* (2 *Salkeld* 460), a tenant for years erected a nuisance and afterwards made an under-lease, and the question was whether, after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an under-lease? And it was held that it would, 'for he transferred it with the original wrong, and his demise affirms the continuance of it.' In *Todd v. Flight* (9 *C. B.* [N. S.] 377) it was held that an action lies against the owner of premises who lets them to a tenant in a ruinous and dangerous condition, and who causes or permits them to remain so until by reason of the want of reparation they fall upon and injure the house of an adjoining owner. In *Nelson v. Liverpool Brewing Company* (L. R. 2 *C. P. Div.* 311), it was held that a landlord is liable for an injury to a stranger by the defective repair of demised premises only when he has contracted with the tenant to repair, or where he has been guilty of misfeasance, as, for instance, in letting the premises in a ruinous condition, and that in all other cases he is exempt from responsibility for accidents

happening to strangers during the tenancy. * * * In *Kansas v. Brua* (107 Penn. 85), repeated in *Fow v. Roberts* (108 id. 489), it is said: 'We do not doubt but that in the absence of an agreement to repair, the landlord is not liable to a third party for a nuisance resulting from the dilapidation in the leasehold premises whilst in the possession of a tenant.' In *City of Lowell v. Spaulding* (4 Cush. 277), Shaw, Ch. J., said: 'By the common law, the occupier, and not the landlord, is bound, as between himself and the public, so far to keep buildings in repair that they may be safe for the public; and such occupier is *prima facie* liable to third persons for damages arising from any defect. If, indeed, there be an express agreement between landlord and tenant that the former shall keep the premises in repair so that in case of recovery against the tenant he would have his remedy over, then, to avoid circuity of action, the party injured by the defect and want of repair may have his action in the first instance against the landlord. But such express agreement must be distinctly proved.' And to the same effect is *Lorne v. Farren Hotel Company* (116 Mass. 67): In *Cunningham v. Cambridge Savings Bank* (138 Mass. 480), Morton, Ch. J., said: 'It is often said in the cases that the occupier, and not the owner, of a building is liable to third persons for damages arising from any defect. But by occupier is meant, not merely the person who physically occupies the building, but the person who occupies it as a tenant having the control of it, and being, as to the public, under the duty of keeping it in repair.' * * * In *Nugent v. B. C. & M. Railroad Company* (80 Me. 62, 77), Virgin, J., writing the opinion, said: 'It is settled law that where the owner lets premises which are in a condition which are unsafe, for the avowed purpose for which they are let, or with a nuisance upon them when let, and receives rent therefor, he is liable whether in or out of possession, for the injuries which result from their state of insecurity to persons lawfully upon them; for by the letting for profit he authorized a continuance of the condition they were in when he let them, and is, therefore, guilty of misfeasance.' In *Joyce v. Martin* (15 R. I. 558), "A.," owning a defective wharf used in connection with a public resort, and knowing the defect, leased the place and wharf to "B.," who learned of the wharf defect after accepting the lease, but continued to use the wharf and place for public resort; and in an action for damages to "C." who was injured by the wharf defect, it was held that the action was maintainable against both "A." and "B." jointly—against "A." solely on the ground that he knew the wharf was defective when he let it.

In *Owens v. Jones*, 9 Md. 108, the plaintiff sued for damages for injuries by falling into a vault appurtenant to the property of the defendant, and built under a sidewalk of a public street. It was shown in defense that the property had been leased by the defendant for the term of seven years, for an annual rent, and the court held that the defendant was not relieved from liability if the vault was so constructed as to be unsafe for passers-by when the premises were let, or as to be liable to become unsafe in the necessary opening for the purpose of cleaning it; and it laid down the following rules: (1) When property is demised and at the time of the demise is not a nuisance, and becomes so only by the act of the tenant while in possession, and injury happens during such possession, the owner is not liable. (2) But where the owner leases premises which are a nuisance, or must, in the nature of things, become so by their use, and receives rent, then, whether in or out of possession, he is liable for injuries received from such nuisance. In *Albert v. State*, 66 Md. 325, the action was brought by a minor for damages sustained by him by the death of his parents, who were drowned by

reason of the defectiveness of a wharf in the occupation of the defendant's tenant. The instruction given on the trial was that, 'if the jury found that the defendant was the owner of the wharf and that he rented it out to a tenant, and that at the time of the renting the wharf was unsafe, and the defendant knew, or by the exercise of reasonable diligence could have known of its unsafe condition, and the accident happened in consequence of such condition, then the plaintiff was entitled to recover;' and this was, upon appeal, held to be a correct exposition of the law. In *Clancy v. Byrne*, 56 N. Y. 129, the true rule was fully apprehended by Folger, J., who wrote the opinion. That was a case where plaintiff's horse fell through a defective pier, and the action was against a lessee who had covenanted with his landlord to make all ordinary repairs. The lessee had sublet the pier, and was not in the occupancy thereof, and it was held that if premises were in good repair when demised, but afterwards become ruinous and dangerous, the landlord is not responsible therefor either to the occupant or to the public during the continuance of the lease, unless he has expressly agreed to repair or has renewed the lease after need of repair has shown itself; and that this rule applies to a lessee out of possession who has sublet to another who is in possession. * * * In *Jaffe v. Harteau*, 56 N. Y. 398, it was held that a lessor of buildings, in the absence of fraud or any agreement to that effect, is not liable to the lessee or others lawfully upon the premises for their condition, or that they are tenantable and may be safely and conveniently used for the purposes for which they are apparently intended."

The defendant owned a building the cellar and area of which he rented. Somebody removed the grating over the area; the defendant was not liable for injury therefrom to person passing. *Martin v. Pettit*, 117 N. Y. 118, rev'g s. c., 49 Hun, 166 and judg't for pl'ff.

There were two doors in the hall of an apartment house, one of which opened upon a platform at the head of the cellar stairs, and the other door opened into a closet. The plaintiff, a guest of a tenant, and entitled to the same care and no more, passed from the hall, which was not lighted, and by mistake walked across the landing and fell down the cellar steps and was injured. The defendant was not negligent but the plaintiff was. *Hilsenbeck v. Guhring*, 131 N. Y. 674, rev'g judg't for pl'ff.

The owner of real estate may use the same, as he chooses, provided the rights of others are not thereby violated, and provided such use is not of such a public character, as to require reasonable care to save those harmless, who are invited to come upon it for its benefit and safety. One entering the premises of another upon lawful business, by such other's expressed or implied invitation, may believe that, if he takes reasonable care of himself, all reasonable care has been taken by the owner to protect him; but a mere licensee without inducement enters another's premises at his own risk and the owner owes him no duty or care, although the premises were leased with the condition that the owner may re-enter and repair, yet the owner's liability is not thereby enlarged to a third person.

The defendant, as owner, leased certain premises, the rear steps of which were decayed, and the defendant had failed to repair them. The plaintiff kept the adjoining premises in the rear and came through the opening in the fence, without invitation, and was injured while descending the defective steps. The complaint was properly dismissed. *Sterger v. Van Siclen*, 132 N. Y. 499, aff'g judg't for def't.

From opinion.—"The covenant of the landlord to repair does not inure to the benefit of a stranger sustaining injury because of its breach. *Odell v. Solomon*, 99 N. Y. 635.

But when the occasion of the injury constitutes a nuisance as to the party complaining, then a landlord may be chargeable in damages on the ground that he maintains a nuisance, where the contract of letting contains a covenant authorizing him to re-enter for the purpose of making repairs. *Ahern v. Steele*, 115 N. Y. 203. * * As to her it was not a nuisance, because it did not invade either her property or personal rights. *Murphy v. City of Brooklyn*, 98 N. Y. 642. * * *

In *Timlin v. Standard Oil Company*, 126 N. Y. 514, the nuisance complained of was dangerous to the public and the adjoining owner. The wall of a building was so out of repair that it fell over upon the tracks of a railroad company, killing plaintiff's intestate while engaged in repairing the track.

In *Back v. Carter*, 68 N. Y. 283, the owner made an excavation on his own land, but so near to the highway as to render travel thereon dangerous and failed to guard it, and the instruction of the trial court to the jury that the excavation was a nuisance if made in the highway, or so near it that a person exercising ordinary care was liable to fall into it, was sustained. The court holding that the circumstances of that case imposed a duty on the defendant to protect the excavation."

A stranger was injured by reason of defect in the hall of a tenement house, through which he was passing to visit a tenant. Notice of defect must have been given landlord or proof that he omitted to use reasonable means of precaution to ascertain condition and repairs, before he could be made liable. *Henkel v. Murr*, 31 Hun, 28, rev'g judg't for pl'ff.

From opinion.—"It was necessary to show that he had neglected, after having knowledge or notice of its dangerous condition, to repair the oil-cloth with promptitude, or if he had no such notice or knowledge that he had omitted to use such reasonable means and precautions for ascertaining its condition and making requisite repairs, as his relation to it, and his duty to the tenants and other persons lawfully using it, demanded at his hands. * * * The mere fact that a hole had suddenly broken in the oil-cloth in which the passer's heel had tripped, causing a fall and injury, would be negligence *per se*, under the rule of the charge, because the landlord had failed in his duty to keep the covering in a careful and safe manner, absolutely and under all circumstances," and this rule the court condemned. The court further said: "It was not enough, therefore, to find that a hole had come in the oil-cloth in which the plaintiff's heel caught so as to cause the fall which injured her, for, in the nature of things, all that might occur without just ground to charge the landlord with negligence."

Defendant bought the premises in September, 1883, subject to a lease expiring May 1, 1884, whereby the tenant should repair. In April, 1884, the plaintiff fell into a defective coal hole. Defendant not liable. *Woram v. Noble*, 41 Hun, 398, aff'g order setting aside verdict for pl'ff.

From opinion.—"In the case of *Clancy v. Byrne*, 56 N. Y. 129, the judge who wrote the opinion of court of appeals made the following specifications of the grounds of liability of defendants in cases similar to this, viz.. 'That he owned or had right in the premises, and leased them with the nuisance upon them; that he was in the possession of the premises and used them in their defective condition; that he was under a contract enforceable by plaintiff to keep the premises in repair and failed to do so; that he, in the first instance, created the nuisance, and put it in the power of the others to continue it; or that being a municipal corporation there was a duty upon it to repair.' This is a comprehensive classification, but the facts of this case disclose no ground of liability therein laid down. The case falls within neither class, and we have found no case similar to this in which a liability has been imposed.

In the cases of *Dygert v. Schenk*, 23 Wend. 447; *Congreve v. Morgan*, 4 Duer, 439; 5 id. 495; *Congreve v. Smith and another*, 18 N. Y. 79, 84; *Clifford v. Dam*, 81 id. 52, the obstructions causing the injuries were created by the defendants, who utilized them or leased them in connection with their premises.

In the case of *Davenport v. Ruckman*, 37 N. Y. 568, the defendant Ruckman was the owner of the house and had allowed the cellar way to become dangerous, and had leased the premises and put his tenant in possession while the premises were in that condition.

In the case of *Irvine v. Wood*, 51 N. Y. 224, there was a recovery against both the landlord and the tenant, but the former abandoned his appeal and the decision is authority only against a tenant, and it was said in the opinion that the 'liability attached not only to those who made the excavation, but to those who continued and used it in its improper and unsafe condition.

In the case of *Anderson v. Dickie*, 26 How. 105, the owner constructed the coal-vault under the sidewalk for his own convenience and covered it with an insecure circular grating, and then rented the premises.'

In the case of *Swords v. Edgar*, 59 N. Y. 34, the judge writing the opinion of the court of appeals said: 'Where there has been a nuisance of continued existence upon demised premises, the lessor and the lessee may both be liable for damages resulting therefrom. The lessee in the actual occupation of the premises if he continues the nuisance after notice of its existence and request to abate it, and the lessor if he at first created it and then demised the premises with the nuisance upon them, and at the time of the damage resulting therefrom, is receiving a benefit therefrom by way of rent or otherwise.'

In the case of *Edwards v. New York and Harlem Railroad Company*, 98 N. Y. 249, it is said: 'The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum*, which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him.'

In the case of *Wolf v. Kilpatrick*, in the court of appeals, 101 N. Y. 146, which was an accident case similar to this, it was said: 'The recovery must stand, if at all, upon the sole ground that an owner who has constructed vaults under the sidewalk lawfully and with due prudence and care, and transferred possession of the premises, if he ever had it, to third persons without covenant on his part

to repair, is liable for a defect in the vault covering which afterwards occurs through the interference of a stranger, although he may have had neither knowledge nor notice of the defect.' Again, in the same case, it is said: 'It may be that the condition of the coal hole in the sidewalk became a nuisance while Macpherson was in possession, and after the stone was broken. *Swords v. Edgar*, 59 N. Y. 34. But if so, the party responsible can only be the person who either creates the nuisance or suffers it to continue. The owners did not create it; that was the wrongful act of strangers. How can it be said that they suffer it to continue and so failed in their duty, if they had no knowledge, actual or constructive of the defect, and were out of possession and control.' The judgment for the plaintiff in that action was reversed and the doctrine of the decision is in favor of the defendant in this case.

In the case of *Conhocton Stone Road v. Buffalo, New York and Erie Railroad Co.*, (51 N. Y. 582) it was decided by the Commission of Appeals that proof of the mere continuance of a nuisance on the land of a defendant, without such knowledge or notice of its existence as to charge him with fault for such continuance, was insufficient to maintain an action therefor."

A child fell from a platform used for an entrance to a tenement house and was injured. The landlord was not liable, as it was not charged or alleged that the platform was, to the landlord's knowledge, dangerous for the use for which the premises were let, or that the landlord had covenanted to repair it and had failed so to do; or that the platform was a nuisance for which the landlord might continue liable. There was no warranty implied on the part of the landlord that the dwelling was safe; if not guilty of willful wrong, fraud or culpable negligence, he is not liable for injury suffered by a person occupying or coming on the premises during the term. *Donner v. Ogilvie*, 49 Hun, 229, sustaining demurrer to complaint.

Premises were in the possession and entire control of the tenant with no covenant to repair on the part of the landlord who had no notice of the condition of the premises. Latter was not liable to a customer of the former. *Curran v. Flammer*, 49 App. Div. 293.

See, also, *Black v. Maitland*, 11 App. Div. 188.

Fire escape ladder was removed from its proper place without landlord's knowledge or consent by a stranger, and placed within reach of boys who frequented the premises to play. Landlord not liable for an injury to one of the boys. *Kelly v. Smith*, 26 App. Div. 346.

The owner, lessee, or occupant of a tenement house is under no legal obligation to keep lights in the hallways therein.

Plaintiff resided on the third floor of defendant's tenement house, and her three-year-old child opened the hall door leading from her apartments, passed into the unlighted hall and fell down the stairs. In an action to recover for injuries sustained, it appeared that defendant, who resided in the house, was in the habit of lighting the gas on

the first two floors, and that plaintiff's mother attended to the lighting of the gas on her floor. What caused the child to fall did not appear. Held, that as it did not appear that the proximate cause of the injury was the sole neglect of defendant to light the gas on the floors below, he was not liable. *Muller v. Minken*, 5 Misc. 444. (N. Y. Supr. Ct.)

From opinion.—"Aside from any special contractual understanding upon the subject, the law casts upon the landlord the duty of making the hallways of a tenement house reasonably safe for the use of the different tenants and their visitors, and he is liable to anyone lawfully there who is injured in consequence of the neglect to perform this duty after notice of the defect. *Henkel v. Murr*, 31 Hun, 28; *Alperin v. Earl*, 55 id. 212; *Monteith v. Kinkbeiner*, 50 N. Y. St. Rep. 453; 21 N. Y. Supp. 288; *Looney v. McLean*, 129 Mass. 33; *Donohue v. Kendall*, 50 N. Y. Supr. Ct. 386; 98 N. Y. 635; *Peil v. Reinhart*, 127 id. 381; *Dollard v. Roberts*, 130 id. 369. The owner's duty is to guard against probable damages. It does not go to the extent of requiring him to make accidental injuries impossible. The stairways are of the same character tenement houses usually have. No defects in construction or in repair were charged or proved, and the sole ground of liability alleged must be found in the failure to light the gas on the afternoon in question. Since the case of *Halpin v. Townsend*, 2 City Ct. Rep. 417; 107 N. Y. 683, it has been considered the settled law in this state that the owner, lessee or occupant of a tenement is under no legal obligation to keep lights in the hallways of a house nor to maintain handrails; that the absence of lights or handrails does not prove negligence. To substantially the same effect see *Hildebrand v. Schenck*, 2 City Ct. Rep. 249, where a tenant residing in a tenement house fell down stairs and sued the landlord for neglect to light the gas in the lower hall, alleging that she fell because of the failure to perform that duty. It was held that she could not recover. In *Jucht v. Behrens*, 26 N. Y. St. Rep. 690, plaintiff, after delivering her washing to one of the defendant's tenants, fell down the cellar stairs, the cellar door having been left open by some one, and the hallway being very dark. There was no peculiar construction in the hall or stairway, and the tenant had agreed, at defendant's request, to keep the hall lighted. It was held that the plaintiff could not recover, as no negligence was shown on the defendant's part. See, also, *Pfeiffer v. Ringler*, 12 Daly, 437; *Kaiser v. Hirth*, 36 N. Y. Supr. Ct. 344. In *Hilsenbeck v. Guhring*, 131 N. Y. 674, plaintiff was visiting a tenant of the defendant's in an apartment house in the city of Brooklyn. The court held that he was entitled to the same amount of care that a tenant would be entitled to. He went down the stairs, there was no gas lit in the hall; it was late in the evening; not knowing the exact location of a water-closet he was seeking, he opened a door which was slightly open and stepped out on a platform from which he fell down into the cellar of the building and broke his leg, the court said: 'We cannot see that there was any obligation on the part of the defendant to keep the hallway lighted, or to keep the cellar door locked, at the peril of becoming responsible for an accident such as happened in this case!'

* * * The case of *O'Sullivan v. Norwood*, 8 N. Y. St. Rep. 388, holds that if ordinary care requires that the stairs should be kept lighted in order to make them reasonably safe for travel, it is the lessor's duty to light them. But this decision seems contrary to the consensus of opinion on the subject and cannot, therefore, be followed."

While defendant, owner of building, with his wife, was sweeping out water from his cellar, and was removing the water from a hole near the foot of the front area steps, plaintiff, the janitress, descended said steps to light the gas, and fell into the hole, from which the board which usually covered it had floated or been removed. It was the custom of plaintiff to enter the cellar by this way, but it was not shown that defendant had knowledge of such custom or that he had reason to suppose that she would enter from the front, there being an inside stairway. Held, defendant was not liable.

The court charged the jury that if defendant lifted the cover off the hole and put it on one side, then if he did not warn plaintiff of that fact he was guilty of negligence. Held, error; as it omitted the qualification that the jury must also find that he knew, or must have known, that plaintiff was approaching or might approach the place of danger before he was required to warn her. *Spengeman v. Alter*, 7 Misc. 61.

As to non-liability to guest for sickness caused through breach of landlord's covenant of repair. See *O'Gorman v. Teets*, 20 Misc. 359.

Ice on a stoop had formed from natural causes and possessed no ridge or unevenness. Guest slipped. *Harkin v. Crumbie*, 20 Misc. 568, rev'g, id. 169.

Landlord was permitted in defense to show that the premises were leased to a responsible party. Grating let in light and air to premises. *Finigan v. Biehl*, 30 Misc. 735; rev'g s. c., 61 N. Y. S. 1116.

Landlord had no control over the premises, and it was the tenant's duty to repair. Employé of tenant was injured by an uncovered opening into the cellar. *Dood v. Rothschild*, 31 Misc. 721.

No implied warranty under Civ. Code sec. 1941, such as will subject landlord to damages for tenant's ill health, resulting from defective sewer. *Angevine v. Knox-Goodrich*, (Cal.) 31 Pac. Rep. 529.

Sieber v. Blane, 76 Cal. 173; *Van Every v. Ogg*, 59 id. 566. See *Wilson v. Treadwell*, 81 id. 59; *Bertie v. Flagg*, (Mass.) 37 N. E. Rep. 572; *Bernhard v. Reeves*, 33 Pac. Rep. 424.

Unless by express agreement where premises were injured by explosion of an engine through tenant's negligence. *Morris Co. v. Southworth*, 50 Ill. App. 429.

Injuries were due to improvements which were made by tenant solely for himself. *Hull v. Sherrod*, 97 Ill. App. 298.

Plumbing, alleged to be defective, was made by a former tenant and was latent and undiscovered. Injury was to employé of tenant. *Metzger v. Schultz*, 16 Ind. App. 454.

Guests of tenant were injured by the fall of a gallery on tenant's premises. *McConnell v. Lemley*, 48 La. Ann. 1433.

Landlord was not bound to protect the employ  s of lessee by testing the apparatus of a mill before turning it over. *Whitmore v. Orono Pulp &c. Co.*, 91 Me. 297.

Liability for defects in a balustrade on a porch did not give rise to a right of action in favor of sub-tenant. *Smith v. State*, 92 Md. 518.

On account of insufficient lighting of stairs a person leaving an office and using care suddenly fell down stairs. Lessor not liable. *Pinney v. Hall*, 156 Mass. 225.

Liability did not inure to a mere licensee going to see tenant on purely personal business. *Ganley v. Hall*, 168 Mass. 513.

Defect was not in the condition of the coal hole itself but in tenant's failure to fasten on the cover. *Frischberg v. Hurter*, 173 Mass. 22.

Premises though defective, were in the same condition as when they were accepted by plaintiff's host. *Roche v. Sawyer*, 176 Mass. 71.

Defect was perfectly obvious. No recovery allowed to a sub-lessee injured thereby. *Harpel v. Fall*, 63 Minn. 520.

Tenant's child fell from a retaining wall in the rear of a space between houses permitted to be used as a play ground. No recovery though the wall was but a foot high on its front side and seven and one-half on its rear. *Kayser v. Lindell*, 73 Minn. 123.

Where demised property becomes dangerous merely by the manner of its use by a tenant; as where stairway safe enough by day is not lighted by night. Lessor not liable. *Eyre v. Jordan*, 111 Mo. 424.

See *Tailor v. Bailey*, 74 Ill. 178; *McCarthy v. Bank*, 74 Me. 315; *Quinn v. Perham*, 151 Mass. 162.

A pipe, in good order at the beginning of the term, broke, injuring adjoining owner. Landlord was not liable. *Deutch v. Abeles*, 15 Mo. App. 398.

In the absence of an agreement to repair, or concealment, liability for a defect did not inure to a sub-tenant. *Towne v. Thompson*, 68 N. H. 317.

Landlord need not light hall and stairways at night. *Gleason v. Boehm*, 58 N. J. L. 475.

Agreement to repair did not permit a member of tenant's family to recover for injuries received through failure to perform it. *Clyne v. Helmes*, 61 N. J. L. 358.

See, also, *Folsom v. Parker*, 31 Misc. 348; *McGinn v. French*, 107 Wis. 54; *Wilcox v. Hines*, 100 Tenn. 524.

Employ   of a tenant loading a stove into an elevator was merely a licensee of the landlord. *Burger v. Johnson*, 6 Oh. N. P. 252.

Failure to light hallways, though within landlord's control, gave no re-

covery in the absence of any structural defect therein. *Capen v. Hall*, 21 R. I. 364.

See, also, *Jordan v. Sullivan*, (Mass.) 63 N. E. Rep. 909.

Landlord's guest was injured by falling into an elevator well entirely in the tenant's control. No recovery. *McKee v. McCardle*, (R. I.) 46 Atl. Rep. 181.

In the absence of concealment or agreement to repair, defects existing at the inception of the lease gives no recovery to employé of tenant. *Oriental Investment Co. v. Sline*, 17 Tex. Civ. App. 692.

Nor to one in privity with the tenant injured by the tenant's use of the premises while in such a condition. *Schwalbach v. Skinkle & Co.*, 97 Fed. Rep. 483.

Landlord had no notice of a defective ceiling which fell on lessee's licensee. *Dyer v. Robinson*, 110 Fed. Rep. 99.

(b). CONTRIBUTORY NEGLIGENCE.

Guest of a tenant without excuse walked into a defective passage where it was dark and he had never been before. *Kammerer v. Gallagher*, 58 Ill. App. 561.

See, also, *Gleason v. Boehm*, 58 N. J. L. 475.

VIII. When Lessee Is Liable to Lessor.

Tenant covenanted to surrender in as good condition as when received. He was liable for accidental injuries to the premises by a third person. *Myers v. Hussenbuth*, 32 Misc. 717.

The removal of water pipes from a building by a lessee was not shown to have been the cause of its loss by fire. *Franke v. Head*, (Ky.) 42 S. W. Rep. 913.

In the absence of an agreement to repair or to surrender in good order the landlord cannot recover for an accidental explosion. *Earle v. Arbogast*, 180 Pa. St. 409.

IX. When Lessee Is Not Liable to Lessor.

Lessee had the privilege of boxing all trees for turpentine purposes under a certain size. He was not liable for the violation by sub-lessee, of a like clause in sub-lease. *Perkins Man. Co. v. Williams*, 98 Ga. 388.

Loss might nevertheless have been avoided by the exercise of due diligence on the part of the lessor. *Burdon & Co. Ref. Co. v. Ferris Sugar Man. Co.*, 78 Fed. Rep. 417.

X. When Lessee Is Liable to Licensees and the Public.

The right of the city of New York to collect wharfage, carries the duty to keep the wharves in repair, and the legal transfer of the right subrogates the transferee to the correlative duty, and makes him liable for injury resulting from his negligence.

Defendant liable for the value of a horse, cart and load of merchandise, which, for want of a suitable guard, had been lost by backing off the wharf into the river. *Radway v. Briggs*, 37 N. Y. 256, rev'g judg't of nonsuit.

A lessee, by negligently suffering demised premises to become dangerous, becomes liable to a stranger injured in consequence, but the lessee is not a guarantor of the safety of the premises and is bound only to exercise reasonable care, and negligence must be proved as a matter of fact and not constructively.

The covenant by the tenant to keep the premises in repair does not inure to the benefit of a stranger injured in consequence of a breach of the covenant. Negligence of lessee was not shown. *Odell v. Solomon*, 99 N. Y. 635, rev'g judg't for pl'ff.

Sign erected by an advertiser upon the roof of the premises fell upon a passer-by. It was held that, even if it be assumed that the instrument giving the former the right to erect his sign there constituted him a sub-lessee with a covenant to repair, such a covenant did not inure to the benefit of a stranger who sustained injury in consequence of its breach. See *Reynolds v. Van Beuren*, 155 N. Y. 120; rev'g s. c., 10 Misc. 703.

A laborer was killed by the falling of the wall of a shed, belonging to a party other than his employer, and situated on the premises adjoining those where he was employed. The wall had long been in existence and for years had, in part, been dangerous. The lessee of the shed property and under tenants were liable, if, as the jury found, this structure was a nuisance at the time they received the same as lessees or under tenants, or parties standing in the same relation, and were within the rule that, where one hires or buys land, upon which there is an existing nuisance, which may prove dangerous to others, although notice of this ought to be brought home before action will lie against him, yet, such notice may be acquired from others or by himself; but if such persons knew or ought to have known of the dangerous condition, they will be liable for injuries resulting therefrom to others. The Standard Oil Company had procured a lease in the name of the Acme Company, and stipulated that its liability was the same as that of the Acme Company, and such two companies were held liable if, as found

by the jury, they leased the property in a dangerous condition to the sub-tenants, because they undertook to procure profitable occupancy of the premises while they were in such condition. *Timlin v. Standard Oil Co.*, 54 Hun, 44, aff'g judg't for pl'ff.

In an action for pernicious waste, against a tenant, it appeared that, upon the dock department of the city of New York attempting to make changes affecting certain dock property leased by the defendant, the defendant promptly applied to the United States Circuit Court to restrain the performance of the work. The defendant was not liable for pernicious waste. *Beekman &c. v. Van Dolsen*, 63 Hun, 487, granting new trial after verdict for pl'ff.

Tenant was individually liable for the erection of a barbed wire division fence without the consent of the adjoining owner. *Buckley v. Clark*, 21 Misc. 138.

By tenant's negligence a window sash fell on passerby. *Odell v. Solomon*, 50 N. Y. S. C. 119.

Tenant was in possession of the premises containing the unsecured coal hole cover in question, and had covenanted to make repairs. *West Chicago &c. Ass'n v. Cohn*, 192 Ill. 210.

Occupant of premises is ordinarily liable for injuries from failure to repair. *Cleveland &c. R. Co. v. Wheeler*, 14 Ill. App. 12.

Tenant in possession was required to fill a hole near a path used by the public. *De Tarr v. Ferd. Heim Brewing Co.*, (Kan.) 61 Pac. Rep. 689.

Where a nuisance originated during the term the lessee was made liable, unless landlord was bound to repair. *Harris v. Cohen*, 50 Mich. 324.

Through a dangerous area persons in street were hurt. *Buresching v. St. Louis &c. R. Co.*, 73 Mo. 219; *Manufacturing Co. v. Lindsey*, 10 Ill. App. 1083; *Millen v. Rainer*, 45 N. J. L. 520.

As to tenant's non-liability for maintaining in repair a structure found upon the premises at the time of his occupancy; not being bound to remove it or suffer it to decay. See *Myer v. Harris*, 61 N. J. L. 83.

Tenant, without authority allowed the storage of cotton on the premises which caused the spread of fire. *Anderson v. Miller*, 96 Tenn. 35.

Guests of tenant were injured through lack of repair of the premises, which were in good order at the beginning of the term. *Marshall v. Herd*, 59 Tex. 266.

Although lessor be bound to repair, yet lessee may be liable for injury to third person from failure to repair. *Leonnard v. Decker*, 22 Fed. Rep. 741.

A pier, defective to lessee's knowledge, did damage. *Onderdonk v. Smith*, 41 Fed. Rep. 599.

Boiler exploded through fault of defendant's rendering the property unfit for use. *Wilcox v. Cate*, 65 Vt. 478.

(a). BURDEN OF PROOF.

In an action by a landlord against his tenants for injuries to the premises, the burden is on the defendant of proving that the act causing the injury was by the direction and permission of the landlord. *Olson v. Webb*, (Neb.) 59 N. W. 520.

XI. When Lessee Is Not Liable to Licensees and the Public.

Covenants to repair do not inure to the benefit of strangers. *Brogan v. Hanan*, 55 App. Div. 92.

Tenant need not see that the elevator shaft is guarded to protect customers, where the duty to repair is cast by the lease on the landlord. *Weinberger v. Kratzenstein*, 71 App. Div. 155.

Lessee need not provide lights in hallways. *Brancato v. Kors*, 36 Misc. 776.

Recently constructed vane, of the defect of which the lessee had no knowledge, fell and injured his servant. *Mason v. West*, 78 Me. 253.

A defective sidewalk in the rear of premises was suffered to remain. *Birnbaum v. Crowninshield*, 137 Mass. 177.

Liability for defective construction is confined to such as would be discovered by the exercise of due care. *Eckman v. Atlantic Lodge*, (N. J. L.) 52 Atl. Rep. 293.

Tenant, to take possession on the completion of repairs, was allowed to deposit a portion of his goods upon the premises theretofore. He did not become responsible thereby for injury to employé of landlord's contractor. *Reilly v. Shannon*, 180 Pa. St. 513.

Conditions were not such as to charge lessee of a theatre with notice of the defective condition of a ceiling. Licensees did not recover. *Dyer v. Robinson*, 110 Fed. Rep. 99.

XII. When One Lessee Is Liable to Another Lessee.

In an action brought to recover damages for an overflow of the premises, occasioned by leaving open a faucet, occupied in common by the plaintiffs and the defendants, the plaintiffs must show that the parties sued caused the overflow.

Where premises were occupied in common no presumption arises, that the overflow was occasioned by the neglect of the defendant. *Moore v. Goedel &c.*, 34 N. Y. 527, aff'g judg't for def't.

An additional story, erected by a tenant through permission, was con-

structed in such a way that its removal at the end of the tenancy weakened the building, but it did not make the floor of the lower tenant so intrinsically dangerous as to render the former liable to the latter for the consequences of its falling. *Quigley v. H. W. Johns Man. Co.*, 26 App. Div. 434.

Promise by a tenant on the first floor to turn off the water flowing to a tank on the fourth floor was gratuitous and did not subject him to a charge of having contributed to an injury due from the overflow of such tank by reason of the failure of the tenant on the fourth floor to turn off the faucet on his floor. *Miller v. Benoit*, 29 App. Div. 252; s. c. aff'd, 164 N. Y. 590.

So an upper tenant was liable to a lower one for leaving open the stopcock attached to the water apparatus, leading to the tank on such floor. The latter was not negligent in failing to turn off the stopcock on his floor as he had no right to shut off the water from the rest of the tenants. *Citron v. Bayley*, 36 App. Div. 130.

See, also, *Simon-Reigel Cigar Co. v. Gordon & Co. Battery Co.*, 20 Misc. 598.

A tenant, as respects fellow tenants, is strictly chargeable with the proper care of water appliances under his exclusive control.

Defendant, the sole lessee of an upper room, retained its care and control, but permitted its use to his employes and another party. From an open faucet, negligently left running in this room, water overflowed and injured plaintiff, a tenant in the basement. There was no proof that the faucet was out of repair, nor any evidence as to who turned it on. Held, that defendant was liable. *Spencer v. McManus*, 5 Misc. 267.

Water basin on upper floor, occupied by defendants, overflowed and goods below were damaged. The tenant on the lower floor could rely upon the observance of ordinary care by the tenant above. *Curran v. Weiss*, 6 Misc. 138, aff'g judg't for pl'ff.

Where there are two tenants in occupation of premises, one above the other, each is bound to see that no injury shall happen to the other by negligence on his part.

Where the goods of the lower tenant are injured by an overflow of water in the apartments of the upper tenant by a waste pipe becoming choked up, the latter is liable for such damage, although the former could have stopped the flow by means of a stopcock on his own premises. *Slater v. Adler*, 8 Misc. 310.

A tenant cannot be held liable to the landlord, in an action for waste, where the waste was committed by an assignee of the tenant who was in exclusive possession of the premises.

An action may be maintained against the tenant in such a case for

breach of a covenant against waste contained in the lease. *Donald v. Elliott*, 11 Misc. 120.

Upper tenant was not liable where water escaped by rats gnawing the pipe in the night. *Steinweg v. Riel*, 16 Misc. 47.

He was, however, where he placed a cloth in the surplus outlet of a bath-tub so that it overflowed. *Olin P. Ely Co. v. Rhoads*, 30 Misc. 111.

A subsequent lessee of a pasture was not liable for turning out the cattle of a prior lessee where he had no notice of the latter's lease. *McAllister v. Sanders*, (Tex. Civ. App.) 41 S. W. Rep. 388.

XIII. When a Third Person Is Liable to Lessor or Lessee.

A person making an excavation under direction of the landlord is liable to tenant's clerk who is injured by the building falling because of the negligence of such person. *Lamparter v. Wallbaum*, 45 Ill. 444.

As to liability of board of health for directing a building occupied by tenants to be destroyed as a nuisance, see, *Golden v. New York Health Dept.*, 21 App. Div. 420.

As to liability of independent contractors, see "Independent Contractors," *ante*.

XIV. Fire Escapes.

(See "Master and Servant," p. 1386.)

By chap. 863, L. 1863, sec. 37, tit. 13, a landlord must provide egress to the roof and fire escapes, and he is liable for injury through a failure to do so. A jury may find that the tenant would have escaped, if such ladder or fire escapes had been in their place, as a tenant had the right to assume they were. If the tenant discovered to the contrary he had a reasonable time to find other quarters. He had been in the building but three days. *Willy v. Mulledy*, 78 N. Y. 310, aff'g judg't for pl'ff.

From opinion.—"Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire escape, and the duty was imposed for the sole benefit of the tenants of the house, so that they would have a mode of escape in the case of a fire. For a breach of this duty causing damage, it cannot be doubted that the tenants have a remedy. It is a general rule, that whenever one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative; and where a duty is imposed, there must be a right to have it performed. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance thereof may sue for a breach thereof causing him damage, and the same is true of a duty imposed by statute upon any citizen. *Cooley on Torts*, 654; *Hover v. Barkhoff*, 44 N. Y. 113; *Jetter v. N. Y. C. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *Heeney v. Sprague*, 11 R. I. 456; *Couch v. Steele*, 3 Ell. & Bl. 402. In *Comyn's Digest*, Action upon Statute (F.), it is laid down as the rule that 'in every case where

a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

Lessees of a seven-story factory, maintained no stairs from the upper floor to the roof, as prescribed by statute, but two outside fire escapes of iron rungs inserted in the wall, one of which was useless by reason of shutters opening against it, and the other ended over an open area six feet wide, over which there had been a platform, all of which except a remnant about two feet wide and two transverse iron bars on which it rested had been removed. Between these bars was an iron chute three feet wide, the mouth of which was under the fire escape. During a fire an employé dropped from the bottom rung of the above-named escape and fell in the chute and was injured. A verdict for plaintiff was sustained. *Johnson v. Steam Gauge & Lantern Co.*, 72 Hun, 535, aff'g judg't for pl'ff.*

The omission of an owner of a building in the city of New York used for business purposes, in which there is a hoisting elevator, to comply with the requirements of the statute of 1874 (chap. 547, Laws of 1874), requiring that the openings in each floor shall be protected by such a substantial railing, and trap-doors to close the same, as shall be approved by the superintendent of buildings, and that such trap-doors shall be closed at all times except when in actual use, is *prima facie* evidence of negligence, in an action by one lawfully upon the premises who has sustained injury in consequence of a failure to comply with the statute: *McRickard v. Flint*, 114 N. Y. 222, aff'g judg't for pl'ff.

See "Elevators."

Sashes connecting with fire escapes in a factory were so light as to be easily broken through in case of necessity. Screwing them fastened was not a violation of the statute on the subject. *Huda v. American Glucose Co.*, 154 N. Y. 474; aff'g s. c., 12 App. Div. 624.

Alteration of adjoining houses so as to constitute one large boarding house containing 15 rooms brought it within the statute. *Department of Buildings v. Field*, 12 App. Div. 258.

Provision of statute as to written notice to erect a particular fire escape rendered an admission of verbal orders to do so inadmissible. *Greenhaus v. Alter*, 30 App. Div. 585.

Window was nailed but plaintiff could have reached the fire escape nevertheless as her room-mate had done. She was contributorily negligent in jumping. She had also occupied the room for six months without complaint, knowing of the absence of the usual rope or other apparatus in the room. *Armaindo v. Armstrong*, 31 App. Div. 160.

*NOTE.—Affirmed, 146 N. Y. 152.

Injury occurred while exercising the privilege of using the fire escape to dry clothes upon. No liability. *Meyer v. Laux*, 18 Misc. 671.

Possession and control of tenants was no defense, under act requiring provision of fire escapes by owner or lessee as authorities saw fit. *Landgraf v. Kuh*, 188 Ill. 484; rev'g s. c., 90 Ill. App. 134.

Negligence is the gist of an action by tenant for failure to comply with an ordinance. *Schmalzreid v. White*, 97 Tenn. 36.

Such failure was not shown to be the proximate cause of the injury, where it did not appear that the guest attempted to escape by a window, but on the contrary tried to break open the door of the room. *Weeks v. McNulty*, 101 Tenn. 495.

Statutory duty to maintain fire escapes only arises upon notification by the factory inspectors. *McCulloch v. Ayer*, 96 Fed. Rep. 178.

See, also, *De Ginther v. New Jersey Home &c.* 58 N. J. L. 354.

XV. Working Land on Shares.

A lessee occupying and working land on shares, and not the lessors, was liable for a vicious ram that escaped onto plaintiff's farm and injured the latter. *Strober v. Elting*, 97 N. Y. 102. There was no relation of master and servant. *Ferguson v. Hubbel*, 97 N. Y. 507. The lessee was an independent contractor. *Marsh v. Hand*, 120 N. Y. 315, aff'g judg't of nonsuit.

Citing *Ferguson v. Hubbell*, 97 N. Y. 507.

See *Hays v. Miller*, 70 N. Y. 112.

Baldwin, in possession of Aldrich's farm, with Aldrich's consent and direction, built a fence so negligently, that the plaintiff's horse was hurt. Aldrich was liable for Baldwin's negligence, as the latter was his agent or servant. *Roney v. Aldrich & Baldwin*, 44 Hun, 320, rev'g order granting new trial after verdict for pl'ff.

Under a contract to work a farm on shares, the tenant kept for the owner's sole benefit a bull, and on its becoming vicious and dangerous informed the owner, defendant, of the fact, who neglected to take measures to prevent injury to a third party, and the owner became liable therefor. The tenant was but a bailee in possession, and not liable; had he, with the owner, been a tenant in common, he would have been liable also. Tenant's employé was injured. *Lettis v. Horning*, 67 Hun, 627, rev'g nonsuit.

From opinion.—"This case differs from *Atwater v. Lowe*, 39 Hun, 150, and *Van Slyke v. Snell*, 6 Lans. 302. In those cases the cattle had been rented to the tenants for a term of years, and the latter had the sole control and charge and possession of said stock for their own benefit. In this case Kelly was merely the

keeper of defendant's bull for defendant's sole benefit. Also, the cases of *Ryan v. Wilson*, 87 N. Y. 471; *Mellen v. Morrell*, 126 Mass. 545; *O'Brien v. Greenbaum*, 23 N. Y. St. Rep. 405, cited by defendant were cases in which the real estate in question had been leased by the owners for a period, and it was held that the owner having parted with the possession and control of the property, was not liable for the injury caused by its condition during the period of the tenancy.

* * *

Marsh v. Hand, 120 N. Y. 315, was a case somewhat similar to the one under consideration. In that case one Hand was sued as the owner, and Cumber as the party working the farm on shares, and to whom, under the contract between the parties (which was similar to the contract in this case), the possession of the dangerous animal was given. In that case, in his opinion, Justice Bradley uses the following language: 'He' (Cumber), 'as well as Hand, had an interest in the use of the stock and was liable for the injury resulting from the trespass upon the plaintiff's premises, but inasmuch as the defendant Hand had neither parted with the title to the stock left to them upon the farm, or rented it to Cumber, they were also liable for any trespass committed by such stock upon the lands of another. The relation of Cumber as the bailee, and his duties assumed with respect to it, did not have the effect to relieve them, who were the general owners, from liability. * * * If, under the contract, the defendant and Kelly could be deemed tenants in common of the bull, *Sheldon v. Skinner*, 4 Wend. 525, the former was also liable. *Oakes v. Spaulding et al.*, 40 Vt. 347."

Lessor of a grand stand participated in the profits of the lessee's exhibition. It was held to have thus become a party to the wrong of holding out an invitation to the public to come upon the stand while it was in an unsafe and dangerous condition. *Fox v. Buffalo Park*, 21 App. Div. 321; s. c., *aff'd*, 163 N. Y. 559.

The provisions of the lease requiring the landlord to furnish wire, &c., for fencing, lessee to do the work, did not contemplate the use of barbed wire for use in division fencing without the neighbors' consent, so as to implicate the former in the act of the latter. *Buckley v. Clark*, 21 Misc. 138.

Landlord and tenant jointly used an elevator shaft. Former was as liable as the latter to a customer of the latter for failure to see that it was properly guarded. *Rhodus v. Johnson*, (Ind. App.) 56 N. E. Rep. 942.

Lessee on shares, entitled to his share of the crops put in and growing at the end of the term, recovered where landlord plowed them up. *Baldwin v. Curth*, 17 Oh. C. C. 174.

Lessee advised sub-lessee to remove an obstruction and promised to stand by him. Held, not to implicate former in the assault of the latter while carrying out the advice. *Wagner v. Aulenbach*, 170 Pa. St. 495.

See, also, *Swingert v. Wingard*, 48 S. C. 321.

As to strangers, the liability of lessor and lessee for the condition of the premises is to be considered as being joint. *Brogan v. Hanan*, 55 App. Div. 92; *Walterhouse v. Joseph Schlitz Brewing Co.*, 12 S. D. 397; *Schwalbach v. Shinkle & Co.*, 97 Fed. Rep. 483.

LIMITATION AND ABATEMENT OF ACTIONS.

(See "Death from Negligence.")

Action against a carrier, by husband, for loss of service and expense on account of injury to his wife while a passenger is grounded in tort; it does not abate at the death of the plaintiff. It is within R. S. 447; sec. 1, permitting action "for wrongs done to the property, rights or interests of another," and is not within the exception of injury to a person. *Cregin v. Brooklyn Cross-Town R. Co.*, 75 N. Y. 192; 19 Hun, 341, aff'g order substituting representatives.

The provision of said code (sec. 410) providing that where "a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete," is applicable to actions against the city of New York.

Such an action is not saved from the operation of said provision by the provision (sec. 3341) declaring that "any special provision of the statutes remaining unrepealed which is applicable exclusively to an action" against said city shall not be affected by the Code.

The provision of the charter of said city of 1873 (sec. 105, chap. 335, Laws of 1873) providing that no action shall be maintained against the city "unless the claim upon which the action is brought has been presented to the comptroller and he has neglected for thirty days after such presentment to pay the same" was intended for the benefit of the city, not of claimants, and does not deprive the city of the benefit of the said provision as to the time when the statute of limitations begins to run.

Accordingly, held, that, as it was set forth in the complaint that the accident happened in January, 1877, and that the claim was presented to the comptroller in April, 1881, the action was barred. *Dickinson v. Mayor*, 92 N. Y. 584, aff'g 28 Hun, 254, and overruling demurrer to answer.

Plaintiff was injured by reason of defendant's negligence in April, 1877. She commenced this action to recover damages in January, 1880. Held, that the statute of limitations was not a bar, as the case was governed by the three years' limitation prescribed by the Code of Civil Procedure (sec. 431, subd. 15), not by the one year rule previously existing (sec. 7, chap. 431, Laws of 1876), that the case was not within the exception in the provisions of said Code (sec. 414) making the rule of limitations therein prescribed the only one thereafter applicable to civil actions except where a person was entitled, when the

Code took effect, to commence an action, and did so within two years thereafter. *Watson v. Forty-second St. d'c. R. Co.*, 93 N. Y. 522, aff'g 16 J. & S. 44, and judg't for pl'ff.

An action for damages for death by negligence, &c., abates by the death of the wrongdoer and cannot be revived against his representatives. *Hegerich v. Keddie*, 99 N. Y. 258, rev'g 32 Hun, 141, and aff'g order in sustaining demurrer to complaint; overruling *Yertore v. Wiswall*, 16 How. Pr. 8, and distinguishing *Needham v. G. T. R. Co.*, 38 Vt. 294. (See death from negligence.)

From opinion.—"Under this condition of the law the provisions of the Revised Statutes were enacted in 1828, and contain the rule by which this controversy must be determined. Section 1 reads as follows: 'For wrongs done to the property rights or interests of another for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or after his death by his executors or administrators against such wrongdoers, and after his death against his executors or administrators in the same manner and with the like effect in all respects as actions founded upon contract.' Section 2. 'But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff or to the person of the testator or intestate or any executor or administrator.' * * * It has been held that a cause of action by a master for the seduction of his servant does not survive (*People ex rel. v. Tioga Com. Pleas*, 19 Wend. 73); or for a fraudulent representation by a third person in reliance upon which credit is given to an irresponsible person (*Zabriskie v. Smith*, 13 N. Y. 322); or for a breach of promise to marry (*Wade v. Kalbfleisch*, 58 id. 286); or for damages occasioned by the negligent killing of another (*Whitford v. Panama R. Co.*, 23 id. 465); or for a penalty incurred by trustees under the General Manufacturing Act (*Stokes v. Stickney*, 96 id. 323), and for fraud in inducing one to marry another (*Price v. Price*, 75 id. 244)."

An action against a carrier for injury to a passenger from the negligent employment of a defective vehicle must be brought within three years.

It is immaterial whether the action is in form *ex contractu* for a breach of the carrier's contract or *ex delicto*. *Webber v. H. & M. Street R. Co.*, 109 N. Y. 311; aff'g 35 Hun, 44; judg't for def't.

A limitation of three years, (Code of C. P. sec. 383, sub. 5) in an action for negligence, applies to an action by a husband for the loss of the services of his wife, or another founded in fact on negligence. *Marson v. D., L. & W. R. Co.*, 112 N. Y. 559; rev'g 48 Hun, 172, and judg't for pl'ff.

Motion to revive action for negligence denied though no time limitation prescribed. *Pringle v. Long Island R. Co.*, 157 N. Y. 100; rev'g s. c., 27 App. Div. 144.

An action under chapter 450 of 1847, as amended by chapter 256 of 1849, and chapter 78 of 1870, to recover damages for the death of a

person occasioned by the defendant's negligence must be brought within two years from the time of the death. *Bonnell v. Jewett*, 24 Hun, 524; aff'g judg't of nonsuit.

Action for death must be begun within two years after death in Alabama, Arkansas, Colorado, Dist. of Columbia, Florida, Illinois, Nebraska, New York, Ohio, Oregon, South Carolina, Utah, Vermont, W. Virginia, Wyoming.

Action must be begun within one year after death in Arizona, Louisiana, Maine, Maryland (twelve calendar months), Mississippi, New Jersey (twelve calendar months), North Carolina, Pennsylvania, Texas, Virginia (twelve months).

Action must be begun within two years in California, Idaho, Indiana, Kansas, Oklahoma, Wisconsin.

Within two years from the commission of the negligence in Colorado.

Within one year after negligence, or against a railroad company eighteen months after death in Connecticut.

Within two years, dating from the time that the action accrued to deceased, in Iowa.

Within one year from the injury causing death in Massachusetts.

Within two years after the act or omission in Minnesota.

Within one year after the cause of action accrued in Missouri and New Mexico.

Within three years after death in Montana.

Within two years after death, unless barred in New Hampshire.

Within six years after cause of action accrued in Rhode Island.

In an action by one person against another for negligence, for injury, received through the negligence of the defendant, as a medical attendant, action must be brought within three and not six years from the time the negligent act was done. *Burrell v. Preston*, 54 Hun, 70; aff'g judg't for nonsuit.

An action for the alleged wrongful causing of death by negligence is an action "for damages for personal injuries alleged to have been sustained by reason of negligence" of a municipal corporation, within the meaning of ch. 572, L. 1886, and is barred by the one year statute of limitation. *Titman v. Mayor*, 57 Hun, 469; aff'g order of nonsuit.

The action by the receiver of a bank against its director for loss resulting from his alleged misconduct survives death of defendant. *O'Brien v. Blaut*, 17 App. Div. 288.

Action for injury from negligent maintenance of roof survives death of defendant. *Stephen v. Woodruff*, 18 App. Div. 625.

The right of action for death held to survive to an administrator *de bonis non*. *Mundt v. Glokner*, 24 App. Div. 110; rev'g 20 Misc. 63.

Voluntary dissolution held to abate an action for negligence against a corporation not organized under New York Laws. *Matter of Yuengling Brewing Co.*, 24 App. Div. 223.

Action against bank president for damages due to his negligent conduct, revived against his administrator. *Seventeenth Ward Bank v. Webster*, 67 App. Div. 228.

In Missouri, under a limitation of one year "after the cause of action shall accrue" the cause of action began to run at death. *Kennedy v. Burrier*, 36 Mo. 128.

And the provision that the action must be begun "within two years" was construed in the same way. *Hanna v. Jeffersonville R. Co.*, 32 Ind. 113.

And where the action is made a continuing one, it runs from the time of the injury. *Tiffany's Death by Wrongful Act*, sec. 122.

And so where it is provided that the action shall be brought within one year after the cause of action accrued. *Fowlkes v. Nashville R. Co.*, 5 Baxter, 663; 9 Heisk. 829.

But in Kentucky, under similar statute time begins to run from time administrator qualifies. *Tiffany's Death by Wrongful Act*, citing *Louisville R. Co. v. Sanders*, 86 Ky. 259.

Time of limitation of action for construction of an embankment runs not from the time of construction but injury therefrom. Action for injuries to son instituted for son's benefit was amended so as to be for the father's benefit. A new cause of action was thereby set up. *Motes v. Gila Valley &c. R. Co.*, (Ariz.) 68 Pac. Rep. 532.

Where the statute limited the time "within one year after the cause of action shall have arisen," the limitation began to run after the appointment of an administrator. *Andrews v. Hartford &c. R. Co.*, 34 Conn. 57.

Same construction in *Sherman v. Western Stage Co.*, 24 Iowa, 515.

Change of form of action against carrier from assumpsit to tort held not to bar it by the statute of limitation. *Howard v. Chesapeake &c. Co.*, 11 App. D. C. 300.

See, also, *Valparaiso City Water Co. v. Dickover*, 17 Ind. App. 233; *Kelly v. Pittsburg &c. R. Co.*, (Ind. App.) 63 N. E. Rep. 233; *Kansas City v. Frohwerk*, (Kan. App.) 62 Pac. Rep. 432; *Fremont &c. R. Co. v. Harlin*, 50 Neb. 698; *Chicago &c. R. Co. v. Emmert*, 53 id. 237; *Missouri P. R. Co. v. Heminway*, (Neb.) 88 N. W. Rep. 673; *Parker v. Norfolk & C. R. Co.*, 119 N. C. 677; *Harrell v. Norfolk & C. R. Co.*, 122 id. 822; *Hocutt v. Wilmington & W. R. Co.*, 124 id. 214; *Lasiter v. Norfolk &c. R. Co.*, 126 id. 509; *Smith v. Seattle*, 18 Wash. 484; *Schaefer v. City of Fond du Lac*, 104 Wis. 39. But see *Parker v. Atchison*, 58 Kan. 29.

Right of action for unskillfulness of an attorney accrues at the time of his negligence, and not from the time the extent of the injury is discovered. *Gould v. Palmer*, 96 Ga. 98.

Action brought October 24, 1893, for injuries on "October 24, 1891," barred by a two-year limit. *Peterson v. Georgia R. &c. Co.*, 97 Ga. 798.

Limitation of actions for damages to personalty or personal estate in-

cludes an action for the loss of a minor son's services. *Frazier v. Georgia R. &c. Co.*, 101 Ga. 70.

Limitation of action against a city for the removal of water gates whereby damage is caused to foundry by the excessive discharge of water through its race runs from the time of injury and not from the time of removal where the damage only occurs at a time of high water. *Augusta v. Lombard*, 101 Ga. 724.

The statutory right of action of a dependent widow does not accrue until the death of her husband. *Western &c. R. Co. v. Bass*, 104 Ga. 390.

And not simply his injury. *Glover v. Savannah &c. R. Co.*, 107 Ga. 34.

Amendment, adding an item, growing out of a transaction referred to in the original petition, related back so as to be within the statutory period. *Roberts v. Leak*, 108 Ga. 806.

Amendment of complaint for negligence of master by specifying use of defective cogwheel, held not to change cause of action. *Swift & Co. v. Foster*, 163 Ill. 50.

Amendment, denying relationship of fellow servant, in complaint for negligence of master, held not to change cause of action; but *contra* as to an amendment charging incompetency of servants. *Chicago City R. Co. v. Leach*, 182 Ill. 359; rev'g s. c., 80 Ill. App. 354.

A declaration stating no cause of action cannot be amended so as to incorporate a cause of action barred by limitation. *Illinois C. R. Co. v. Campbell*, 170 Ill. 163; rev'g s. c., 58 Ill. App. 275.

Inserting words "unfastened a rope by which said brace was fastened and which would prevent its falling and," before, the words "inserted a handle in a hole in the brace and gave the brace a sudden and violent twist," held not to change the cause of action. *Wolf v. Collins*, 196 Ill. 281; aff'g s. c., 94 Ill. App. 518.

An amendment, alleging freedom from contributory negligence held not to add new cause of action. *Chicago &c. R. Co. v. Cooney*, 196 Ill. 466; aff'g s. c., 95 Ill. App. 471.

The statute of limitations does not prevent the addition of allegations as to injury resulting, where the negligence itself which was the gist of the action was alleged before the period expired. *Illinois Steel Co. v. Szutenbach*, 64 Ill. App. 642.

Additional counts as to negligence were not cut off where they were but amendments that were substantially restatements of the original cause of action and were not barred by the statute. *Illinois C. R. Co. v. Swisher*, 74 Ill. App. 164.

Amendment alleging that plaintiff was struck by a piece of projecting

timber, a ground of negligence not originally claimed, set up a new cause of action and was barred. *Chicago &c. R. Co. v. Reilly*, 75 Ill. App. 125.

But the addition of "unlicensed" to an original charge against an "unskillful, and incompetent," employé did not. *Illinois Steel Co. v. Richter*, 82 Ill. App. 45.

An additional count reiterating the facts but adding other beneficiaries did not state a new cause of action. *Chicago &c. R. Co. v. Hackendahl*, 88 Ill. App. 37; s. c. aff'd, 58 N. E. Rep. 930.

See, also, *Hooper v. Atlanta &c. R. Co.*, 107 Tenn. 712; *Love v. Southern R. Co.*, 108 id. 104.

Where the amendment amounts merely to a restatement of the cause of action, the statute is not a bar. *Western Stone Co. v. Earnshaw*, 98 Ill. App. 538.

An original declaration which fails to state a cause of action cannot be saved after the expiration of the statutory period by an amendment which does. *Foley v. Suburban R. Co.*, 98 Ill. App. 108; *Missouri &c. R. Co. v. Bagley*, (Kan.) 69 Pac. Rep. 189; *Doyle v. Sycamore*, 193 Ill. 501; aff'g s. c., 81 Ill. App. 589.

Statutory action for negligence of fellow servant barred by limitation cannot be added by amendment to complaint for common law negligence. *Atchison &c. R. Co. v. Schroeder*, 56 Kan. 731.

See, also, *Kansas City v. Hart*, 60 Kan. 684.

The addition of specific allegations as to negligence already set forth in general terms does not add a new cause of action. *Missouri P. R. Co. v. Moffatt*, 60 Kan. 113.

See, also, *Taylor v. Atchison &c. R. Co.*, 64 Kan. 888; *Texas & P. R. Co. v. Fuller*, 13 Tex. Civ. App. 151; *The Oriental v. Barclay*, 16 id. 193; *Cross v. Evans*, 86 Fed. Rep. 1; *Cincinnati &c. R. Co. v. Gray*, 101 id. 623.

Right of action against abstractor of titles accrues from the time of delivery of the certificate and not from the time of injury or discovery of the negligence. *Provident Loan R. Co. v. Wolcott*, 5 Kan. App. 473.

Right of action against register of deeds for a mistake in recording did not accrue until there was some one who could enforce it. *Hatfield v. Malin*, 6 Kan. App. 855.

Such action on his official bond is "an action for injury to the rights of another not arising on contract" within a statute limiting suit to three years. *Hatfield v. Malin*, 6 Kan. App. 855.

Statutory action for negligent killing, accrued upon the death and not the injury of the decedent. *Carden v. Louisville &c. R. Co.*, 101 Ky. 113.

See, also, *Carden v. Louisville &c. R. Co.*, (Ky.) 37 S. W. Rep. 839.

But the action for the injury accrues at the date of injury and is not

affected by subsequent death. *Louisville &c. R. Co. v. Brantley*, 106 Ky. 849.

Changing "willful" negligence into simple negligence did not substitute a new cause of action. *Roseberry v. Newport News &c. R. Co.*, (Ky.) 39 S. W. Rep. 407.

Statute held not to run against the continuing right to have a private crossing over a railway. *Louisville &c. N. R. Co. v. Pittman*, (Ky.) 53 S. W. Rep. 1040.

Limitation of statutory action for damages from ordinary operation of an elevated road runs from the beginning of the road's operation. *Rowlstone v. Chesapeake &c. R. Co.* (Ky.) 54 S. W. Rep. 2.

See, also, *Illinois Cent. R. Co. v. Hodge*, (Ky.) 55 S. W. Rep. 688.

Limitation does not run against a life tenant for injury that is continuous; and not to the fee but to the use. *Louisville v. Coleburne*, (Ky.) 56 S. W. Rep. 681.

Statute, held to run against each overflow of a culvert as a separate injury. *Louisville &c. R. Co. v. Cornelius*, (Ky.) 64 S. W. Rep. 732.

Actions for personal offenses barred after one year. *Warner v. New Orleans &c. R. Co.*, 104 La. 536.

Statutory action for death by wrongful act barred after a year from the injury causing it. *Clare v. New York &c. R. Co.*, 172 Mass. 211.

Statute limiting personal injuries, construed not to cover action for battery. *Ott v. Great Northern R. Co.*, 70 Minn. 50.

Where the statute gives an action for damages to a minor child, to be begun one year after the cause of action had accrued, such action may be given within one year after the child has attained its majority. *Rutter v. Missouri &c. R. Co.*, 81 Mo. 169.

Right of action for damages by undermining, due to collapse of a pier, accrues when damage begins and not when pier collapses. *Howard County v. Chicago &c. R. Co.*, 130 Mo. 652.

Right of action for negligence in investigating title accrues at the time of the negligence and not of the resultant injury. *Schade v. Gehner*, 133 Mo. 252.

Limitation of statutory action held not to affect common law action for the same cause. *Hill v. Missouri P. R. Co.*, 66 Mo. App. 184.

Action for death is not effected by the elapse of time between the death and the injury causing it unless the right of action for the injury is barred before that for the death accrues. *Solar Refining Co. v. Elliott*, 15 Oh. C. C. 581.

Statute limiting actions for death by wrongful act to one year, held constitutional. *Bachman v. Philadelphia &c. R. Co.*, 185 Pa. St. 95.

Statute ran from the failure to properly support a mine and not from the time it caved in. *Noonan v. Pardee*, 200 Pa. St. 474.

Constitutional provision forbidding distinction between corporations and individuals in the matter of limitation, construed not to include actions for death. *Grath v. Iowa Barb Wire Co.*, 5 North. Co., Rep. (Pa.) 359.

An amendment, stating a defective axle in addition to a defective road bed, does not set up a new cause of action within such rule. *Texas &c. R. Co. v. Buckalew*, (Tex. Civ. App.) 34 S. W. Rep. 165.

Nor is the cause of action for injuries from a defective bridge changed by an amendment alleging them to be from a defective approach. *Mexican C. R. Co. v. Mitten*, 13 Tex. Civ. App. 653.

Nor is an action for failure to obey rules, by amendment charging failure to establish them and incompetence of servant. *Southern P. Co. v. Wellington*, (Tex. Civ. App.) 36 S. W. Rep. 1114.

The day on which the injuries were received was excluded in computing period limited. *Texas &c. R. Co. v. Moore*, (Tex. Civ. App.) 43 S. W. Rep. 67.

Amendment enlarging the relief sought, held not to interpose a new cause of action. *International &c. R. Co. v. Delwigh*, (Tex. Civ. App.) 56 S. W. Rep. 136.

An amendment substituting negligent loading, instead of negligent carriage, held to interpose a new cause of action. *Missouri &c. R. Co. v. Levy & Co.*, 23 Tex. Civ. App. 686.

An amendment dropping out a party sued as a joint wrongdoer, did not set up a new cause. *Texas M. R. Co. v. Cardwell*, (Tex. Civ. App.) 67 S. W. Rep. 157.

The United States government is not bound by the statute of limitations applicable to private individuals though it claims under a deed between private parties. *United States v. Devereux*, 90 Fed. Rep. 182.

Statute begins to run at the time of the injury notwithstanding subsequent expenditures in connection therewith. *Birmingham v. Chesapeake &c. R. Co.*, 98 Va. 548.

Amendment adding negligent selection to action for negligent and unskillful treatment of defendant's physician held not to set up a new cause of action already barred. *Richardson v. Carbon Hill Coal Co.*, 18 Wash. 368.

Action for death held to abate on death of beneficiary. *Frazier v. Georgia R. & B. Co.*, 101 Ga. 77.*

See, also, *Hilliker v. Citizens' Street R. Co.*, 152 Mo. 86; *Chivers v. Rogers*, 50 La. Ann. 57; *Texas Loan Agency v. Fleming*, 18 Tex. Civ. App. 668; *Weller*

*NOTE.—See, also, "Death by Negligence," *ante*, p. 942.

v. St. Paul City R. Co., 97 Fed. Rep. 140; *Schmidt v. Menasha Woodenware Co.*, 99 Wis. 300.

Action for personal injuries not causing death does not. *Harper v. Nash County*, 123 N. C. 118.

It does when not begun in life time of person injuring. *Johnson v. Farmer*, 89 Tex. 610.

And in Wisconsin may be maintained after his death for the benefit of his estate. *Brown v. Chicago &c. R. Co.*, 102 Wis. 137.

In Pennsylvania it survives the death of the wrong doer, but must be brought within two years. *Rodenbaugh v. Philadelphia Traction Co.*, 190 Pa. St. 358.

Nor did it abate by death of the injured person, in the following cases: *Missouri P. R. Co. v. Bennett*, 5 Kan. App. 231; s. c. aff'd, 49 Pac. Rep. 606.

See, also, *Missouri &c. R. Co. v. Elliot*, (Ind. Terr.) 51 S. W. Rep. 1067; *Crawford v. Chicago &c. R. Co.*, (Mo.) 66 S. W. Rep. 350; *Webster v. Hastings*, 59 Neb. 563; *Daniel v. Coal Co.*, 105 Tenn. 470; *Houston &c. R. Co. v. Rogers*, 15 Tex. Civ. App. 680; *Gulf &c. R. Co. v. Moore*, (Tex. Civ. App.) 68 S. W. Rep. 559.

Contra, *Morehead v. Bitner*, (Ky.) 50 S. W. Rep. 857; *Munal v. Brown*, 70 Fed. Rep. 967.

Statute providing for survival of actions for negligence held not to apply where injury received before but death occurred after passage of the act. *Marshall v. McAllister*, 18 Tex. Civ. App. 159.

Especially so, where death occurred before. *Fitzgerald v. Western &c. Teleg. Co.*, 15 Tex. Civ. App. 143.

Mental anguish due to non-delivery of telegram is an injury to the person and not the estate of the party injured. *Kelly v. Western &c. Teleg. Co.*, 17 Tex. Civ. App. 344.

Action to recover for injuries caused by delay in the delivery of a telegram does not survive. *Morton v. Western &c. Teleg. Co.*, 130 N. C. 299.

Action for injuries due to master's failure to perform his agreement to protect his servant from assault, does not survive. *Lewis v. Taylor Coal Co.*, (Ky.) 66 S. W. Rep. 1044.

Statute providing for survival of actions for injuries to personal estate, construed to apply to horses and sleigh. *Wilkins v. Wainright*, 173 Mass. 212.

A widow may continue an action for injuries to her, in her own name, after the death of her husband. *Corsicana Cotton Oil Co. v. Valley*, 14 Tex. Civ. App. 250; *Mexican C. R. Co. v. Goodman*, 20 Tex. Civ. App. 109.

Wife cannot continue an action brought by her husband for injuries

to himself which occurred before his marriage. *Houston &c. R. Co. v. Rogers*, 15 Tex. Civ. App. 680.

That an action by the person injured for the injuries themselves was barred at the time of his death, does not prevent his administrator recovering for the death not barred. *Hoover v. Chesapeake &c. R. Co.*, 46 W. Va. 268.

Liability of corporate officers for negligent management held not to survive them. *Boston &c. R. Co. v. Graves*, 80 Fed. Rep. 589.

See, also, *Fisher v. Graves*, 80 Fed. Rep. 590; *First Nat. Bank v. Briggs*, 70 Vt. 599.

MANUFACTURERS AND VENDORS.

(See "Private Premises.")

If a person negligently market a substance hurtful to health in such form or with such representation as to its identity or properties, as to justify the belief that it is harmless, the vendor is liable to any person injured thereby, while using the same for an apparently suitable purpose. It is immaterial in such case, whether the injured person hold a contractual relation to the vendor, or how often the article be resold.

If a person know or, in the exercise of ordinary care, should know that any piece of machinery, implement or article has a dangerous defect, not discoverable by the exercise of ordinary inspection, and market it as merchantable and without disclosing its concealed defect, he would be liable to the purchaser for injury therefrom, but not to a third person unless the defect was so highly dangerous to any one exposed to the same as to make it negligent to market it at all. Generally, however, the degree of care owing by a vendor or manufacturer to any one other than the vendor is very slight and liability in such cases is very sparingly asserted, and is never enforced when the injury arises from the negligent or improper use of the article by the purchaser or third persons. Indeed, it is stated by some writers that, if before the injury the culpable negligence of a third person intervene, such negligence becomes the proximate cause of the injury and that the original wrongdoer is relieved of responsibility.

(Wharton on Negligence, sec. 134.)

A dealer in drugs labeled a deadly poison as a harmless medicine and sent it upon the market. He was liable to all persons injured in consequence of such label, through whosoever hands the drug may have passed. *Thomas v. Winchester*, 6 N. Y. 397, aff'g judg't for pl'ff.*

The defendants sold "C." a machine with a defect visible and known to "C." While the plaintiff's intestate ("C.'s" neighbor) was using it, with "C.'s" consent, it exploded and killed "A." The defendant was not liable. *Loop v. Litchfield*, 42 N. Y. 351, aff'g judg't, rev'g judg't for pl'ff.

The maker and vendor of a boiler is only liable to the purchaser for defective materials and for want of care or skill in construction; and if, after delivery and acceptance, it injure a third person by explosion, the maker is not liable to the third person. *Loose v. Clute*, 51 N. Y. 494, aff'g judg't of nonsuit.

See *Mayor &c. v. Cunliff*, 2 N. Y. 165.

Readhead v. R. R., L. R. 2 Q. B. 412; *L. R. 4, Q. B. 397*; *George v. Skivington*, L. R. 5 Exch. 1; *Brown v. Edgington*, 2 M. & G. 279; *Francis v. Cockrell*, L. R. 5 Q. B. 184; aff'd, L. R. 5 Q. B. 503; *Searle v. Laverick*, L. R. 9 Q. B. 122; *Collis v. Selden*, L. R. 3 C. P. 495.

* NOTE.—*Farrant v. Barnes*, 11 C. B. (N. S.) 553; *Davidson v. Nichols*, 11 Allen, 519, 520; *McDonald v. Snelling*, 14 id. 290, 395; *Norton v. Sewall*, 106 Mass. 143.

If a druggist fully and fairly warned the purchaser of the nature of the medicine, and gave accurate information as to a proper dose, he would not be liable for the effects of an overdose because he did not label the bottle "poison" as required by R. S. 694, sec. 23. If the testimony of the clerk to such state of facts as above was to be taken as the truth, a verdict for defendant was properly directed; but that the jury were at liberty, under the circumstances, to disbelieve such testimony, as the witness was interested, having violated the law by omitting the prescribed label, and that, therefore, the question as to whether the warning testified to was in fact given was one for the jury, and the direction was error. *Wohlfhart v. Beckert*, 92 N. Y. 490, aff'g 27 Hun, 74, rev'g judgment of nonsuit.

The apparatus used to furnish steam to the plaintiff by the defendant, having been tested in the usual manner and found to be perfectly safe, was left unused from Saturday night until Tuesday morning, and, shortly thereafter, the bonnet on the surface valve in one of the pipes in the basement of the plaintiff's store was blown off and steam escaped, doing damage. No similar accident had occurred in the defendant's business. The best materials purchased of manufacturers of high repute were used, competent workmen employed, and no defect was visible. The complaint should have been dismissed, as the burden was upon the plaintiff to show that the defendant had failed to use the degree of care which ordinary prudence would, under the circumstances, suggest, and the mere fact that the bonnet blew off was not sufficient evidence of negligence. *Reiss v. N. Y. Steam Co.*, 128 N. Y. 103, rev'g judg't for pl'ff.

A manufacturer and dealer in dangerous articles intended for use, such as explosives of this character, may become liable to the purchaser at least, and possibly to third persons in some cases, for damages resulting from defective materials or from want of proper care and skill in the manufacture, but it has never been held that he could be made liable for any injury resulting from the negligent or improper use of the article by the purchaser or by third persons. (*Loop v. Litchfield*, 42 N. Y. 351; *Losee v. Clute*, 51 id. 494; 7 Am. & Eng. Encyclopedia of Law, 417-524.) *Wyllie v. Palmer*, 137 N. Y. 255.

Servant of a stevedore cannot recover against the owner of a derrick which his master has hired, for injury therefrom, unless the act of negligence be highly dangerous, as the culpable party is only liable to the person with whom he contracts. *Burke v. DeCastro, &c. Co.*, 11 Hun, 354, aff'g judg't for def't.

The manufacturer or builder of a defective article, is not liable for injuries, resulting to the third persons, except where the article is imminently dangerous and calculated to cause injury. An employé of an ice

company, delivering ice at a meat market, was injured by the falling of a platform connected therewith upon which he necessarily stepped to deposit the ice in the box, and he brought action therefor against the person who had constructed the platform, in the defective manner for the owner of the market. The plaintiff was not allowed to recover. *Swan v. Jackson*, 55 Hun, 194, aff'g judg't of nonsuit.

Defendant was a furnisher of derricks and power, and furnished one to a contractor, who employed plaintiff's intestate, who was killed by the breaking of a rope specially provided by defendant at the intestate's request, and upon his judgment that it was safer, and inspected and approved by him.

Held, that the intestate having assumed to be an expert and to know the kind of rope best suited to his purpose, and having directed the change, and accepted the new one, knowing its size, and presumably its estimated strength, was as guilty of negligence as was the defendant, if either could be said to have been negligent. *Davies v. The Pelham Hoisting Elevating Co.*, 76 Hun, 289.

The defendant's clerk put up a prescription erroneously, as claimed, hence injuries. The defendant's liability would not be established by showing a mistake, but would depend on the question whether the clerk was competent and used skill and care in putting up prescriptions. The skill and care must be proportioned to the injury that would result from error. *Beckwith v. Oatman*, 43 Hun, 265, rev'g judg't for pl'ff.

Manufacturer has performed his duty, where he has not only purchased his materials from parties who tested them before selling, but has himself tested his finished articles before selling. *Favo v. Remington Arms Co.*, 67 App. Div. 414.

Though a druggist sold carbolic acid for a liniment, it is proper to consider whether plaintiff's wife in applying it was so intoxicated as not to know what she was doing. *McVeigh v. Gentry*, 72 App. Div. 598.

Vendor's duty toward servants of vendee is the same as to his own. *Sweeney v. Rozell*, 31 Misc. 640.

Cartridges similar in appearance but different in character from those asked for were sold to plaintiff. Held negligence. *Smith v. Clark Hardware Co.*, 100 Ga. 163; s. c. 39 L. R. A. 607.

Where the manufacturer of machinery was making alterations he was held liable to an employé of the vendee, temporarily assisting, for injury due to defect in the machinery. *Empire Laundry Mach. Co. v. Brady*, 164 Ill. 58.

The defendant, contrary to statute, sold cartridges to a boy, who left a toy pistol loaded therewith, so that a younger boy picked it up and was injured. *Binford v. Johnson*, 82 Ind. 426.

That wholesale dealer mislabeled a drug held no defence for a retail dealer who failed to discover and rectify the mistake. *Howes v. Rose*, 13 Ind. App. 674.

The defendant violated the statute by selling a minor, fifteen years old, a revolver with which he was hurt. No liability in civil action. *Poland v. Earhart*, 70 Iowa, 285.

That a prescription clerk is a registered clerk is no defense. *Burgess v. Sims Drug Co.*, 114 Iowa, 275; s. c., 54 L. R. A., 364.

Druggist was not negligent in not giving specific warnings as to the use of phosphorus instead of simply labeling the water jar containing it. *Gibson v. Jorbert*, 115 Iowa, 163.

Although a horse was sold as gentle and kind and a good family horse, the vendor is not liable for injury to the vendee's wife, received while riding after such horse, through opposite qualities. *Carter v. Harden*, 78 Me. 328.

A boy bought gun powder, and had it a week with the knowledge of his mother and aunt, and was finally injured. Defendant was not liable for selling it to him. *Carter v. Towne*, 103 Mass. 508; 98 id. 567.

A caterer was liable for poisonous food, furnished at a ball to one who bought a supper ticket therefor. *Bishop v. Webber*, 139 Mass. 411.

A manufacturer was not liable to a purchaser of cloth, who was injured by the die in handling, as such a thing had not happened before. *Gould v. Slater Woolen Co.*, 147 Mass. 315.

As to injury causing death from negligence of druggist. *Osborne v. McMasters*, 40 Minn. 103.

Selling a harmful drug to be used as a joke or trick rendered druggist liable. *State v. Monroe*, 121 N. C. 677.

So, in selling a poisonous substance as rhubarb. *Wood v. Bartholomew*, 122 N. C. 177.

Druggist was liable for selling sulphate of zinc for epsom salts. *Walton v. Booth*, 34 La. Ann. 913; S. P., *Davis v. Guarnieri*, 45 Oh. St. 470; 13 West. 438.

Negligence of husband in buying medicine not imputable to wife. *Davis v. Guarnieri*, 45 Oh. St. 470.

Failure to test a pressure cylinder bought from reputable manufacturers and apparently sound was not negligence. *Kilridge v. Carbon Dioxide &c. Co.*, 201 Pa. St. 552.

The labeling of poison as required by statute held not to apply to prescriptions containing it. *Wise v. Morgan*, 101 Tenn. 273; s. c., 44 L. R. A. 548.

Sale of 87% gasoline, a product not in common use and inherently dangerous, held to impose the duty of notifying vendee of its explosive

quality. *Waters-Pierce Oil Co. v. Davis*, (Tex. Civ. App.) 60 S. W. Rep. 453.

See, also, *Ives v. Welden*, 114 Iowa, 476; s. c., 54 L. R. A. 854.

Action for the defective construction of a side saddle sold to a husband, held not to inure to the benefit of his wife. *Bragdon v. Perkins-Campbell Co.*, 87 Fed. Rep. 109.

Manufacturers and vendors of drugs, poisons, medicines, etc., are bound to use the highest degree of care, and the liability inures to the benefit of a third party injured by a failure to exercise it. *Peters v. Johnson*, 50 W. Va. 644.

A manufacturer or builder of a defective article is not liable for injury to a third party, where the article is not in itself calculated to cause injury. *Swan v. Jackson*, 55 Hun, 194; *Van Winkle v. American Steam Ins. Co.*, 41 A. L. J. 579.

Manufacturer is not liable to one injured unless there be a privity of contract, unless he know the machine was defective. *Heizer v. Kingsland &c. Co.*, 43 A. L. J. 53; *McCaffrey v. Mossberg Co.*, (R. I.) 50 Atl. Rep. 651.

Manufacturers were liable for marketing a step-ladder known to be defective, to any person using the same, in good faith and injured thereby. *Schubert v. J. R. Clarke Co.*, (Minn.) 45 A. L. J. 497; see 106 Mass. 143; see *ante*, p. 494.*

GAS COMPANIES.

A gas company permitted gas to be turned into a three-story building occupied by different tenants, each supplied through a separate meter, without any inspection of the pipes, after plans had been submitted to it and a meter had been provided by it upon an application, after which it was the custom to permit any one to turn on the gas; the pipes in a room occupied by persons not using gas and who had not applied for a meter were uncapped and an explosion occurred. For the jury.

A company does not insure against explosions of gas carried into buildings, but should use the care which the nature of the article and the consequences to be apprehended therefrom reasonably call for.

The contributory negligence of a boy of eighteen, injured by an explosion of escaping gas while seeking with a lighted candle to discover the leak, is for the jury. *Schmeer v. Gas Light Co. of Syracuse*, 147 N. Y. 529, rev'g judg't for def't; and 73 Hun, 616, and 65 id. 378.

* NOTE.—See *Wellington v. Downer Oil Co.*, 104 Mass. 64. Explosion of oil. *Elkins v. McKean*, 70 Pa. St. 493; *Moulton v. Phillips*, 10 R. I. 218; *Walden v. Finch*, 70 Pa. St. 461; *Longmeid v. Holliday*, 6 Exch. 766; *Witterbottom v. Wright*, 10 M. & W. 109; *Blakemore v. Bristol and Exeter R. Co.*, 8 El. & B. 1035, limiting *Langridge v. Levy*, 2 M. & W. 519.

A gas company, lawfully occupying a street with its mains and pipes, is bound to use its rights and to conduct its operations so as not to inflict injury upon neighboring property.

Recovery was had for the destruction of trees from leakage of gas. *Evans v. Keystone Gas Co.*, 148 N. Y. 112, aff'g 72 Hun, 503.

City in making a sewer connection had cut a tunnel from plaintiff's premises to the sewer. Upon notification of a leak of gas the water purveyor's department sent an employé to investigate. He did so by going with a light along the surface of the street. The leak was discovered and, in an attempt to extinguish the flame ignited from the light by covering it with dirt, it was forced along the tunnel and into the cellar of plaintiff's premises, where an explosion of accumulated gas occurred. In the absence of knowledge on the part of such employé of the existence of the excavations, the method of discovery was not negligent. *Littman v. New York*, 36 App. Div. 189; s. c. aff'd, 159 N. Y. 559.

Defendant's gas mains were suffered to leak, and the escaping gas, working its way onto plaintiff's premises and into his greenhouses, destroyed his plants. Defendant was liable. *Armbruster v. Auburn Gaslight Co.*, 18 App. Div. 447.

See, also, *Siebrecht v. East River Gas Co.*, 21 App. Div. 110, as to what is sufficient evidence of negligence in permitting the escape of gas. *Tiehr v. Consolidated Gas Co.*, 51 App. Div. 446.

A statute imposing liability on gas companies for neglect to supply customers within 100 feet of its main, construed to apply to an office in a building within that distance, though the office exceeds it. *Jones v. Rochester Gas & Co.*, 7 App. Div. 465.

A gas company, reserving the right to make all connections, was not protected from liability for explosion due to imperfect connection, by a stipulation for exemption from liability for explosion incident to the "use of the gas." Smelling held an insufficient test. *Bastian v. Keystone Gas Co.*, 27 App. Div. 584.

Plaintiff was not negligent in lighting a gas radiator and lying down to sleep. On a conflict of evidence as to whether defendant's employés, who turned off the gas to attend to the pipes and then turned it on again, had knocked on her door but not loud enough to arouse her, their negligence was left to the jury. *Beyer v. Consolidated Gas Co.*, 44 App. Div. 158.

Plaintiff was assured that there was no leak after calling the workman's attention to the odor. He was not charged with negligence in continuing use. *Anderson v. Standard Gaslight Co.*, 17 Misc. 625.

DEGREE OF CARE REQUIRED.—Ordinary process and ordinary precautions are required in manufacturing gas and in the conduct of the business (*Keiser v. Gas*

Co., 143 Pa. St. 276), and in the care of pipes (*Mississinewa Co. v. Patton*, 129 Ind. 472; *Holly v. Gas Co.*, 8 Gray, 123, where there was a percolation of gas into a house; approved, *Hunt v. Gas Co.*, 1 Allen, 347; s. c., 3 id. 418, where gas entered into a house from pipes.) Company must use proper care and prudence, having reference to the delicate and dangerous character of material in its charge. (*Smith v. Gas Co.*, 129 Mass. 318, where a child was found insensible and its mother dead; recovery allowed the child upon proof of a defective pipe.) Care must be proportionate to the risk; also to prevent careless interference with pipes by others. *Butcher v. Gas Co.*, 12 R. I. 149; *Sher. & Red. on Neg.*, sec. 692, and see *Thomp. on Neg.*, sec. 11, p. 108; *Schmeer v. Gas Co.*, 147 N. Y. 529; *Anderson v. Standard Gaslight Co.*, 17 Misc. 625; *Barrickman v. Marion Oil Co.*, 45 W. Va. 634; and see *Evans v. Gas Co.*, 148 N. Y. 112.

Reasonable diligence required to find a leak (*Emerson v. Gas Co.*, 3 Allen, 410) where gas escaped from street pipe, through sewer, into a house. Noxious substances were washed over the surface of "A.'s" land or diffused through the soil into neighbor's well; "A." was liable, but not when carried by subterraneous currents, in absence of malice. *Brown v. Illius*, 27 Conn. 84. See, also, *Terhuson v. Boston Gaslight Co.*, 170 Mass. 182. Percolation of gas into a person's land and well is a nuisance, as are smells emitted beyond that degree necessarily incident to its manufacture. *Pottstown Gas Co. v. Murphy*, 39 Pa. St. 257. In *Hipkins v. Gas Co.*, 6 Hurl. & Nor. 250, and *Parry v. Gas Co.*, 15 C. B. N. S. 566, the actions were for statutory penalty for suffering impure matter to flow into a stream, etc. Under a statute a natural gas company was liable for injury in conducting gas in the street without negligence. *Gas Fuel Co. v. Andrews*, 50 Ohio St. 695. Falling buildings broke gas pipes so that the explosion of gas therefrom was alleged to have fired another building and an inmate was injured. Company was not negligent for failure to close certain pipes; nor did it appear that such action would have prevented the explosion. *Hutchins v. Gas Light Co.*, 122 Mass. 219. A gas company should provide pipes and fittings of such material and workmanship, and lay the same with such skill and care, as to provide against the escape of gas when new, and employ such a system of inspection as would insure reasonable promptness in the erection of leaks that might occur from the deterioration of the material, or from other causes with the circumspection of men of ordinary skill in the business. *Kiebele v. The City of Philadelphia*, 105 Pa. 41, where natural gas escaped from a not recent hole in a defective service pipe into a house and exploded. *Koelsch v. The Philadelphia Co.*, 152 Penn. 355.

Gas company is not an insurer. *Schmeer v. Gas Co.*, 147 N. Y. 529.

Company is bound to use due care to stop escape of gas from a break in a pipe after notice. *Pine Bluff &c. L. Co. v. Schneider*, 62 Ark. 109; s. c., 33 L. R. A. 366.

Gas company is liable where its negligence contributed to the injury with that of a third party. *Pine Bluff &c. L. Co. v. McCain*, 62 Ark. 118.

Construction company had not fully completed the contract when it turned over the line. But defendant had actually used the pipes without inspecting them. Recovery was permitted. *Chicago &c. Gas Co. v. Myers*, 168 Ill. 139.

Owner of premises adjoining the street recovered for the loss of trees in front thereof through negligence of gas company. *Rockford Gas &c. Co. v. Ernst*, 68 Ill. App. 300.

Leakage for more than a month showed lack of proper inspection. *Rockford Gas &c. Co. v. Ernst*, 68 Ill. App. 300.

See, also, *Consumers' Gas &c. Co. v. Perrego*, 144 Ind. 350; s. c., 32 L. R. A. 146; *Prichard v. Consolidated Gas Co.*, 2 Pa. Super. Ct. 179.

Where it is a matter of nuisance, the question of degree of care, is immaterial. *Belvidere Gaslight Co. v. Jackson*, 81 Ill. App. 424.

Liable for negligent construction without notice; for negligent maintenance, after notice and reasonable time to repair. *Aurora Gas &c. Co. v. Bishop*, 81 Ill. App. 493.

See, also, *Greaney v. Holyoke Water Power Co.*, 174 Mass. 437; *Consumers' Gas Co. v. Corbaley*, 14 Ind. App. 549; *Dow v. Winnepesaukee Gas &c. Co.*, 69 N. H. 312; *Wichita Gas &c. Co. v. Wright*, 9 Kan. App. 730.

Recovery was allowed where, after repeated notices, the company attempted to repair, but failed; though it assured consumer that it was all right. *Richmond Gas Co. v. Baker*, 146 Ind. 600; s. c., 36 L. R. A. 683.

Failure to supply gas by a company having a franchise to pipe the street is a tort as well as breach of contract. *Coy v. Indianapolis Gas Co.*, 146 Ind. 655; s. c., 36 L. R. A. 535.

Court has no right to assume that accidents will probably occur. *Indiana Natural Gas &c. Co. v. Jones*, 14 Ind. App. 55; *Indiana Natural Gas &c. Co. v. Bailey*, 14 Ind. App. 697.

See, also, *Windfall Man. Co. v. Patterson*, 148 Ind. 414; s. c., 37 L. R. A. 381.

Gas company required to supply a more approved device when the old one gave out. *Consumers' Gas &c. Co. v. Corbaley*, 14 Ind. App. 549.

Company failed to test its pipes at a pressure of at least 300 pounds as required by statute. Was liable for resulting injuries. *Alexandria Min. &c. Co. v. Irish*, 16 Ind. App. 534.

Recovery may be had for overheating of stoves by negligently increasing the usual pressure. *Indiana &c. Gas Co. v. New Hampshire &c. Ins. Co.*, 23 Ind. App. 298.

Indiana &c. Gas Co. v. Long, 27 Ind. App. 219; *Barrickman v. Marion Oil Co.*, 45 W. Va. 634; s. c., 44 L. R. A. 92.

Negligence *per se* to enter gas-filled room with light. But held that such act was not the proximate cause of explosion in this case. *Consolidated Gas Co. v. Crocker*, 82 Md. 113; s. c., 31 L. R. A. 785.

Suffocation was produced by gas escaping from a leak caused by settling of earth replaced after construction of sewer of which the gas company was ignorant. Negligence was for the jury. *Greaney v. Holyoke Water-Power Co.*, 174 Mass. 437.

Negligence not to provide an inspector during construction work on subway was for the jury. *Koplan v. Boston Gaslight Co.*, 177 Mass. 15.

Gas company held not liable for explosion caused by employé of another company operating on its pipes by mistake. *McKenna v. Bridgewater Gas Co.*, 193 Pa. St. 633; s. c., 47 L. R. A. 790.

Negligence was for the jury where several causes for the leakage were assigned by the different parties. *Heh v. Consolidated Gas Co.*, 201 Pa. St. 443.

Right of action for breach of contract was no bar to an action in tort for turning off gas in cold weather, which resulted in increased illness and death. *Hoehle v. Allegheny Heating Co.*, 5 Pa. Super. Ct. 21.

The duty to repair a gas box in the sidewalk was imposed upon the company having entire control of it, though the consumer was required to pay for it. *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316.

PRESUMPTION OF NEGLIGENCE.—The escape of gas from plants and appliances under the control of the company raises a presumption of negligence. *Smith v. Gas Light Co.*, 129 Mass. 318; *Sherm. & Red. on Neg.*, sec. 697; *Brown v. N. Y. Gas Co.*, Anth. N. P. 351; *Mose v. Gas Co.*, 4 Fost. & Fin. 324; *Lampert v. Laclede Gas Co.*, 14 Mo. App. 276; *Hipkins v. Gas Co.*, 6 Hurl. & Nor. 250; *Kiebele v. City of Phila.* 105 Pa. St. 41. *Contra*, *Hutchinson v. Gas Light Co.*, 122 Mass. 219; *Rockford Gas &c. Co. v. Ernst*, 68 Ill. App. 300.

Plaintiff must prove not only that the escape of gas was by negligence but that death was the proximate result. *State v. Consolidated Gas Co.*, 85 Md. 637.

Plaintiff must show due care by himself, negligence by defendant and injury therefrom. *Blakie v. Brookline Gas &c. Co.*, 167 Mass. 150.

CONTRIBUTORY NEGLIGENCE.—Negligence of father knowing of defective pipe, resulting in injury to his child, defeated recovery by the child. *Holly v. Gas Co.*, 8 Gray, 123; but, see, *Lannen v. Gas Light Co.*, 44 N. Y. 459, where it was held that the act of the infant's father in causing the leak was too remote to constitute contributory negligence. Whether a person knowing of a leak into his house should give notice to the company, was for the jury. *Holly v. Gas Light Co.*, 8 Gray, 123; but, see, *Hunt v. Gas Co.*, 1 Allen, 343; second trial, 3 id. 418, where recovery was sustained. Company was not liable to owner of house for explosion of gas where his tenant negligently lighted a candle. *Bartlett v. Gas Co.*, 117 Mass. 533. Company's negligence not relieved because plumber called by consumer to mend pipe was negligent. *Schermerhorn v. Gas Co.*, 5 Daly, 144, following *Burrows v. Gas Light Co.* (E. L.) Ex. Ch., vol. 5, p. 69; *Lannen v. Gas Light Co.*, 44 N. Y. 459, aff'g 46 Barb. 264. The owner of premises was liable for injury to an inspector of a water meter negligently allowed to enter the cellar in ignorance of gas in the cellar; the inspector was not necessarily negligent because there was a smell of gas. *Finnegan v. Gas Co.*, 159 Mass. 311. Where a stranger negligently struck a light in a cellar into which gas was negligently allowed to escape by the company, the company as well as such person was a wrongdoer. *Koelsch v. Philadelphia Co.*, 152 Pa. 355. Company knowing of leakage from a main, defective from the building of a sewer, was negligent; a city surveyor, entering the sewer with a lighted lantern, could not recover if he knew of the probable flow of gas into the sewer. *Robinson v. Oil City Gas Co.*, 99 Pa. 1.

Remaining in house after company has professed to repair, held not contributory negligence. *Richmond Gas Co. v. Baker*, 146 Ind. 600; s. c., 36 L. R. A. 683.

Plaintiff was negligent where he adjusted an individual pressure regulator on the assumption that the pressure in the main would remain even. *Ibach v. Huntington Light & Fuel Co.*, 23 Ind. App. 281.

Consumer turned on the gas without authority and in spite of warnings. No recovery was allowed. *Kohler Brick Co. v. Northwestern &c. Gas Co.*, 11 Oh. C. C. 319.

Failure to cut off the pipe into the premises did not impose liability for escape of gas into the house, where plaintiff's tenant turned the gas on. *Cree v. Charleston &c. Gas Co.*, 51 W. Va. 129.

SERVANTS—NEGLIGENCE OF.—Company is liable for the negligence of its servants while finding a leak. *Lannen v. Gas Co.*, 44 N. Y. 459, aff'g 46 Barb. 264. But is not liable for the negligence of a former servant employed by a consumer. *Flint v. Gas Co.*, 9 Allen, 552.

DAMAGES.—The escape of gas into a well, operating with other causes to foul the water, will not relieve the company, but might affect the amount of damages recoverable. *Sherman v. Fall River Iron Co.*, 5 Allen, 213; *Brown v. Illius*, 27 Conn. 84; *Blenkerin v. Gas. Co.*, 2 Frost. & Fin. 437.

Damages for the construction of a pipe line does not include those resulting from its operation. *Denniston v. Philadelphia Co.*, 1 Pa. Super. Ct. 599.

INJURY TO PIPES FROM STRUCTURES IN THE STREET.—A gas company should take notice of and guard against sewers so constructed as to be likely to injure gas mains. *Robinson v. Oil City Gas Co.*, 99 Pa. St. 1; *Koelsch v. Phila. Co.*, 152 id. 355.

Company should, with reasonable speed, see that the earth was properly put back over the sewers, and the pipes properly supported. *Butcher v. Gas Co.*, 12 R. I. 149, where gas escaped through sewers into greenhouse.

MASTER AND SERVANT.

I. GENERAL RULES.

II. HOW RELATION IS CREATED AND WHEN IT EXISTS.

- (a) What constitutes an employment.
- (b) When servant is acting within scope of his employment.
- (c) Beginning, interruption and termination of the relation.
- (d) Who is master.
 - 1. Temporary transfer of authority.
 - 2. Independent contractor.
 - 3. Lessee.
 - 4. Joint liability.
- (e) Municipality.

III. DEGREE OF CARE REQUIRED OF MASTER.

- (a) Master not insurer of servant's safety.
- (b) Liable for injury due to lack of ordinary care.
- (c) But not for lack of extraordinary care.

IV. MASTER'S DUTY.

- (a) Machinery, appliances and place to work.
 - 1. Duty to use ordinary care to provide such as are reasonably safe for their purpose.
 - 2. What constitutes reasonably safe machinery, &c.
 - 3. Duty to use ordinary care to maintain in reasonably safe condition.
 - 4. Whether duty to provide and maintain reasonably safe machinery, &c., can be delegated.
- (b) Instructions and warning.
 - 1. To the mature and experienced, none required, where danger is incident to employment.
 - 2. Or known to servant or discoverable by him while in the exercise of ordinary care.
 - 3. But required where danger not incident to employment nor discoverable in exercise of ordinary care.
 - 4. To the immature and inexperienced, instruction and warning as to dangers of employment commensurate with youth and inexperience.

5. Provided master knew, or by the exercise of ordinary care could have known of the danger.
6. Sufficiency of the warning or instruction.
- (c) Competent and sufficient employés.
 1. Duty to furnish competent and sufficient employés.
 2. When duty is discharged.
- (d) Rules and regulations.
 1. Duty to provide and enforce rules to facilitate complex and dangerous operations.
 2. Sufficiency of rules.
 3. Sufficiency of their promulgation.
 4. Effect of their violation with knowledge of master.
- (e) When appliances, &c., are sufficient, master not liable for acts of fellow servant.
- (f) Proximate cause.

V. ASSUMPTION OF RISK BY SERVANT.

- (a) Servant assumes risk by continuing in employment with knowledge of it.
- (b) But to charge him with assumption, he must not only know the conditions but appreciate the danger.
 1. Effect of assurance of safety by master.
- (c) Servant relieved from assumption by reliance for a reasonable time on master's promise to remove danger.
 1. Unless danger is such that ordinary prudence would refuse to risk it.
 2. What constitutes a reasonable time.
 3. Character of the promise.
 4. Who must give it.
- (d) But not relieved where he chooses to remain in the face of danger.

VI. RISKS INCIDENTAL TO EMPLOYMENT.

- (a) Master is not liable for injury from risks incidental to employment.
- (b) What risks held incidental.
- (c) Work beyond scope of employment.

VII. FELLOW SERVANTS.

- (a) When servants are fellow servants.
 1. When they have a common master.

2. And are engaged in a common employment.
 3. And acting within the scope of their employment.
 4. But not when one is engaged in the performance of duty owed by master to his servants.
 5. Or represents his master in a position of superior authority.
- (b) Master liable where his own negligence concurs with that of fellow servant.

VIII. CONTRIBUTORY NEGLIGENCE.

- (a) In the absence of actual knowledge to the contrary, servant may rely on master's performance of his duty.
1. As to machinery, appliance, &c.
 2. As to safe place to work.
 3. As to rules and regulations.
 4. As to warning and instruction and rules.
 5. As to selection of servants.
- (b) But when danger readily discoverable while in exercise of ordinary care in employment, servant cannot recover.
1. What held discoverable while in exercise of ordinary care.
- (c) Servant's conduct in his employment must be governed by ordinary care.
1. What held negligent conduct.
- (d). Violation of rules, orders, &c.
1. No recovery where they are violated.
 2. Provided the violation contributed to the injury.
 3. And the rules, &c., were valid.
 4. And brought home to servant.
 5. What constitutes a violation.
 6. Effect of habitual violation.
- (e) Effect of compliance with express orders, threats or assurance of safety.
- (f) Effect of choice of materials, methods, &c.
- (g) Transitory dangers in course of work.
- (h) Effect of acting in an emergency.
- (i) Youthful and inexperienced servants.
- (j) Contributory negligence not a defense to wanton or willful negligence.

(k) Modification of rule by contract.

(l) Proximate cause.

IX. INJURY TO SERVANT BY THIRD PERSON.

X. LIABILITY OF SERVANT TO THIRD PERSON.

XI. MEDICAL ATTENDANCE.

XII. RELEASING LIABILITY.

XIII. STATUTORY LIABILITY.

(a) What law governs.

(b) Statutes as to safe appliances and places to work.

(c) Employer's Liability Acts.

(d) Construction of Employer's Liability Acts.

1. In general.

2. Liability to a stranger's employés as if they were servants.

3. Liability to a master's employés as if they were not servants.

4. Liability for acts of servants in authority.

5. Liability for employment of minors.

6. Liability of fellow servants.

I. General Rules.

.(For liability of master for injuries to third person through servant's negligence, see "Agency.")

*A master should, to protect his servants from injury, by the usual implication of the contract of hiring exercise the care and skill that a man of ordinary prudence would observe under the circumstances,

(a) to supervise his work and servants;

(b) to furnish them with reasonably safe machinery, appliances, tools, place to work, and to keep the same in reasonably safe repair;

(c) to give instructions to his servants respecting any dangers not ordinarily incident to the business, or even as to the dangers ordinarily incident to the business, in case he know that his servant, from youth or inexperience, is not likely to discover the same by the exercise of the care that may be properly expected on the servant's part; but the master is not obliged to give instructions or warnings except as to dangers of which he knows or should know in the exercise of requisite care;

(d) to furnish competent and sufficient employes;

(e) To issue and enforce rules for the conduct and regulation of his work and his servants where the work is complex;

The master should use like care in his personal intercourse with his servants;

But a master, unless otherwise commanded by statute, need perform none of these duties, except the last mentioned, provided he fully instruct his

* NOTE—How the duties here enumerated fall short of general adoption will be pointed out.

servants respecting the dangers arising from the absence of such performance, or provided the servant have from any source like information. For it is the personal right of every man to use such machinery, appliances, plant, assistance or system of work, as he desires provided he do not infringe upon the rights of others. If he employ a servant, he owes to him the duty of either using due care to point out to his understanding the dangers, if any there be, pertaining to his peculiar equipment and manner of doing business, so far as the servant may not discover the same by the use of ordinary care, so that the servant may decline the occupation, or, forewarned, enter upon and encounter the risks thereof, or, as an alternative, the master must discharge the obligations of care in the respects first above stated;

Delegation of duty.—A master's duty may be delegated, but the delegate represents the master and there is therefore demanded of him care and skill equal to that required of the master, in the performance of the delegated duty, and for neglect thereof the master will be liable to the same extent as if the neglect were directly his own;

How the master's duty may be determined.—When the duties which a master owes to his servant are known, the principles or process of determining the question of the master's negligence, however difficult of application, may be stated with generality. The inquiry always must be whether the master, acting through himself or another, failed to exercise the requisite care respecting a duty owing by him to the injured servant. If so, he is primarily liable (subject to all allowable defences);

The perplexities and differences, aside from the difficulties that usually beset the application of the law, have reference to the question as to what are the master's duties. In some jurisdictions all the duties enumerated above are not accepted as those owing by the master, or are accepted with modifications.

Thus, in a few States, it is not regarded as a master's duty to keep machinery in repair, when he commits such repair to competent servants, and perhaps all courts would regard it as the frequent duty of a servant to observe the condition, and attend to the repair of small tools, or certain minor or simple parts of appliances, easily repaired or replaced, when the servant is engaged in the use of the same. It may be stated that the courts are generally in accord as to the duties owing by the master except in respect to supervision and directions where, not only the tribunals of different States, but also those of the same jurisdiction often widely diverge. In New York all of the above stated duties are accepted, save that it would be considered that the matter of supervision and direction fell within the duty of the master only as to the general oversight and ordering of the work, and that a servant would only be doing a master's duty as regards supervision and direction, when there was a general committal of the business to him voluntarily, or necessarily as in the case of corporations;

In New York a servant supervising or directing represents the master as to other servants only when power and discretion as to some general branch of the business is committed to him; *Hankins' Case*, 142 N. Y.

The superior servant thus endowed may be at once a superior or inferior; he may be the governing power over other employes, or he may be one of the employes whom he governs, and this is determined by the act that he happens to be doing when he injures his fellow-servant, for no ser-

vant can be so superior by the New York rule, that he may not instantly become a fellow-servant with those whom he rules by actually joining in the work which it is their part to do;

The Ohio rule as to supervision and direction largely observed in Kentucky, and other States, and measurably adopted in some Federal decisions and by the courts of certain States, is that supervision and direction are the sole duty of the master, and whenever a person is placed in power over a distinct part of the work, be it a general or special branch thereof, he is a superior, and those subject to his command and power to enforce obedience are subordinates, and that while he remains clothed with the superior power he cannot lay it aside by doing the act or work of a subordinate. Whether a servant is a superior is tested sometimes by his power to employ and dismiss those under him, and sometimes power to command is alone considered sufficient to indicate that the servant represents the master;

This difference as to the extent of the master's actual duty and the inability of a superior to be at once a superior and operative has led to the terms "New York Rule" and "Ohio Rule" as expressing the widest extremes of thought on this subject. In New York the master's liability is said to be determined by the nature and character of the act, irrespective of the question of grade or rank, that is, the inquiry is, does the nature of the act show that the offending servant was at the time of the injury doing a master's duty, and that the injured servant was not? *Crispin v. Babbitt*, 81 N. Y. 516.

In Ohio the same precise principle underlies the master's liability, except that supervision and direction, even in minor branches of the business, are regarded as the master's duty, and the servant endowed with power to do that duty cannot act in a dual capacity; he cannot be a ruler and of the ruled. *Little Miami R. Co. v. Stevens*, 20 Oh. St. 415.

In New York the person doing a master's duty, however high his grade, becomes an operative when he does the act of an operative. Hence, according to the work to which he applies himself he is vice-principal or fellow-servant of those under him.

If he puts his hand for a moment to the work of an operative, he is an operative; he is divested of his superiority; he is a fellow-servant. Under the Ohio rule it would be held that the superintendent could not change his attitude towards his co-employés by being now superior, now inferior; that he could not thus suddenly change the complexion of his employment.

But it is thought that there is no difference in the principle that the offending servant can only subject the master to liability because he is doing the master's duty.

Indeed, in the case where the Ohio doctrine is strongly affirmed it was distinctly stated that from the very nature of the contract of service between the company and the employés, the former was under obligations to superintend and control, and that when he delegates this, as to a train conductor, etc., the latter represents the master, and "is in the discharge of a duty which the owner, as a man and a party in the contract of service, owes to those placed under him, and whose lives depend upon his fidelity. * * * This service is not common to him and the hands placed under him. They have nothing to do with it. His duties and their duties are entirely separate and distinct, although both necessary to produce the result. It is his to command, and theirs to obey and execute. No service is common that does

not admit a common participation, and no servants are fellow servants where one is placed in control over the other." *Little Miami R. Co. v. Stevens*, 20 Oh. St. 415.

It will be observed that the basic principle is that the offending servant is performing the master's duty, and that while so doing he cannot incidentally fill the position of an operative.

In some states it is held that although a servant be a superior as regards others, yet if the injurious act might as well have been done independently of any rank held by the offending servant, or if the superiority of the servant had no influence on the act, the difference in rank will not be regarded, and the parties will be deemed fellow servants, and this seems no illogical determination;

Best appliances not required.—The degree of care exacted of a master does not require him to provide the very best machinery, nor the safest appliances, but only those reasonably safe, if used with the degree of care that a servant should exercise in his employment. Hence, the latest improvements, newly patented or even the best and safest devices are not required;

Inspection.—The master, in furnishing machinery, etc., should use due care to discover defects by a reasonably careful inspection, and should continue such inspection to preserve the same in proper condition. But injuries resulting from latent defects not discoverable by such inspection, are not chargeable to the master. It is usually considered sufficient, as to defects not visible at least, that the master purchased the materials of a reputable dealer or manufacturer; thereupon giving the appliances such exterior inspection as is usually regarded sufficient. Following this it is the logical but not accepted doctrine that it should be sufficient to employ a reputable and skilled person, selected with ordinary care, to repair;

Notice or knowledge.—The master is only liable for defects of which he had, or in the exercise of due care should have had, knowledge; but his duty requires due diligence to discover defects, and, as in other relations, the duration of the defects may be considered as bearing upon such diligence;

Sufficient and competent employes.—Among the duties owing by the master to the servant is that of using due care to furnish sufficient and reasonably competent employes, and to use like care that they so continue. After the master has used reasonable care in selecting such servants, the presumption arises that their competency continues, yet it is the master's duty to exercise reasonable care respecting them, and he will be responsible for incompetency of which he had notice or knowledge, or of which in the exercise of the requisite care he should have had knowledge. Repeated acts, but not a single act indicating incompetency, will be sufficient evidence thereof, and when the incompetency is notorious, and long continued the master will be deemed to have notice thereof;

Rules.—It is also the duty of the master to use requisite care to issue rules and regulations for the conduct of his business, and use due care for their observance by his servants;

This does not apply to every simple and ordinary employment and detail of the business, but only to the general government of employes, where the duties are so diverse and complicated as to require systematic regulation to secure reasonably safe co-operation in the common business. Such rules should be made for such minor branches and details of the work as have

proved necessary, practicable and useful among good business men. The servant must use reasonable care to obey all reasonable and proper rules, and if his disobedience of them aids his injury he cannot recover;

Risks assumed by the servant.—(1) The servant assumes the ordinary risks of the employment because every person is presumed and in fact tacitly represents himself to be skilled and intelligent respecting any matter that he undertakes to do, and so much the master may expect. If, however, the master knowingly takes into his employment a person, from immature age or inexperience, ignorant of its dangerous nature and exposures, he should use due care to instruct and warn him concerning them;

(2) The servant assumes the particular risks of his employment discoverable by the use of ordinary care. The risks of the same employment even, in different places, would not be precisely the same; hence, the servant should use due care to discover the particular arrangements of the place, where he is to work, and the machinery and appliances he is to use, and the dangers to which they expose him, and risks so discoverable he assumes;

(3) If the master do not use the care required of him, and if either in the machinery, appliances, tools, system, selection or continuance in employment of fellow servants, the issuing or enforcement of rules, there be dangers discoverable by the use of ordinary care on a servant's part, or if there be dangers of which the servant knows either by information derived from the master, or from any other source, and the servant remains voluntarily in the employment, he takes the risk;

(4) *Fellow servants.*—The servant assumes the risk of injury arising from the negligence of his fellow servant. The doctrine of the common law is that the master is not liable for an injury to his servant caused by the negligence of a fellow servant. The principal difficulties have arisen in determining who is a fellow servant. Generally it is considered that persons are fellow servants, when they are engaged by the same master and working in the same business, either both doing some duty pertaining to the master, or both otherwise engaged in the common service;

In some jurisdictions, there are added qualifications, viz: if the fellow servant is endowed with the power of supervision and direction, that is, if he is made a superior, every act that he does partakes of that character, and he cannot, whatever he does, be a fellow servant with one under him. This is the Ohio rule considered above. It is, however, held by some courts, that if the rank of the offending servant had no connection with and no influence upon the tortious act, and if such act were not one pertaining to the master, the servants are fellow servants;

In some states there is another qualification, that the servants cannot be fellow servants if they are engaged in different departments or branches of the business, or if they are so dissociated by the nature or place of occupation, that they are strangers to each other in character, care and skillfulness. This is the Illinois rule;

Master's promise to remove danger.—If the master, however, upon his attention being called to dangerous conditions existing, promise to correct the same, the servant is often justified, if the employment be not so dangerous as to preclude a man of common prudence from exposing himself to its hazards, in continuing the service for such reasonable time thereafter as will give the master an opportunity to make such corrections, and if it be

not then done, the servant again takes upon himself the risk of further continuing in the employment;

Master's assurance of safety.—It is often the case, also, that the servant may, when the danger is not certain, accept the assurance or advice of the master that his safety is not threatened, and so relieve himself of the risk;

Contributory negligence.—A servant, quite independently of the question of the assumption of risks, is required to use reasonable and ordinary care for his own safety. There is no proper connection between the doctrine of contributory negligence and that of the assumption of the risks of the employment by a servant. The servant assumes the risks by the implied terms of the contract under which he enters the service. They include such dangers as are ordinarily incident to the employment, and also the dangers which the servant discovers, or should discover, respecting the master's own way of conducting his particular business. As regards such risk the master is relieved from responsibility whether the servant is negligent or not, for the contract of hiring is not that a servant assumes such risks as he may be negligent in encountering. It may be that a servant is negligent as to a matter respecting which he assumes the risk, but that is merely coincidental and has no bearing on the question of his assumption of the risk; his assumption of the risk would exist, if it existed at all, whether he used care or not. It is said that a servant assumes the risk of those dangers which are discoverable by the exercise of ordinary care; but that is intended to describe the risks assumed, and not to make his assumption of them depend upon his using care. If it were the duty of a master to erect fire escapes, and he did not, and the servant knowing this entered his service and voluntarily remained in the service, appreciating the danger, it would be urged, in case of his injury from this neglect of the master, that the servant took the risk of the danger caused by the absence of the fire escapes. If, however, the master erected proper fire escapes, and in case of fire the servant neglected to use them, it would be urged that he was guilty of contributory negligence. Contributory negligence is the failure to use such reasonable care to protect one's person or property as the circumstances would demand of a person of ordinary prudence, and has reference to personal conduct. A servant is always required to exercise a degree of care for his own protection, and it may be that his failure to do so will be in connection with a danger of which he assumes the risk; but the two defenses would be entirely separate, and one in legal theory quite unnecessary to and independent of the other;

Diverted attention.—Courts have occasionally held that a servant might be excused or that a jury might excuse a servant injured for omission to avoid a danger, or to use due care respecting it, on account of his attention being diverted by the performance of his duties;

Such a doctrine has been but should not be invoked while determining the question of an assumption of the risk, except to this degree, that, as the servant assumes the risks of dangers discoverable by the exercise of ordinary care, it might be proper to consider whether in view of the diversions and absorption of his attention by his duties, a man of ordinary prudence would have discovered the danger. But the doctrine has been applied where the danger was well known to him, and the servant pleaded that his attention, diverted by his duties, caused him to forget it. If a servant and not the master assume a certain risk of an employment it cannot be possible that

the servant is released from the risk because his duties cause him to overlook its dangers. His very obligation is to perform his duty and carry the risk. But, in considering a question of contributory negligence, the diversion of the attention is often a legitimate consideration for a jury.

Concurring negligence of master.—If the negligence of a fellow servant were to an extent the cause of the injury, as above stated, the master would nevertheless be liable, if his own negligence also aided the injury, or it may be stated that if the master's negligence in any part caused the injury, he will be liable, however much the negligence of a third person concurred in producing the result;

Injury by the negligence of a third person or such third person's servant.—If the servant is injured by the negligence of a third person, in the course of his employment, or by such person's servant, the third person is liable for his own negligence or his servant's negligence according to the usual rules governing the doctrine of respondeat superior;

Waiver by servant of master's liability.—The servant, by merely continuing the employment with knowledge of the danger of the master's failure to perform his duty, assumes the risks thereof. Therefore a fair contract to do so is, on principle, unobjectionable, at least where a statutory direction, or where the statutory right of beneficiaries in case of death is not involved. The cases are few and conflicting;

II. How Relation Is Created and When It Exists.

(a). WHAT CONSTITUTES AN EMPLOYMENT.

The relation of master and servant can arise only from contract, express or implied, and hence is purely a contractual relation. *Stevens v. Armstrong*, 6 N. Y. 442.

Farwell v. Boston & C. R. Co., 4 Met. (Mass.) 49; *Ross v. N. Y. C. R. Co.*, 5 Hun, 493; *Bailey's Master & Servant*, 1.*

A car carried a military company, including plaintiff, to "B." and was switched on a side track to take them back. Before the arrival of the return train the plaintiff and others went in the car, and the conductor in control asked them to help push the car on to the main track. The plaintiff got off to do so and fell through a bridge. Question was for jury whether plaintiff had placed himself under the conductor's care as a passenger, and if the conductor was guilty of negligence in asking them to alight at that place. *Bellman v. N. Y. C. & H. R. R. Co.*, 42 Hun, 130, denying motion for new trial after verdict for pl'ff.

Contractor in states prison must furnish suitable machinery to convicts enforced to labor under his contract, and is liable for negligence. *Hartweg v. Bay State S. & L. Co.*, 43 Hun, 425, aff'g judg't for pl'ff.

The deceased, who was crushed to death by the coming together of two

* NOTE.—This work analyzes the doctrine of the liability of the master to his servant, and presents and reviews with just comment the holdings of the courts of the several states.

cars upon the defendant's tracks, was not a mere volunteer on the tracks of the railroad corporation, but his relations to certain work which his employer had contracted with the railroad company to do required him to go to and from the work over the railroad tracks.

Held, that in doing so he had rights which it was the duty of the railroad company to recognize. *Dempsey v. N. Y. C. & H. R. R. Co.*, 81 Hun, 156.

Janitress was none the less a servant because she took rooms in the building in part payment of service. Defendant contended that she was a tenant. *Anderson v. Steinreich*, 32 Misc. 680.

Defendant did not know plaintiff was helping his servant and gave the latter no authority to employ help. Plaintiff acted as a volunteer. *Langan v. Tyler*, 114 Fed. Rep. 716.

See, also, *Manchester Man. Co. v. Polk*, (Ga.) 41 S. E. Rep. 1015; *Wagen v. Minneapolis &c. Street R. Co.*, (Minn.) 82 N. W. Rep. 1107; *Missouri &c. R. Co. v. Reasor*, (Tex. Civ. App.) 68 S. W. Rep. 332.

Evidence showing employment through a foreman goes to the jury. *Consolidated Coal Co. &c. v. Bruce*, (Ill.) 37 N. E. 912.

One employed by a servant without necessity or authority, held not a servant. *Stalcup v. Louisville &c. R. Co.*, 16 Ind. App. 584.

Connelly v. Boothby Hotel Co., 190 Pa. St. 553; *Cleveland Terminal &c. R. Co. v. Marsh*, 17 Oh. C. C. 1.

But, where a sudden emergency demands help one so employed becomes a servant. *Louisville &c. R. Co. v. Ginley*, 100 Tenn. 472.

Servant not a volunteer by working during lunch hour. *Mitchell Trauter Co. v. Emmett*, (Ky.) 65 S. W. Rep. 835.

A boy did not become an employé by assisting an engineer while riding on the engine for amusement. *Holmes v. Cromwell &c. Lumber Co.*, 51 La. Ann. 352.

A special police officer held not a servant of the proprietor of the place for which he was appointed. *Healey v. Lathrop*, 171 Mass. 263.

A stock pass does not constitute a shipper a servant of the railroad company. *Omaha &c. R. Co. v. Crow*, 54 Neb. 747.

A section hand though off duty became a servant at work while engaged in helping at the direction of the section boss. *Johnson v. Southern R. Co.*, 122 N. C. 955.

A substitute hired by a foreman is a servant. *Wilson v. Sioux &c. Min. Co.*, 16 Utah, 392.

Plaintiff engaged in defendant's work at the request of the man in charge of it, and was held to have been defendant's servant. *Johnson v. Ashland Water Co.*, 71 Wis. 553. See *Marks v. Rochester R. Co.*, 146 N. Y. 466.

See. *Button v. Chicago &c. R. Co.*, 87 Wis. 63; *Degg v. M. R. Co.*, 1 Hurl. & N. 773; *Potter v. Faulkner*, 31 L. J. Q. B. 30; *Warburton v. G. W. R. Co.*, L. R. 2 Exch. 30; *Wiggett v. Fox*, 11 id. 832; *Flower v. P. R. Co.*, 69 Pa. St. 210; *New Orleans &c. R. Co. v. Harrison*, 48 Miss. 112; *Street R. Co. v. Bolton*, 43 Oh. St. 224; *Althorf v. Wolf*, 22 N. Y. 355.

(b). WHEN SERVANT IS ACTING WITHIN SCOPE OF HIS EMPLOYMENT.

Employés without instruction or authority attempted to place a defective belt on a pulley. Their negligence did not bind their employer. *Sann v. H. W. Johns Mfg. Co.*, 16 App. Div. 252.

Boy attempted to shift a belt merely to display his ability. *Pfeffer v. Stein*, 26 App. Div. 535.

See, also, *Colorado Fuel &c. Co. v. Cummings*, 8 Colo. App. 541; *Chielinsky v. Hoopes &c. Co.*, 1 Marv. (Del.) 273.

Gate fell upon plaintiff in a portion of the yard where his duties did not require him to be. No recovery. *Flanagan v. Atlantic &c. Co.*, 37 App. Div. 476.

See, also, *Jorgenson v. Johnson Chair Co.*, 169 Ill. 429; aff'g s. c., 67 Ill. App. 80; *Ellsworth v. Metheney*, 104 Fed. Rep. 119; s. c., 51 L. R. A. 389; *Cleveland &c. R. Co. v. Martin*, 13 Ind. App. 485; *Sievers v. Peters Box &c. Co.*, 151 Ind. 642; *Block v. Swift &c. Co.*, 161 Ill. 107; aff'g s. c., 58 Ill. App. 354.

Car inspector assumes the risk in voluntarily undertaking to uncouple cars. *Devoe v. New York &c. R. Co.*, 70 App. Div. 495.

To recover the servant must show that he was acting within the scope of his employment. *Southern R. Co. v. Guyton*, 122 Ala. 231.

A voluntary service beyond the scope of duty, and in violation of orders is conferred at employé's own risk. *Ray v. Diamond State Steel Co.*, 2 Penn. (Del.) 525.

See, also, *Allen v. Hixson*, 111 Ga. 460; *Parent v. Nashua Mfg. Co.*, 70 N. H. 199; *McGill v. Maine &c. Co.*, (N. H.) 46 Atl. Rep. 684.

Order to turn gas on in mains was given by defendant's president as such, though he was also chief engineer of the company laying them. *Chicago Economic Fuel Gas Co. v. Myers*, 64 Ill. App. 270.

Employé on his own motion, tried an experiment, without knowing its outcome, at his peril. A safe method had been provided. *Lehman v. Bagley*, 82 Ill. App. 197.

Plaintiff charged that he was injured by reason of a defective belt; it being too loose for use without pressure which he was directed to apply. The jury found, however, that the injury occurred while pressing on it outside the scope of his duties, and when shifted to an idler. *Phillips v. Romona &c. Stone Co.*, 19 Ind. App. 341.

Employé was not beyond the line of his duties where the position he

assumed was not beyond the call or service of his foreman. *Gremnis v. Louisville Electric Light Co.*, (Ky.) 49 S. W. Rep. 184.

So where the procurement of a tool was necessary to secure the performance of the work. *Conley v. Lincoln Foundry Co.*, 14 Pa. Super. Ct. 626.

See, also, *Nutzmann v. Germania Life Ins. Co.*, (Minn.) 84 N. W. Rep. 730; *Terre Haute &c. R. Co. v. Fowler*, (Ind.) 56 N. E. Rep. 228; *Indiana Pipe-Line & Ref. Co. v. Neusbaum*, 21 Ind. App. 361; *Olson v. Minneapolis &c. R. Co.*, 76 Minn. 149.

Employé carried a gun without his employer's knowledge or consent and outside the scope of his employment. Latter was not liable for its accidental discharge. *Chicago &c. R. Co. v. Smith*, (Kan. App.) 63 Pac. Rep. 294.

Employment for general work held to include assistance in lifting a car upon its truck by means of a steam winch. *Findlay v. Russell Wheel &c. Co.*, 108 Mich. 286.

Employé was a trespasser in riding on an engine without the knowledge of the conductor. *Martin v. Kansas City &c. R. Co.*, 77 Miss. 720.

Servant was within his employment in obeying an order to work on another company's private track. *Brown v. Toledo &c. R. Co.*, 10 Oh. C. D. 278.

Employé walked on the tracks of a derrick out of curiosity. No recovery. *Hocking Coal &c. Co. v. Voght*, 7 Oh. C. D. 494.

Chambermaid held not beyond her duty in riding in hotel elevator. *The Oriental v. Barclay*, 16 Tex. Civ. App. 193.

Servant, though instructed to act under one having charge of cars on a side track, was held within his duty in executing an order of one in charge of cars on the main track. *DeWalt v. Houston &c. R. Co.*, 22 Tex. Civ. App. 403.

Where the duty is the same to a volunteer as to a servant, the question as to scope of authority does not arise. *Stevens v. Chamberlain*, 100 Fed. Rep. 378.

Where plaintiff was actually a servant, permission to use machinery entitled him to as much protection as in case of an order to use it. *Virginia &c. Wheel Co. v. Chalkley*, (Va.) 34 S. E. Rep. 976.

(c). BEGINNING, INTERRUPTION AND TERMINATION OF THE RELATION.

The relation continues during the time allowed for lunch, where it is too short to permit leaving the premises for the purpose. *Cleveland &c. R. Co. v. Martin*, 13 Ind. App. 485.

It exists while being conducted to the premises for employment. *Powers v. Calcasien Sugar Co.*, 48 La. Ann. 483.

Bowles v. Indiana R. Co., 27 Ind. App. 672.

The incorporation of a partnership, held not to terminate the relation. *Goodwin v. Smith*, (Ky.) 66 S. W. Rep. 179.

It exists while servant is lunching in place provided by the master. *Heldmaier v. Cobbs*, 195 Ill. 172; aff'g s. c., 96 Ill. App. 315.

But not while fireman was off duty. *Davis v. Atlantic &c. R. Co.*, 63 S. C. 370.

(d) WHO IS MASTER.

1. TEMPORARY TRANSFER OF AUTHORITY.

A charter gave over the absolute control of the vessel and crew. The latter were the servants of the charterer, though they still owed a general duty to the vessel owner. *Anderson v. Boyer*, 156 N. Y. 93.

The relation of master and servant exists where one is bound to render the service and the other to pay the stipulated consideration; so where owner of a building furnishes one of his servants, at the request of a contractor, to run an elevator for the use of the contractor's employes, he is liable for such servant's negligence. *Higgins v. Western Union &c. Tel. Co.*, 8 Misc. 433.

Inarman v. Bennett, 6 M. & W. 500; *Gerlach v. Edelmeyer*, 47 N. Y. Super Ct. 292. See 88 N. Y. 645; *Annett v. Foster*, 1 Daly, 507; *Brooms Leg. Max.* 669; *Story's Agency sec.* 453b.

A member of one gang was directed by his foreman to work under the direction of the foreman of another gang. He was still a servant though the latter foreman supposed he was a volunteer. *Southern R. Co. v. Guyton*, 122 Ala. 231.

Where one person hired his wagon, team and teamster to another, the first will be liable for injuries caused by the running away of the same. *Crockett v. Calvert*, 8 Ind. 127.

Laugher v. Pointer, 5 Barn. & Cress. 578; *Jones v. Mayor, &c.* 14 Q. B. Div. 890; *Fenton v. Steam Packet Co.*, 8 Adol. & Ellis 835; *Dalyell v. Tyrer*, 28 L. J. Q. B. 52; *Meyant v. N. Y., &c. R. Co.*, 3 Duer, (N. Y.) 360; *Schular v. Hudson R. R. Co.*, 38 Barb. 653; *Bonifre v. Relyea*, 3 Abb. Pr. (N. S.) 259

Where a driver was the general servant of the defendant and paid by him, and not by contractor, the jury may rightly infer that the defendant, and not the contractor, was the master. *Reagan v. Casey*, 160 Mass. 374.

See *Kimball v. Cushman*, 103 Mass. 194; *Huff v. Ford*, 126 id. 24.

The manufacturer of an elevator is liable to a servant, who, at a purchaser's direction, commenced to load up the elevator and was injured by the falling of the same. *Necker v. Harvey*, 49 Mich. 517.

See, also, *Empire Laundry Machinery Co. v. Brady*, 60 Ill. App. 379.

The assent of the servant is necessary to constitute a transfer of his

relationship from one master to another. *Delaware &c. R. Co. v. Hardy*, 59 N. J. L. 35; s. c., 58 id. 205.

For example, where servants were sent to work under an independent contractor. *Missouri &c. R. Co. v. Ferch*, (Tex. Civ. App.) 36 S. W. Rep. 487.

Where the nature of the truck hired is to be temporarily changed by an additional structure, the driver becomes the special servant of the hirer. *Hardy v. Shedden Co.*, 78 Fed. Rep. 610.

2. INDEPENDENT CONTRACTOR.

"A." employed "B." to paint his house and agreed to erect a scaffold therefor without expense to "B." "A.'s" duty was to use reasonable care in erecting a scaffold, and, when through failure to do so, "B.'s" servant was injured, "A." was liable therefor. *Coughtry v. G. W. Co.*, 56 N. Y. 124, rev'g 1 S. C. R. (T. & C.) 452, and judg't of nonsuit.

From opinion.—"It is evident from the nature and position of the structure that death or great bodily harm to those persons would be the natural and almost inevitable consequence of negligently constructing it of defective material or insufficient strength. It was clearly the duty of the defendant and its agents to avoid that danger by the exercise of proper care. *Thomas v. Winchester*, 2 Seld. 397; *Godley v. Hagerty*, 20 Penn. St. R. 387; *Cook v. N. Y. Floating Dry Dock Co.*, 1 Hilt. 436. This duty was independent of the obligation created by the contract. If neglected, it would be no answer to the action to say that the defendant was also guilty of a breach of its contract; nor would it be any better answer to say that by the terms of the contract it was permitted so to construct the scaffold as to imperil the lives of the workmen."

A carpenter, building cattle stalls on the upper deck, went at night with the engineer below, where the latter placed the plaintiff's tools in the boiler to conceal. In the morning, the plaintiff, while going to get them, fell in a hole, etc. Held, he was about his own business and the defendant was not liable. *Belford v. Canadian Shipping Co.*, 35 Hun, 347, aff'g judg't of nonsuit.

Citing *Severy v. Nickerson*, 120 Mass. 306; *Zoebisch v. Tarbell*, 10 Allen, 385.

Master was not liable where he had no control over the place for work which was constructed by another contractor. *Whallon v. Sprague Electric Elevator Co.*, 1 App. Div. 264.

Duty to furnish safe appliances is raised toward servants of independent contractors where the masters combine their forces to accomplish together the work each is required to do separately. *Hannigan v. Union Warehouse Co.*, 3 App. Div. 618.

Servant cannot recover from master for negligent acts of competent servants of master's independent contractor. *Wittenberg v. Freiderich*, 8 App. Div. 433.

Plaintiff and his foreman were directed to do the work assigned by engineer of their employer's employer. Such engineer did not represent their employer, but his employer. *Brown v. Terry*, 67 App. Div. 223.

The right of the owner to prescribe the order, etc., of materials placed in the building, to control the removal of an employé, as well as the general supervision of and approval of the work, did not make the servants of the independent contractor, those of the owner. *Callan v. Bull*, 113 Cal. 593.

Nor did the right to supervise the work. *Pioneer &c. Co. v. Hansen*, 176 Ill. 100; aff'g s. c., 69 Ill. App. 659.

A "boss roller" paid his own expenses and controlled the details of his work but others retained control of the finished product and power to discharge his employés. He was held a servant. *Indiana Iron Co. v. Cray*, 19 Ind. App. 565.

See, also, *Reiser v. Detroit Steel &c. Works*, 109 Mich. 244; *Barg v. Bousfield*, 65 Minn. 355.

Employé of a contractor, paid by the number of men employed, but under direct control of contractor's employer, were held latter's servants. *Dehority v. Whitcomb*, 13 Ind. App. 558.

See, also, *Southern Cotton-Oil Co. v. Wallace*, (Tex. Civ. App.) 54 S. W. Rep. 638.

Relationship of independent contractor was not changed by employer's agreement to furnish appliances, where their selection was left to the former. *McCall v. Pacific Mail S. S. Co.*, 123 Cal. 42.

The owner, on the other hand, by undertaking to furnish employés of a contractor with appliances, becomes bound to see that they are suitable. *Green v. Sansom*, 41 Fla. 94.

See, also, *Neimeyer v. Weinhaeuser*, 95 Iowa, 497; *Covington &c. Bridge Co. v. Goodnight*, (Ky.) 60 S. W. Rep. 415; *Jeffries v. De Hart*, 96 Fed. Rep. 494.

Sub-contractor was not liable for injury to his employé working around an unanchored cornice. The contractor's superintendent persuaded him to go on and agreed to assume the risk. *Winkle Terra Cotta Co. v. Homersky*, 77 Ill. App. 42; s. c. aff'd, 178 Ill. 562.

Contractor must use reasonable care to protect an employé of a sub-contractor. *Dettmering v. English*, (N. J. L.) 44 Atl. Rep. 855.

3. LESSEE.

Lessee corporation held not liable for injury from its machinery to plaintiff laying a brick wall under contract with the lessor. *Horton v. Vulcan Iron Works Co.*, 13 App. Div. 508.

Employer is as liable for defects in a hired machine which is operated under his direction as if he owned it. *Higgins v. Williams*, 114 Cal. 176.

Lessee had complete control of the employment of servants in the factory as well as the management of the business, only turning over the profits, above a certain amount. The lessor was not the master of the factory hands. *Ault Wooden-Ware Co. v. Barker*, (Ind. App.) 58 N. E. Rep. 265.

But, see, *Consolidated Coal Co. v. Seniger*, 179 Ill. 370; aff'g s. c. 79 Ill. App. 456.

Lessee company held not liable to its servants for acts of servants of lessor. *Brady v. Chicago &c. R. Co.*, 114 Fed. Rep. 100.

4. JOINT LIABILITY.

The plaintiff's intestate was killed by the fall of a platform erected and maintained by "A." and "B.," through the fault of "C.," whose duty it was to look after it. All three were held liable. Active negligence holds a co-servant for negligence, as well as his principals. *Murray v. Usher*, 117 N. Y. 542, aff'g 46 Hun, 404, and judg't for pl'ff.

Hogan v. Smith, 125 N. Y. 774, rev'g judg't for pl'ff.

From opinion.—"They (the servants) built the stool and laid the plank for their own convenience in doing the work for which they were hired, and it was not the master's duty to do either. If he was bound to furnish the necessary means and material, there is no suggestion even of a failure in that respect. The injury happened not from an inadequate supply of boards, or any defect in those supplied, but from the negligent manner in which the workmen used them. The evidence shows that it was their duty and their privilege in the place furnished by the master and with the material supplied by him, to do the work in their own customary way; that it was for them to lay the plank and build the 'stool' and do what was necessary to accomplish the loading with safety and convenience. Bags for the 'stool' and plank for the beams were supplied in abundance, and it was not the master's duty to lay the platform or build the 'stool,' but those duties were matters of detail in the performance of the servant's work. If it be true that the deceased commenced his labor after the 'stool' had been built and without knowledge of the omitted plank, and the consequent possibility of danger, that simply tends to free him from the charge of contributory negligence, but does not alter the relation of the master to the servants and their work."

Servant of vendee did not cease to be such because the installation of a heater was the joint work of the vendor and vendee. *Old Times Distillery Co. v. Zehnder*, (Ky.) 52 S. W. Rep. 1051.

Maintenance of a roadbed was to be charged to joint account of two companies. Workmen engaged thereon were not the individual servants of either company. *Louisville &c. R. Co. v. Chesapeake &c. R. Co.*, (Ky.) 53 S. W. Rep. 277.

See, also, *Dieters v. St. Paul Gaslight Co.*, (Minn.) 91 N. W. Rep. 15.

That trains ran upon the tracks of another whose duty it was to repair, was no defense. *Story v. Concord &c. R. Co.*, (N. H.) 48 Atl. Rep. 288.

But see, *Atwood v. Chicago &c. R. Co.*, 72 Fed. Rep. 447.

Both the master and the company delivering it, a defective car, are liable. *Pennsylvania R. Co. v. Meyers*, 12 Oh. C. C. 263.

(e). MUNICIPALITY.

The work of constructing a sewer is a ministerial act making the city, hiring the workmen, their master. *Donahoe v. Kansas City*, 136 Mo. 657.

City's liability for a defect in the street is no different to an employé than to any citizen. *Kansas City v. McDonald*, 60 Kan. 481; s. c., 45 L. R. A. 429.

See, also, *Thompson v. Winston*, 118 N. C. 662.

See, also, "Municipality," *post*, p. 1807.

III. Degree of Care Required by Master.

(a). MASTER NOT AN INSURER OF SERVANT'S SAFETY.

Master is not liable for accidents. *Stewart v. Seaboard &c. R. Co.*, (Ga.) 41 S. E. Rep. 981.

See, also, *Bingham v. Caroline &c. R. Co.*, (N. C.) 41 S. E. Rep. 807.

Master is not an insurer. *Indianapolis &c. R. Co. v. Troy*, 91 Ill. 474; *Wabash &c. R. Co. v. Moran*, 13 Ill. App. 72; *Western Screw Co. v. Johnson*, 86 Ill. App. 89; *Atchison &c. R. Co. v. Winston*, 56 Kan. 456.

Though the servant is a minor. *Swift & Co. v. Holoubek*, 55 Neb. 228.

Master is liable for negligence in providing machine, even if injury would not have happened, had co-employé observed care in its use. *Sherman v. Menominee &c. Co.*, 72 Wis. 122.

(b). LIABLE FOR INJURY DUE TO LACK OF ORDINARY CARE.

The master, except as hereinafter stated, is required to exercise certain care to provide for the safety of his servants. That care is not the very highest diligence practicably attainable; but is usually considered to be that reasonable care that a man of ordinary prudence would exercise under the circumstances. *Painton v. Northern Cent. R. Co.*, 83 N. Y. 7.

Burke v. Witherbee, 98 N. Y. 562; *Probst v. Delemater*, 100 id. 266; *Marsh v. Chickering*, 101 id. 390; *Abel v. Prest. D. & H. C. Co.*, 103 id. 581; *Hickey v. Taaffe*, 105 id. 26; *Kern v. DeCastro, &c. Co.*, 125 id. 50; *Carlson v. P. B. Co.*, 132 id. 277; *Harley v. Buffalo Car Mfg. Co.*, 142 id. 31; *Smoot v. Railway Co.*, 67 Ala. 13; *St. Louis, &c. R. Co. v. Rice*, 51 Ark. 467; *Atlanta &c. R. Co. v. Ray*, 70 Ga. 678; *Chicago &c. R. Co. v. Avery*, 109 Ill. 314; *Louisville &c. R. Co. v. Buck*, 116 Ind. 566; *Cincinnati &c. R. Co. v. Rolsch*, 126 id. 445; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; *Lawless v. Conn. R. Co.*, 136 id. 1; *Eicheler v. Hanggi*, 40 Minn. 263; *Covey v. R. C.*, 86 Mo. 635; *Gutridge v. Mo. Pac. R. Co.*,

94 id. 468; *New Orleans &c. R. Co. v. Hughes*, 49 Miss. 258; *Little Miami R. Co. v. Fitzpatrick*, 42 Ohio st. 318; *McCombs v. Pittsburg &c R. Co.*, 130 Penn. St. 182; *Washington &c. R. Co. v. McDade*, 135 U. S. 571; *Johnson v. Ashland Water Co.*, 71 Wis. 553; *Wilson v. Willimantic &c. R. Co.*, 50 Conn. 433.

A high degree of care required. *Toledo &c. R. Co. v. Fredericks*, 71 Ill. 296.

Master is not bound to take more care of the servant than the servant does of himself. *Karr Supply Co. v. Kroenig*, 167 Ill. 560; rev'g s. c., 63 Ill. App. 219.

Care due a servant carried in an elevator is that due to a servant not that due to a "passenger." *McGregor v. Reid &c. Co.*, 178 Ill. 464; rev'g s. c., 76 Ill. App. 610.

Defendant does not use reasonable diligence where he knows of a precaution that is necessary to provide for the safety of his employes. *Coal Valley Min. Co. v. Haywood*, 98 Ill. App. 258.

See, also, *Downey v. Gernim Min. Co.*, (Utah) 68 Pac. Rep. 414.

Reasonable care depends upon the character of the service required and the dangers an ordinarily prudent man might apprehend. *Ashland Coal &c. Co. v. Wallace*, 101 Ky. 626.

See, also, *Boyd v. Blumenthal*, (Del.) 52 Atl. Rep. 330; *Oliver v. Ohio River Co.*, 42 W. Va. 703; *Schwartz v. Shull*, 45 W. Va. 405, in case of a manufacturer of dynamite.

But not such care and prudence as one skilled in that business would observe. *English v. Galveston &c. R. Co.*, 22 Tex. Civ. App. 3.

The reasonable care both are required to take depends upon the relative positions of each. *Leak v. Carolina C. R. Co.*, 124 N. C. 455.

The degree of care depends upon the relation of the parties; the quantity thereof, upon the conditions surrounding them. *Galveston &c. R. Co. v. Gormley*, 91 Tex. 393.

So long as it amounts to the care which would be observed by ordinarily prudent persons in similar circumstances. *Texas M. R. Co. v. Taylor*, (Tex. Civ. App.) 44 S. W. 892.

(c). BUT NOT FOR THE LACK OF EXTRAORDINARY CARE.

Master is not held to the extraordinary care necessary to anticipate and provide against a danger not ordinarily to be foreseen. *Del Sejnore v. Hallman*, 153 N. Y. 274.

There being no inherent danger in the act directed. *Coosa Mfg. Co. v. Williams*, (Ala.) 32 South. Rep. 232.

For example where rope slipped while plaintiff was engaged in handling a fender during towage operations. *Independent Tug Line v. Jacobson*, 84 Ill. App. 684.

So when a small piece of iron chipped off and struck plaintiff's eye,

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while engaged in foreign operations. *Webster Man. Co. v. Nisbett*, 87 Ill. App. 551.

So where bacteria, produced in defendant's packing house, got into plaintiff's eye. *Hysell v. Swift & Co.*, 78 Mo. App. 39.

Master not being bound to anticipate a possible but only a reasonable probable contingency. *Beasley v. Linehan Transfer Co.*, 148 Mo. 413.

"All reasonable means in their power" calls for too high a degree of care on the part of a railroad. *Houston &c. R. Co. v. Hartnett*, (Tex. Civ. App.) 48 S. W. Rep. 773.

See, also, *Texas C. R. Co. v. Lyons*, (Tex. Civ. App.) 34 S. W. 362.

Defendant was not chargeable where the conditions were not known to be particularly hazardous, especially one which the employé could look out for better than a superintendent. *Roytio v. Litchfield*, 113 Fed. 240.

IV. Master's Duty.

(a). MACHINERY, APPLIANCES AND PLACE TO WORK.

1. DUTY TO USE ORDINARY CARE TO PROVIDE SUCH AS ARE REASONABLY SAFE FOR THEIR PURPOSE.

There is a general but not entire uniformity of decision respecting the several duties required of a master to his servant.

It is usually considered that the master must use the care requisite to furnish at the outstart for his servants reasonably safe machinery, appliances, tools, a safe place to work, and sufficient and competent fellow servants.

See *Smoot v. Railway Co.*, 67 Ala. 13; *St. Louis R. Co. v. Rice*, 51 Ark. 467; *Arizona Lumber &c. Co. v. Mooney*, (Ariz.) 42 Pa. Rep. 952; *Beeson v. Green Mt. Co.*, 57 Cal. 20; *Wilson v. Willimantic L. Co.*, 50 Conn. 433; *Atlantic &c. R. Co. v. Ray*, 70 Ga. 678; *Chicago &c. R. Co. v. Avery*, 109 Ill. 314; *Krueger v. Railway Co.*, 111 Ind. 51; *Brann v. Railway Co.*, 53 Iowa 595; *Atchison &c. R. Co. v. McKee*, 37 Kan. 592; *Towns v. Railway Co.*, 37 La. Ann. 632; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; *Wonder v. Baltimore, &c. R. Co.*, 32 Md. 411; *Fox v. Iron Co.*, 89 Mich. 393; *Brown v. Railway Co.*, 27 Minn. 162; *Howd v. Miss. R. Co.*, 50 Miss. 178; *Corey v. Railway Co.*, 86 Mo. 635; *Jacques v. Man. Co.*, 66 N. H. 482; *Atl. 552*; *Ell v. No. Pac. R. Co.*, 1 N. D. 336; *Little Miami R. Co. v. Fitzpatrick*, 42 Oh. St. 318; *Curlson v. Railway Co.*, 21 Or. 450; *Lewis v. Seifert*, 116 Pa. St. 628; *Brodeur v. Valley Falls Co.*, 16 R. I. 448; *Calvo v. Railway Co.*, 23 S. C. 528; *International &c. Co. v. Ryan*, 82 Tex. 565; *Northern P. R. Co. v. Herbert*, 116 U. S. 650; *Davis v. Central Vt. R. Co.*, 55 Vt. 84; *Sayward v. Carlson*, 1 Wash. 29; *Brabbitts v. Railway Co.*, 38 Wis. 289.

There is always an alternative of this rule, viz., unless otherwise

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specifically commanded by law, the master may, as regards his servant, use such machinery, appliances, etc., as he wishes, if he only apprise a servant, unaware of their dangers, that such dangers exist. *Sweeney v. Berlin &c. Co.*, 101 N. Y. 520.

Tuttle v. Detroit &c. R. Co., 122 U. S. 189; *Richards v. Rough*, 53 Mich. 212; *Hayden v. Smithville Man. Co.*, 29 Conn. 548, 558; *Leary v. R. Co.*, 139 Mass. 580; *Coombs v. New Bedford Co.*, 102 Mass. 572; *Hughes v. Winona Co.*, 27 Minn. 137; *Anthony v. Leeret*, 105 N. Y. 591.

Thus, where defendant was obliged to build scaffold for the use of carpenters and he told the *contractor* for the mason work, that he could use it for such work at his own risk, and contractor's employé was hurt by its falling, defendant not liable. *Larock v. Ogdensburgh & L. C. R. Co.*, 26 Hun, 382, aff'g nonsuit.

Where servant was killed by overhanging bank of earth the question was not whether the master omitted something which he might have done, but did he do anything or omit anything, in the exercise of ordinary care, which a prudent and careful man would have done. *Leonard v. Collins*, 70 N. Y. 90.

Degree of care increases in proportion to the danger involved. *Harroun v. Brush &c. L. Co.*, 12 App. Div. 126.

Croker v. Pusey &c. Co., 3 Penn. (Del.) 1.

A permanent structure must be suitable for the purpose for which it was designed, without further work thereon. *Stock v. Le Boutillier*, 19 Misc. 112; aff'g s. c., 18 id. 349.

Reasonable care as to a new device, demands some precaution against dangers which may be ordinarily incident but as yet unknown. *Hasketh v. New York &c. R. Co.*, 37 App. Div. 78.

Master's duty is to use all reasonable and proper care in the selection and superintendence of operatives, machinery, appliances and all appointments and "its liability should be limited to a failure to meet its obligations in this respect." *Atlanta &c. R. Co. v. Ray*, 70 Ga. 674.

Reasonable care must be used in the selection of materials. *Ambrose v. Angus*, 61 Ill. App. 304.

Of machinery and appliances. *Wabash R. Co. v. Farrell*, 79 Ill. App. 508.

See, also, *Chesson v. John L. Roper Lumber Co.*, 118 N. C. 59; *Garnett v. Phoenix Bridge Co.*, 98 Fed. Rep. 192.

In providing a safe place for work. *Ross v. Shanley*, 86 Ill. App. 144; *Western Screw Co. v. Johnson*, 86 Ill. App. 89.

See, also, *Frye v. Bath Gas &c. Co.*, 94 Me. 17; *Hinrod Coal Co. v. Clark*, 99 Ill. App. 332; *Baltimore &c. R. Co. v. Clifford*, 99 Ill. App. 381; *Lauter v. Duck-*

worth, 19 Ind. App. 535; Van Steenburgh v. Thornton, 58 N. J. L. 160; Knoxville Iron Co. v. Pace, 101 Tenn. 476; Mason &c. R. Co. v. Yockey, 103 Fed. Rep. 265.

Appliances must be reasonably safe to one using them with ordinary care towards himself. *Meyer v. Meyer*, 86 Ill. App. 417.

A reasonably safe place to work held to be one that does not expose one to unnecessary risk. *Ashland Coal &c. Co. v. Wallace*, 101 Ky. 626.

Master's duty is to provide appliances or instrumentalities with care commensurate with the risks to his laborers, and to continue to see that they were in proper and safe condition. *Hoar v. Merritt*, 62 Mich. 386.

Master is not confined in his selection of machinery as long as that chosen is reasonably safe. *Bender v. St. Louis &c. R. Co.*, 137 Mo. 240.

Master owes the same duty to servants as to licensees to protect them against pitfalls. *Irmer v. St. Louis Brew. Co.*, 69 Mo. App. 17.

Machinery must be adequate as well as safe. *Cameron v. Great Northern R. Co.*, 8 N. D. 124.

See, also, *Lake Shore &c. R. Co. v. Corcoran*, 3 Oh. Dec. 641; *Mangumy, Bullion Beck &c. Min. Co.*, 15 Utah, 534; *Chesapeake &c. R. Co. v. Lash*, (Va.) 24 S. E. Rep. 385.

Ordinarily care is the measure of duty. *The Oriental v. Barclay*, 16 Tex. Civ. App. 193.

Texas & P. R. Co. v. Barrett, 166 U. S. 617; *McGowan v. Chicago &c. R. Co.*, 91 Wis. 147.

An engineer's skill does not lessen the railroad company's duty to use ordinary care to furnish a safe engine or a safe road bed to run on. *Galveston &c. R. Co. v. Smith*, 24 Tex. Civ. App. 127.

Duty to provide includes duty to keep in repair. *Hill v. Southern P. Co.*, 23 Utah, 94.

Master not an insurer of absolute, or even reasonable, safety:

Master is not an insurer. *Biddiscomb v. Cameron*, 35 App. Div. 561; s. c. aff'd, 161 N. Y. 637.

See, also, *Chicago &c. R. Co. v. Garner*, 78 Ill. App. 281; *Chicago &c. R. Co. v. Lee*, 17 Ind. App. 215.

Brakeman was killed; supposed to be from defective ladder to freight car. Master is not bound absolutely to furnish safe machinery, nor does he guarantee it. It must be shown that he knew or ought to have known of defects. *Jones v. N. Y. C. & H. R. R. Co.*, 22 Hun, 284, granting new trial after verdict for plaintiff.

From opinion.—"If injury arises from defect or insufficiency in the machinery or implements furnished to the servant by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the same, through his own negligence and want of proper care. In other words, it must be shown that he either knew, or ought to have known,

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the defect which caused the injury." *Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 566; *Warner v. Erie Ry. Co.*, 39 id. 468; *Faulkner v. Erie R. Co.*, 49 Barb. 324; *Malone v. Hathaway*, 64 N. Y. 5; *DeGraff v. N. Y. C. & H. R. R. Co.*, 76 id. 125; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Wharton Law of Negligence*, secs. 211, 212, 232.

Chapter 398 of the Laws of 1890 does not make the proprietor of a factory an insurer of the safety of his employés, nor does it require him to guard against extraordinary accidents which a careful and prudent man could not foresee or anticipate as liable to occur. His duty is fully performed when he furnishes a cover or guard for machinery sufficient to protect his employés against accidents which may reasonably be apprehended as likely to occur. *Cobb v. Welcher*, 75 Hun, 283.

Care necessary to make appliances and places to work only reasonably safe and suitable, is demanded. *Quinlivan v. Buffalo &c. R. Co.*, 52 App. Div. 1.

See, also, *Rollings v. Levering*, 18 App. Div. 223; *Schmidt v. Gillen*, 41 id. 302; *Chicago &c. R. Co. v. Lee*, 17 Ind. App. 215; *Hughley v. Wabash*, 69 Minn. 245; *Brown v. Hershey Land &c. Co.*, 65 Mo. App. 162; *Lake Shore &c. R. Co. v. Gilday*, 16 Oh. C. C. App. 649; *Texas &c. R. Co. v. McCoy*, 90 Tex. 264; *Bering Man. Co. v. Peterson*, (Tex. Civ. App.) 67 S. W. Rep. 133; *Norfolk &c. R. Co. v. Phillips*, 100 Va. 362.

That employés were in the habit of crossing tracks at a certain place does not impose the duty upon an engineer of being on a constant look-out thereat. *Martin v. Chicago &c. R. Co.*, 194 Ill. 138; rev'g s. c., 92 Ill. App. 133.

Duty is not to furnish reasonably safe and suitable tools, etc., but to use reasonable care to do so. *Belleville &c. Works v. Bender*, 69 Ill. App. 189.

See also, *Gormully &c. Man. Co. v. Olsen*, 72 Ill. App. 32; *Chicago &c. R. Co. v. Oyster*, 58 Neb. 1; *Texas &c. R. Co. v. Kings*, 14 Tex. Civ. App. 290; *Gulf &c. R. Co. v. Beall*, (Tex. Civ. App.) 43 S. W. Rep. 605; *Southern R. Co. v. Mauzy*, 98 Va. 692; *Choctaw &c. R. Co. v. Holloway*, 114 id. 458.

Requirement to make the place as safe as human foresight can know, was too onerous. *Southern Indiana R. Co. v. Moore*, 29 Ind. App. 52.

Degree of care required of master is not such as to give the servant the right to rely on any "implied insurance that the place is safe." *Lanza v. La Grand Quarry Co.*, 115 Iowa, 299.

Tools that are safe when used with ordinary care, are sufficient. *Pittsburg &c. R. Co. v. Sentmeyer*, 92 Pa. St. 276.

That care is not such as is commensurate with the danger reasonably to be apprehended (thawing dynamite) but only such as a reasonably prudent person would use under similar circumstances. *Bertha Zinc Co. v. Martin*, 93 Va. 791.

Ordinary care does not require master to provide safest or best:

It is the right of the company to determine how powerful an engine shall be used in any emergency, and it is not liable to an employé injured by the failure to use an engine of more power and this, although the original power of the engine used had been reduced by a defect. *Bajus v. Syracuse, B., N. Y. R. Co.* 103 N. Y. 312, rev'g 34 Hun, 153, and judg't for pl'ff.

The best possible appliances are not required, but they must be reasonably safe and suitable and such as ordinarily used, and in good repair. *Hickey v. Taaffe*, 105 N. Y. 26, rev'g 32 Hun, 7, and judg't for pl'ff.

Stringham v. Hilton, 111 N. Y. 188.

Kern v. DeCastro & Co., 125 N. Y. 50; *Salters v. D. & H. C. Co.*, 3 Hun, 338 (target switch); *Coppins v. N. Y. C. R. Co.*, 43 id. 26 (patent switch); *Gordon v. Reynolds Card Co.*, 47 id. 278 (claim that there should have been some additional way to stop machinery in which man caught his arm); *Cobb v. Welcher*, 75 id. 28; *Kinsley v. Pratt*, 75 id. 322; *Jacobson v. Cornelius*, 52 id. 377; *Kemmerer v. Man. R. Co.*, 81 id. 444; *Cooper v. Central & C. R. Co.*, 44 Iowa, 134; *Greenleaf v. Ill. Cent. R. Co.*, 29 id. 15; *Richmond & C. R. Co. v. Jones*, 92 Ala. 218; *Missouri & C. R. Co. v. White*, 76 Texas, 102.

A master is not bound to furnish the best known appliances but only such as are reasonably safe, so far as the employé is concerned. The test is not whether he could have done something better, or have obtained better machinery, but whether his selection was reasonably prudent and whether the machinery was in proper form for the use required of it. *Kern v. De Castro & D. S. R. Co.*, 125 N. Y. 50, rev'g judg't for pl'ff.

Harley v. Buffalo Car. Manuf. Co., 142 N. Y. 31. It is culpable negligence and not mere error of judgment that makes the master liable.

A railway company is bound to place its employés under no risk from imperfect or inadequate appliances, but is not bound to use a target switch to guard against the negligence of a co-employé. *Salters v. D. & H. C. Co.*, 3 Hun, 338, rev'g judg't for pl'ff.

Piper v. N. Y. C. R. Co., 1 N. Y. S. C. Rep. 290.

Brakeman on the main track was injured by a switch from cross-over track left open; plaintiff claimed that if the *patent* switch had been used the accident would not have happened. This was left to the jury. Error. *Coppins v. N. Y. C. & H. R. R. Co.*, 43 Hun, 26, rev'g judg't for pl'ff.

From opinion.—"Employers are not bound to insure against accidents; 'in the case of employés they are only obliged to provide appliances which are safe so long as used without negligence; the employé takes the risk of danger from negligence of his co-employé.' *Burke v. Witherbee*, 98 N. Y. 562; *Rummell v. Dillworth*, 3 Eastern Rep. 820; *Salters v. Delaware and Hudson Co.*, 3 Hun 338; *Piper v. Railroad Co.*, 1 T. & C. 290.

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In the case last cited Boardman, J., remarked viz: 'If a common switch is properly cared for it is as safe as any other.' See, also, *Bajus v. S. B. & N. Y. R. Co.*, 25 Week. Dig. 5; *Randall v. B. & O. R. Co.*, 109 U. S. 478; *Sammon v. The N. Y. & Harlem R. Co.*, 62 N. Y. 255; *Gage v. D., L. & W. R. Co.*, 14 Hun 447. Between employer and employé the law does not require the safest appliances or instruments, nor does it fix a liability upon the employer 'for the failure to discard' those which are not safest for every exceptional exigency. *Thomp. on Neg.* 983."

Plaintiff, aged eighteen, working about four months feeding paper between rollers, caught his hand in same; he claimed that the defendant was negligent, because no way was provided to stop the rollers except prying off the driving belt. Defendant not liable. *Gordon v. Reynolds Card Man. Co.*, 47 Hun, 278, aff'g judg't of dismissal.

Plaintiff, eighteen years old, who for six months had been in the defendant's factory, caught his arm in belting. Held, that the defendant was not liable; that he was not obliged to furnish counter-shaft and fast and loose pulley more safely to move, connect and disconnect the power. *Jacobson v. Cornelius*, 52 Hun, 377, aff'g judg't of nonsuit.

Citing *Lafin v. Buffalo, &c. R. Co.*, 106 N. Y. 136.

Master was not obliged to provide a device that would prevent the moving of a lever which regulated the passage of a blast, which killed a trackman while cleaning a hot blast oven. *Dana v. Crown Point Iron Co.*, 67 Hun, 586.

In the boiler of the locomotive there were two injectors located for the purpose of taking water when required from the tank into the boiler. Upon the boiler were gauge cocks accessible to the engineer, by which he could test the height of the water in the boiler, and ascertain whether it contained an adequate quantity for the purpose of steam and safety. Upon opening the gauge cocks there was some difficulty in distinguishing between the emission of water and steam, while a well-sustained light upon the test valves would render it more convenient to discover in the night time whether water was discharged from the test valves when opened, the absence of such a light only required more care to be exercised in doing so.

That the defendant was not bound to furnish a fusible plug in the crown-sheet of the boiler. The defendant was not liable for injury from explosion. *Leary v. Lehigh Valley R. Co.*, 76 Hun, 575.

Where an elevated railway company has used a system of fog signals for over fourteen years without accident, it will be justified in continuing to use such system without negligence being imputed to it in that regard, and if it has in use a system which is reasonably safe, the fact that another system which could have been maintained by it was somewhat bet-

ter than the one used, will not be sufficient to establish negligence. *Kemmerer v. Man. R. Co.*, 81 Hun, 444.

Duty is not to provide the latest, most approved, or best-known appliances, but only such as are reasonably safe and suitable. *Spencer v. Worthington*, 44 App. Div. 496.

See, also, *O'Hare v. Keeler*, 22 App. 191; *Rosa v. Volkening*, 64 App. Div. 426; *Strattner v. Wilmington City E. Co.*, 3 Penn. (Del.) 245; *Chicago &c. R. Co. v. Lonergan*, 118 Ill. 41; *Chicago &c. R. Co. v. Finnan*, 84 Ill. App. 383; *Gaulden v. Kansas City &c. R. Co.*, 106 La. 409; *McGinnis v. Can. So. R. Co.*, 49 Mich. 466, 470; *Hathaway v. Mich. Cent. R. Co.*, 51 Mich. 253; *Stiller v. Bohn Man. Co.*, 80 Minn. 1; *Gray v. Commutator Co.*, 85 Minn. 463; *Kent v. Yazoo & M. V. R. Co.*, 77 Miss. 494; *Gardner v. St. Louis &c. R. Co.*, 135 Mo. 90; *Mulligan v. Montana U. R. Co.*, 19 Mont. 135; *National &c. Co. v. Luscomb*, 19 Oh. C. C. R. 673; *North. Cent. R. Co. v. Husson*, 101 Pa. St. 1; *Dwyer v. Shaw*, 22 R. I. 648; *Mississippi &c. Logging Co. v. Schneider*, 74 Fed. Rep. 195.

Nor the most effective. *Cleveland &c. R. Co. v. M'Clintock*, 91 Fed. Rep. 223.

Master is not negligent merely because he has not adopted a safer method of doing his business. *Degenhart v. Gent*, 97 Ill. App. 145.

Particularity is not prescribed as long as the conditions are fulfilled as to safety. *Wood v. Heiges*, 83 Md. 257.

Revolving shaft passed across a door way, but was plainly visible and in good repair. Master was not bound to alter the construction of his mill to make the place safer. *Lemoine v. Aldrich*, 177 Mass. 89.

Railway company is not bound to especially block frogs, if it would entail greater danger than it would avert. *McGinnis v. Canada &c. Co.*, 49 Mich. 466.

Railroad company need not remove bridge simply because an engineer thinks a wider one better, and more convenient. Servant assumes the risk discoverable by observation. *Illick v. Flint &c. Co.*, 67 Mich. 632.

Only such appliances as are in common and general use in similar work need be used. *Shadford v. Ann Arbor Street R. Co.*, 111 Mich. 390.

See, also, *Bonner v. Pittsburg Bridge*, 5 Pa. Super. Ct. 281; *Gulf &c. R. Co. v. Warner*, (Tex. Civ. App.) 36 S. W. Rep. 118.

Master not bound to secure best known materials, but such as are ordinarily used in the particular business. *Allison Man. Co. v. McCormick*, 118 Pa. St. 519.

No presumption of negligence on the part of master from mere fact of injury to servant; brakes to be furnished need only be such as were ordinarily used in similar business. *P. & R. R. Co. v. Hughes*, 119 Pa. St. 301.

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An improved appliance must have been in general use to make it negligence not to adopt it. *Lloyd v. Hanes & Co.*, 126 N. C. 359.

Railroad was held negligent in not using modern self-acting couplers. *Hardin v. North Carolina R. Co.*, 129 N. C. 354.

See, also, *Southern P. Co. v. Winton*, (Tex. Civ. App.) 66 S. W. Rep. 477.

An employer is not bound to use the best machinery, but such as a reasonable and prudent person would ordinarily have used under the circumstances, so, explosion of a locomotive, may or may not be attributable to defendant's carelessness, according as to whether defect was one he should have been guarded against. *Ex Parte Johnson*, 19 S. C. 492.

See *Hull v. Hall*, 78 Me. 114; *Nelson v. Allen Paper Car-Wheel Co.*, 29 Fed. R. 840; *Philadelphia &c. R. Co. v. Keenan*, 103 Pa. St. 124; *C. R. I. &c. R. Co. v. Lonergan*, 118 Ill. 41; *P. R. Co. v. Mason*, 109 Pa. St. 296.

Nor to provide against unusual uses or conditions:

A force pump, used to apply whitewash to the defendant's premises, purchased a few days before, became clogged, and one of the defendant's machinists was directed to put it in order; upon the removal of the cap the compressed air blew the whitewash into his eyes, doing damage. The defendant had no reason to expect such a condition or such a result, and no recovery was allowed. *Kelley v. 42d Street &c. R. Co.*, 58 Hun, 93, rev'g judg't for pl'ff.

Citing *Probst v. Delamater*, 100 N. Y. 266; *Webber v. Piper*, 109 id. 496.

Premises need not be sufficient to withstand an unusual use. *Teetsel v. Simmons*, 88 Hun, 621.

See, also, *Illinois C. R. Co. v. Daniels*, 73 Miss. 258.

Number plate on an engine was insecure, but it was used by a servant to support himself while passing over the pilot. *McCauley v. Southern R. Co.*, 10 App. D. C. 560.

Brake staff was sufficient for the use for which it was designed, but not as a handhold for climbing on a moving car. *Elgin &c. R. Co. v. Docherty*, 66 Ill. App. 17.

A scaffold was subjected to a strain which it was not built to stand. *Chicago Architectural Iron Works v. Nagel*, 80 Ill. App. 492.

McLean v. Cole, 175 Mass. 5.

Heat caused by lack of ventilation in an engine shed, constructed as usual, is an extraordinary occurrence. *Western Stone Co. v. Earnshaw*, 98 Ill. App. 538.

An elevator constructed to carry freight, caused injury while being used to carry persons. *Sievers v. Peters Box &c. Co.*, 151 Ind. 642.

A railroad bridge must be safe for ordinary uses, but precautions for

the unexpected are not required, as guard rails and planking for walking across it. *Koontz v. Chicago &c. R. Co.*, 65 Iowa, 224; *Illick v. F. & P. &c. R. Co.*, 67 Mich. 632.

That a wooden horse used for hauling buckets to a roof, gave way upon being grasped by one falling from the roof, did not show it to be insufficient for the purpose for which it was designed. *Bell v. Refuge Oil-Mill Co.*, (Miss.) 27 South Rep. 382.

Not negligence because the slats of the pilot of an engine were not strong enough to ride on. *Young v. Boston &c. R. Co.*, 69 N. H. 356.

The canvas covering of an elevator shaft running on an incline was so covered with dirt as to give the appearance of being solid. Master not liable to servant who stepped on it. *Morrison v. Burgess &c. Co.*, 70 N. H. 406.

Where all the apparatus is in proper order and sufficient for ordinary purposes, master is not liable for an accident he had no reason to apprehend. *Carter v. Cape Fear Lumber Co.*, 129 N. C. 203.

So where he could not have foreseen the extraordinary strain to which his appliance would be put. *Throckmorton v. Missouri &c. R. Co.*, 14 Tex. Civ. App. 222.

So as to a failure to anticipate that an engine wiper would strike a splinter projecting from the edge of a driving wheel, where there were plenty of smooth places where he might have rested his hand. *McCain v. Chicago &c. R. Co.*, 76 Fed. Rep. 125.

Nor against negligence or incompetence of servants in their use:

Some longshoremen were employed to receive and store away bags of flour in the hold of a ship. To do this they built up a stool under the square of the hatch, consisting of boards laid upon bags of flour upon which some of the men stood and received the bags from above and passed the same to the employés below, who stored them. Usually the planks were extended some distance outside of the stool, so that the workmen could get out of the way of the descending bags. In this case this precaution was omitted, and one of the men was struck by a descending load and killed. The company had furnished sufficient planks for the purpose of building the stool. Company was under no obligation to build the same, but the work was entirely that of the longshoremen, and for their convenience, and if there was any negligence, it was theirs. The fact that the deceased man came to work after the stool was built, did not change the rule. *Hogan v. Smith*, 125 N. Y. 774, rev'g judg't for pl'ff.

Where appliances are suitable and rules have been made for their use, master need not take precaution to prevent their misuse. *Tully v. New York &c. R. Co.*, 10 App. Div. 463.

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Where the appliance is safe, master is not chargeable with negligent handling. *Faw v. Whitmore*, 37 App. Div. 98.

Minority does not *per se* raise the standard of care required of the master. *Alabama M. R. Co. v. Marcus*, 115 Ala. 389.

Appliances are proper that can be safely used. Though placed in the hands of one who is immature. *O'Keefe v. National &c. Co.*, 66 Conn. 38.

From the faulty use and not the imperfect construction of a ladder it slipped and threw plaintiff upon some knives. Defendant was liable. *Young v. Burlington Co.*, 79 Iowa, 415.

The master has the right to assume that his servants will adopt a reasonably proper method of performing the work. *Karr Supply Co. v. Kroenig*, 167 Ill. 560; rev'g s. c., 63 Ill. App. 219.

Master was not liable for servant's selection of the wrong appliance, it being sufficient for the use for which it was made. *Toohy v. Equitable Gas Co.*, 179 Pa. St. 437.

If master use the requisite care in selection and retention of servants, he is not liable for their negligence in the repair of machinery. *Knoxville &c. Co. v. Dobson*, 7 Lea, (Tenn.) 367.

But requires reasonable diligence to discover latent defects:

An employer is bound to use due care in furnishing the employé's fit and safe implements.

The eye-bolt of a brake-rod was defective. The master *had no notice of the defect* and it was not discoverable by inspection, but *could have been discovered in the course of manufacture*. It did not appear whether the eye-bolt was made by the company or purchased. Held, that on this showing alone, the defendant was not liable. There was evidence, however, *that the eye-bolt was smaller than that used by the defendant, at the time of the trial, and that the breaking of the chains had formerly been a frequent occurrence*, and several eye-bolts were submitted to the jury. It was held that the evidence of negligence was slight but sufficient to sustain the verdict. Where there is conflicting evidence, or inference may be drawn from circumstances in regard to which there is room for a difference of opinion, the case is for the jury. *Painton v. Northern Central R. Co.*, 83 N. Y. 7, aff'g judg't for pl'ff.

The care required of a master in the matter of tools is reasonable care and prudence. He is not liable for injuries, resulting from defects discoverable only by careful inspection.

The judge charged that the defendant must provide a safe cable for the hoisting derrick. The charge was too broad but the judgment was

sustained because there was no evidence of care on the part of the master in selecting the cable and attention of court was not called to error claimed. *Probst v. Delamater*, 100 N. Y. 266.

Harley v. Buffalo Car Co., 142 N. Y. 31.

A hook, while used in lifting an iron girder, broke and injured one of the defendant's workmen. The hook was one of a number made for the defendant from iron purchased of reputable dealers, and ordered as the best grade in the market. All the other hooks had proved sufficient and this had been in use for three months. Its external appearance did not indicate its weakness, which resulted from a hidden defect in the iron. The defendant was not liable. *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273; aff'g 55 Hun, 485, and judg't for def't.

Defective ladder on freight car. *Jones v. N. Y. C. R. Co.*, 22 Hun, 284, s. c., 28 Hun, 364.

Murtaugh v. N. Y. C. R. Co., 49 Hun, 456; *Ballard v. Hitchcock Co.*, 51 id. 188; *Racine v. N. Y. C. R. Co.*, 70 id. 453.

Plaintiff, at the tail of a cart, shoveling in dirt; horse threw around his head and the bridle of rein caught on the hook of the saddle and the horse backed the plaintiff against a bank and hurt him. Plaintiff claimed hook improper, etc. Hook was not the proximate cause. No recovery. *Kerrigan v. Hart*, 40 Hun, 389, aff'g judg't of nonsuit.

The boiler, about a week before the accident, was discovered by the engineer to be white. A careful examination was made but no weakness was discovered. Thereafter it resisted a test of 145 pounds pressure, its maximum capacity, but subsequently exploded under a pressure of 110 pounds. The negligence of the master was not established, as the machinery was apparently in a safe condition, and injury resulted from a latent weakness, not discoverable by exercise of ordinary care. *Racine v. N. Y. C.*, 70 Hun, 453, aff'g nonsuit.

Employer is negligent if he knew or by the exercise of reasonable care might have known of latent defect. *Whitney &c. Co. v. O'Rourke*, 172 Ill. 177; aff'g s. c., 68 Ill. App. 487.

See, also, *Purcell Mill & E. Co. v. Kirkland*, (I. T.) 47 S. W. Rep. 311; *Doyle v. Missouri &c. R. Co.*, 140 Mo. 1; *Bullmaster v. St. Joseph*, 70 Mo. App. 60; *O'Donnell v. Sargent*, 69 Conn. 476.

Though he is not an insurer against such defects. *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315; aff'g s. c., 68 Ill. App. 523.

See, also, *Sanden v. Bannon*, 85 Ill. App. 17; *Roughan v. Boston, &c. Block Co.*, 36 N. E. (Mass.) 461; *Girard v. Griswold*, 177 Mass. 57; *Curley v. Hoff*, 62 N. J. L. 758; *Pippin v. Sherman &c. R. Co.*, (Tex. Civ. App.) 58 S. W. Rep. 961.

Ladd v. R. Co., 119 Mass. 412; *Holden v. R. Co.*, 129 id. 268; *Spicer v. Iron Co.*, 138 id. 426; *Moynihan v. Hills Co.*, 146 Mass. 586; *Bradbury v. Kingston*

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Coal Co., 157 Pa. St. 231; Reilly v. Campbell, 59 Fed. Rep. 990; McMullan v. Carnegie Bros. &c. 158 Pa. St. 518.

Master is responsible for latent defects of which he could have known. *Carroll v. Tidewater Oil Co.*, (N. J. L.) 52 Atl. Rep. 275.

Alexander v. Pennsylvania Water Co., 201 Pa. St. 252; Throckmorton v. Missouri &c. R. Co., 14 Tex. Civ. App. 222.

An employer is bound to the exercise of greater diligence in discovering latent defects than an employé. *Pennsylvania Co. v. Witte*, 15 Ind. App. 583.

Mellott v. Louisville &c. R. Co., 101 Ky. 212; Chicago &c. R. Co. v. Kellogg, 54 Neb. 127.

Master must avail himself of scientific information which has become readily attainable, whereby he may discover latent danger. *Hysell v. Swift & Co.*, 78 Mo. App. 39.

And guard against latent dangers:

Master must observe and guard against danger from the compactness of a pile of ore, to be blasted loose, about which it sends men to work. *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447.

Otherwise as to guarding the knives of a woodcutter where no one could use it without discovering the danger. *Guedelhofer v. Ersting*, 23 Ind. App. 188.

Master set an inexperienced girl of 15 at work passing linen through rollers from which the guard had been removed without any warnings of the danger. Recovery was allowed. *Levy v. Clark*, 90 Md. 146.

So where he allowed servant to pass along a place he knew to be dangerous without informing such servant. *Harder &c. Min. Co. v. Schmidt*, 104 Fed. Rep. 282.

So where he set a servant at work which required pushing blocks on a slide towards a saw, and the slide was unsupported near the saw and liable to be thrown off by slight pressure. *Stiller v. Bohn Man. Co.*, 80 Minn. 1.

Master needed only give the servant the means of protecting himself. *Durst v. Carnegie Steel Co.*, 173 Pa. St. 162.

Knowledge that a place in a mine is used as a passage way made it negligent to string a deadly electric wire there, without insulation. *Ellsworth v. Metheney*, 104 Fed. Rep. 119.

Whether duty discharged by use of customary appliances, methods, &c.:

An omission by an employer to provide against an alleged defect in machinery in ordinary use, which defect no one had been able to point

out, will not warrant a finding that the employer has failed in the discharge of his duties towards his employé.

The fact that machinery had started two or three times before the injury, when the cause thereof was not pointed out, did not show actionable negligence against the master, where it did injury from such starting. The machinery was of the usual kind. *Dingley v. Star Knitting Co.*, 134 N. Y. 552, aff'g judg't of nonsuit.

A servant was injured by the breaking of one of the fasteners which spliced a belt. There was a conflict of evidence as to which of several kinds of fasteners was best, but the fastener in question was extensively used. Such use did not constitute negligence. If even an insufficient number of fasteners were used, there was no evidence that this produced the injury, nor was there proof of such insufficiency. Sufficient were furnished by the master, and the co-employés were bound to properly use them to splice the belt, and if they did not do so, the fault was that of a co-employé. If there was any weakness in the fasteners, such imperfection not being visible by observation, defendant could not be made liable on that account. *Harley v. Buff. Car Man. Co.*, 142 N. Y. 31, rev'g judg't for pl'ff.

From opinion.—"The principles of law applicable to such a case as this have exposition in many decisions of this court. It is sufficient to cite the following: *Devlin v. Smith*, 89 N. Y. 470; *Burke v. Witherbee*, 98 id. 562; *Sweeney v. Envelope Co.*, 101 id. 520; *Bajus v. S. B. & N. Y. R. Co.*, 103 id. 312; *Hickey v. Taafee*, 105 id. 26; *Stringham v. Hilton*, 111 id. 188; *Buckley v. G. P. & R. M. Co.*, 113 id. 540; *Dobbins v. Brown*, 119 id. 188; *Cosulich v. S. O. Co.*, 122 id. 188; *Hart v. Naumburg*, 123 id. 641; *Kern v. DeCastro & D. S. R. Co.*, 125 id. 50; *Carlson v. P. B. Co.*, 132 id. 273.

The master does not guarantee the safety of his servants. He is not bound to furnish them an absolutely safe place to work in, but is bound simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known appliances, but only such as are reasonably fit and safe. He satisfies the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the master liable, not a mere error of judgment."

Plaintiff, defendant's employé, slipped on a floor made greasy by drip from machines, while he was feeding a press, and was thrown against the wheels of another press and injured. Defendant employed the usual method of collecting drip. Defendant not liable. *Clark v. Barnes*, 37 Hun, 389, aff'g judg't of nonsuit.

A workman, while cleaning a hot blast oven, was killed through the unexplained moving of a lever which regulated the passage of the blast, although no positive act of negligence on the part of defendant was

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shown. The machine was suitable and was reasonably safe to operate; its operation was a means of detail depending upon the care and fidelity of employes, who were not shown to be unfit, and a nonsuit was properly granted. Held, that the employer was not bound, under the circumstances, to provide some appliance that would have prevented the moving of the lever. *Dana v. Crown Point Iron Co.*, 67 Hun, 586, aff'g nonsuit.

A brakeman in his caboose was injured by a cross piece placed on the top of lumber, on a car of a passing train, and supporting pieces of timber longer than a single car, which became loose and was forced into the caboose. The lumber was loaded in the usual way and properly, and the cars were in good order and had gone one hundred miles in safety. The timber had, shortly before, been inspected, found to be secure and remained so until within a few rods of the accident. The complaint was properly dismissed, although one witness said he thought there were too many cross pieces too long for the cars, and liable to work out. *Knox v. N. Y., L. E. & W. R. Co.*, 69 Hun, 93, aff'g judg't of nonsuit.

Blasts had not been customarily covered and no previous accident had happened. Master was not liable. *Gallagher v. McMullin*, 25 App. Div. 571.

That machinery was dangerous does not create liability as long as it is of the kind ordinarily used for such work. *Washington &c. Tile Co. v. Mackey*, 15 App. D. C. 410.

Fick v. Jackson, Pa. 3 Super Ct. 378.

That the method of ballasting a track was customary, was no defense, where it was not shown to be reasonably safe. *Lake Erie &c. R. Co. v. Morrissey*, 177 Ill. 376.

See, also, *Martin v. California Co.*, 94 Cal. 326; *International &c. R. Co. v. Hawes*, (Tex. Civ. App.) 54 S. W. Rep. 325; *Sawyer v. Arnold Shoe Co.*, 90 Me. 369; *Geno v. Fall Mountain Paper Co.*, 68 Vt. 568.

Master had set up a custom that it was the duty of other contractors to construct scaffold sufficient for their own work and for plaintiff's. There was no consent by the plaintiff to be bound by it and recovery was allowed. *McBeath v. Rawle*, 192 Ill. 626; aff'g s. c., 93 Ill. App. 212.

Propriety in the use of a piece of machinery depends on its own sufficiency, not the relation it bears to others. *Wood v. Heiges*, 83 Md. 257.

That a movement for abolishing projecting set screws on shafts had been on foot for 10 years did not establish negligence, where they had not generally gone out of use. *Demers v. Marshall*, 178 Mass. 9.

The management of a railroad should be according to common custom. *Mich. Cent. R. Co. v. Coleman*, 28 Mich. 439.

Baxter v. Chicago &c. R. Co., 104 Wis. 307.

Master was not negligent, where the machine was of the usual kind and had been used for some time with satisfaction. *Cunningham v. Journal Co.*, 95 Mo. App. 47.

Corletti v. Southern P. Co., 136 Cal. 642; *Lanza v. Le Grand Quarry Co.*, 115 Iowa, 299.

Master was not bound to supply a belt shifter to a machine that had never had one. *Cushman v. Cushman*, 179 Mass. 601.

Master need not go beyond the adoption of such machinery as is in common and general use. *Omaha Bottling Co. v. Theiler*, 59 Neb. 257.

See, also, *Fritz v. Salt Lake & O. Gas & Electric Light Co.*, 18 Utah, 493; *Schultz v. Bear Creek Refining Co.*, 180 Pa. St. 272; *Higgins v. Fanning & Co.*, 195 id. 599.

Such is the exercise of the care ordinarily prudent men actually use under similar circumstances. *Toledo &c. R. Co. v. Beard*, 20 Oh. C. C. 681.

Though such appliances are not the best or safest. *Dooner v. Delaware &c. Canal Co.*, 171 Pa. St. 581.

Rogers v. Louisville &c. R. Co., 88 Fed. Rep. 462; *Innes v. Milwaukee*, 96 Wis. 170; *Prybilski v. Northwestern Coal R. Co.*, 98 Wis. 413.

And though the superintendent had promised to make a suggested improvement. *Leonard v. Hermann*, 195 Pa. St. 222.

See, also, *Higgins v. Fanning &c. Co.*, 195 Pa. St. 599.

Where machinery is dangerous, master must provide such safety devices as are in general use. *Bonner v. Pittsburg Bridge Co.*, 183 Pa. St. 195, 278.

Otherwise he is not liable for damages incident to its use. *Johnston v. Youghiogheny River Coal Co.*, 183 Pa. St. 623.

Guinard v. Knapp &c. Co., 95 Wis. 482.

An employer who has not technical knowledge of boilers and gets one in ordinary use, at the instance of one who has reasonable business prudence, acts with due diligence. *Service v. Shoneman*, 196 Pa. St. 63.

Failing to adopt a customary precaution not required by the dictates of ordinary care, was not negligence. *Sincere v. Union Compress &c. Co.*, (Tex. Civ. App.) 40 S. W. Rep. 326.

Or purchase from reputable dealer:

The purchase of machinery and appliances of approved quality and kind of a reputable dealer and manufacturer, and reasonable care in inspection for the purpose of discovering obvious defects are sufficient. *Carlson v. Phœnix B. Co.*, 132 N. Y. 273.

Ballard v. Hitchcock &c. Co., 51 Hun, 188.

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Defendant's boiler exploded and an employé was killed. Held, that the defendant was bound to exercise reasonable care and diligence to ascertain that the boiler was reasonably safe and fit for its purpose, yet as the defendant obtained it from reputable makers, and its inferior quality of iron could only be discovered by cutting or breaking, and the defective rivet holes could only be discovered by taking the boiler apart, and removing the rivets, the charge was erroneous, that the defendant was liable "if the defects in this boiler were such as were known or discoverable by examination or the application of known tests." *Ballard v. Hitchcock Man. Co.*, 51 Hun, 188, rev'g judg't for pl'ff. The action was retried and judgment for plaintiff affirmed, 71 Hun, 582; *aff'd*, 145 N. Y. 619.

The defendant's employé was killed by the separation of the engine and the tender, caused by a hidden fault in the coupling pin, which had been furnished to the defendant by a reputable firm, and had been inspected by a competent person eight days before the accident, and beyond slight wear, showed no defect. There was evidence that the iron was not of the best quality. The complaint was properly dismissed. Where there is but a *scintilla* of evidence not sufficient to sustain a verdict for the plaintiff, the judge is not bound to submit the question to the jury. *Powers v. N. Y. C. & H. R. R. Co.*, 60 Hun, 19, *aff'g* judg't of nonsuit.

On "*Scintilla* of Evidence," see cases on pages 23, 24.

Master was exempt where the servants of the makers of the appliance were competent and skillful and the flaw in the iron was undiscoverable *Smith v. New York &c. R. Co.*, 164 N. Y. 491.

No liability where the appliance was purchased from a reputable maker and injury arose from a latent defect. *Doyle v. White*, 9 App. Div. 521.

See, also, *Doyle v. White*, 14 Misc. 417; *Reynolds v. Merchants' Woolen Co.*, 168 Mass. 501.

Otherwise where machinery is of the company's own construction. *Atchison &c. R. Co. v. Carey*, 58 Kan. 815.

While a master is bound to exercise great care in the construction and operation of an elevator, he is not a guarantor of the sufficiency of the parts purchased from others. *McGregor v. Reid &c. Co.*, 76 Ill. App. 610.

Although the master is liable for a defect discoverable by careful tests, yet if appliances were bought of reputable dealers the company may presume that the dealer has used such care as was incumbent upon him, and that the articles purchased of him, which seem right, are right in fact; and the company need only give such inspection as is usual and practi-

cable. (This was a passenger case.) *Grand Rapids &c. R. Co. v. Huntley*, 38 Mich. 537, 547.

"They (railroad companies) cannot be held responsible for hidden defects in tools or appliances, if they have used reasonable care in procuring them; but they are not absolved from the duty of testing or inspection because they have bought in the open market of reputable dealers, or employed competent workmen to construct them. If any defect exists which a careful test or inspection would have discovered, the master must be held to have knowledge of such defect, and to be responsible for it.

It is urged that the railroad company has done all it can do when it buys of reputable dealers material and machinery for use by its employés; that it cannot, when buying, inspect personally every link of a chain to see whether it is properly welded. But it can do this personally as well as it can personally do any act involved in the operation of its road. It not only can, but its duty requires that it shall, before it is placed on a car, cause every link of every chain used by its employés in places or under circumstances involving danger in case the chain should break, to be carefully tested and inspected by someone competent to judge of its fitness for the utmost strain that is likely to come upon it. If this duty had been performed in this case, the cold weld in the chain would very likely have been discovered, and the chain condemned as unfit for its intended use." *Morton v. Railroad Co.*, 81 Mich. 423, 433.

Dompier v. Lewis, (Mich.) 91 N. W. Rep. 152.

When mechanics or contractors of good character in an independent business and selected with due care, furnish the machinery, etc., the master is not liable for their negligence. *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146.

Where an experienced carpenter and skilled bridge builder was paid by the day to build a bridge, and controlled the construction, the master was not liable for injury caused by negligence. *Mansfield Coal &c. Co. v. McEnery*, 91 Pa. St. 185.

Employer, with no technical training, may rely on the certificate of an official inspector. *Service v. Shoneman*, 196 Pa. St. 63.

Application of rule to thing wrought upon and dangers arising in course of work:

A servant for ordinary labor, where no machinery or materials are used requiring great skill, was injured by a defective tool of the defects of which he had full knowledge.

A ladder, ordered by the servant and used for some days for lighting lamps, slipped for lack of spikes in it, which had been promised the ser-

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vant. The defendant was not liable. *Marsh v. Chickering*, 101 N. Y. 396, rev'g 25 Hun, 405, and judg't for pl'ff.

A servant was injured by a dull saw, which his master neglected or refused to sharpen. The master was not liable. This was neglect in an act to be performed by a co-servant. *Webber v. Piper*, 109 N. Y. 496, aff'g 38 Hun, 353, and judg't of nonsuit.

Distinguishing *Kain v. Smith*, 89 N. Y. 375.

There are also certain apparent qualifications of the principal rule, as when some appliance is needed in and about the general work, and it is the duty of the servant to make it with proper materials therefor furnished by the master.

Where the master has furnished sufficient plans for the purpose of building a stool upon which men were to stand to receive bags from above and load them into the hold of a vessel, the work of erecting the stool was that of the servants. *Hogan v. Smith*, 125 N. Y. 774, aff'g judg't for pl'ff. *Marsh v. Herman*, 47 Minn. 537.

The rule that a master shall, in behalf of his servants, keep the machinery or appliances used by them in order, and that he cannot delegate the duty, so as to escape liability, does not apply to defects, arising in its daily use, which are not of a permanent character and require the skill of mechanics, but which are easily remedied by the workmen, and to repair which proper and suitable materials are supplied.

The ropes, or "fall," attached to a derrick in hoisting bags of coal from the hold of a vessel, were examined a day or two before the accident by an engineer, and deemed safe. The defendant kept a supply of the best and most approved kind of "falls" locked up, but the same were supplied, when called for, and the call, although usually made by the engineer or his assistant, could also be made by any of the employés. The condition of the "fall" was under the constant observation of the employés, and they were able to know whether prudence required it to be changed.

It was error to charge that the defendant should have watched the ropes used by his servants, and the negligence of the engineer was the negligence of the defendant. *Oregon v. Marston*, 126 N. Y. 568, rev'g judg't for pl'ff.

From opinion.—"The cases cited by the respondent do not touch the question. In one the defect was in an engine which only an expert could repair and for which the servant was furnished with no materials. *Slater v. Jewett*, 80 N. Y. 50. In one the chain of an elevator had grown thin and no new one was supplied. *Corcoran v. Holbrook*, 59 N. Y. 518. In two the cars or the platform were defective when supplied by the master. *Gottlieb v. N. Y., L. E. & W. R. Co.*, 100 N. Y. 462; *Benzing v. Steinway*, 101 id. 547. And in one the master permitted

the use of a rope which was rotten from a year's exposure to the weather and without supplying a new one. *Baker v. Allegheny*, V. R. Co., 95 Penn. St. 211. In *Cone v. D., L. & W. R. Co.*, 81 N. Y. 208, the defect was in the engine, which the servants using it could not be required or expected to repair, and in *Murray v. Usher*, 117 N. Y. 543, the platform fell from an original defect in construction."

Master furnished suitable materials for the erection of a scaffold upon which his masons were to work. They constructed it in their own way and according to their own judgment. It was held that the erection of the scaffold was a mere detail of the work, the execution of which devolved upon the workmen themselves for the sufficiency of which they themselves were responsible. *Kimmer v. Weber*, 151 N. Y. 417; rev'g s. c., 81 Hun, 599.

When the construction of a scaffold was left to a servant and associates, and it was improperly done, his master is not liable for the fall thereof. *Hogan v. Field*, 44 Hun, 72, aff'g nonsuit.

Plaintiff was stacking ice. He claimed his hook parted from the ice, and he fell off the ice. His ice hook, he claimed, was dull; it was an ordinary defect of an ordinary instrument; he could see it as well as the master. *Thorn v. N. Y. Ice Co.*, 46 Hun, 497, aff'g judgt of nonsuit.

Plaintiff claimed that the defendant required him to use a pickaxe by holding it upon a spike while it was being struck by a heavy hammer, and that while so being struck a piece of metal was broken from the hammer by reason of its being unsafe, defective and improper. The plaintiff failed to prove that the condition of the chisel before the blow was struck was dangerous, and that the court could not say that a spicula would not be dislodged by the blow. *Mulligan v. Crimmins*, 75 Hun, 578.

Master is not liable for not providing against dangers which arise in the course of the execution of the work; *e. g.*, where in the course of shoveling coal a crust is left overhanging. *Miller v. Thomas*, 15 App. Div. 105.

The rule applies where the performance of the work, constantly changing, produces the dangerous condition. *O'Connell v. Clark*, 22 App. Div. 466.

Laborer improperly shored trench. Master's duty to provide safe place did not apply. *Golden v. Sieghardt*, 33 App. Div. 161.

As to what is not negligence in a mere detail of the work. See *Parsley v. Edgemoor Bridge Works*, 56 App. Div. 71.

The rule that a master is bound to provide a safe place for the servant to work does not apply to a case where the servant is injured while himself digging a trench in which he is to work.

Where the master has provided competent foremen, and sufficient

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proper appliances to protect the servant while at work, he has performed his duty to the servant.

Where the manner of doing the work has been intrusted to the foreman, they are fellow servants of the workmen in that respect, and the master is not liable for their negligence in conducting the work. *Collins v. Crimmins*, 11 Misc. 24.

Building of scaffold to work upon held a detail of the work and not within master's duty to furnish safe place. *Banzhaf v. Ludwig*, 28 Misc. 496; rev'g s. c., 27 id. 821.

Servant cannot complain where the appliances are to be supplied and the place of work to be prepared by the servant himself. *Callan v. Bull*, 113 Cal. 593.

Conway v. Chicago &c. R. Co., 103 Iowa, 373; *Perigo v. Indianapolis Brewing Co.*, 21 Ind. App. 338; *Adasken v. Gilbert*, 165 Mass. 443; *Allen v. Galveston &c. R. Co.*, 14 Tex. Civ. App. 344.

An employé who directs his workmen to do certain work, leaving it for them to provide the structures and appliances required for its prosecution, may be responsible only for care in selection of the men and material assigned for it. *Arkerson v. Dennison*, 117 Mass. 407; *Killea v. Faxon*, 125 Mass. 485.

Where a block and hook is used only as a temporary incident, master was not liable for defects therein. *Harnois v. Cutting*, 174 Mass. 398.

But the fact that the place is only temporarily unsafe is not a defence. *Hess v. Rosenthal*, 160 Ill. 621.

Where the necessity for appliances arose from a method of work negligently adopted by fellow servants, master was not liable for failing to provide them. *Cogan v. Burnham*, 175 Mass. 391.

A master was not required to see that planks laid without fastening in the usual manner upon a scaffold erected by his direction were at all times properly adjusted. Such duty pertains to his servants using the scaffold. *Jennings v. Iron Bay Co.*, 47 Minn. 111.

Where a lineman is charged with the duty of repairing defects, he cannot complain of injuries from defects. *Roberts v. Missouri &c. R. Co.*, 166 Mo. 370; *Sias v. Consolidated L. Co.*, 73 Vt. 35.

Richardson v. Anglo-American Provision Co., 72 Ill. App. 77.

The duty as to safety does not extend to dangers which are incident to the performance of the work or the method employed. *Cleveland &c. R. Co. v. Brown*, 73 Fed. Rep. 970.

Oleson v. Maple Grove Coal &c. Co., (Iowa) 87 N. W. Rep. 736; *Anderson v. Daly Min. Co.*, 16 Utah, 28.

Staging was not provided by master as a place to work, but was con-

structed by the workmen as a convenience for themselves in accomplishing the work, though from materials furnished by the master. Recovery denied. *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278; *Garrow v. Miller*, 72 id. 284.

Otherwise where the material furnished is not only defective, but the master gives specific directions as to construction. *Stanwick v. Butler-Ryan Co.*, 93 Wis. 430.

Duty voluntarily assumed must be carefully performed:

A foreman employed the plaintiff to aid him, in removing snow from the track, and agreed to advise him of coming trains, which he neglected to do and the plaintiff was injured. Defendant was liable. *Bradley v. N. Y. C. R. Co.*, 62 N. Y. 99, aff'g judg't for pl'ff.

By undertaking a duty, though voluntarily, a master assumes the obligation of securing its proper performance. *Consolidated Coal Co. v. Scheiber*, 167 Ill. 539.

After notifying employes whom it knew were using the track as a passageway, that trains would be run slowly past the place, defendant was bound to so run them. *Louisville &c. R. Co. v. Simpson*, (Ky.) 64 S. W. Rep. 750.

For example in voluntarily supplying a safety device, he assumes the obligations of keeping it in a reasonably safe condition. *Bender v. St. Louis &c. R. Co.*, 137 Mo. 240.

And where an employer unnecessarily causes circumstances to arise which appear to threaten life, he cannot set up as a defense the servant's error of judgment, in the method employed to save his life. *Gulf &c. R. Co. v. Knott*, 14 Tex. Civ. App. 158.

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Railroads:

The defendant, by continuing in use a dangerous locomotive after notice thereof, is liable to a servant, injured while operating the same without negligence on his part. It was not found that the plaintiff knew of its dangerous condition. *Keegan v. Western R. Co.*, 8 N. Y. 175, aff'g judg't for pl'ff.

A brake-chain broke and the brakeman was hurt. The car had been properly furnished and the employe properly instructed, and the cause of the breakage was not shown. The chains had broken before. Held (1) that the employe, although a minor, assumed the risk; (2) that no

* NOTE.—What is an appliance and not a place of work. See *Fink v. Slade*, 66 App. Div. 105; *Brown v. Terry* 67 id. 223.

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negligence of the master was shown. *De Graff v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 125, affirming order granting new trial to defendant.

An infirm, weak engine, which was frequently taken to the shop for repairs, and was unable to hold water or sustain a full head of steam, exploded and killed the fireman. Defendant's negligence was for the jury. *Kirkpatrick v. N. Y. C. & H. R. R. Co.*, 79 N. Y. 240, aff'g judg't for pl'ff.

Wood v. Ill. R. Co., 23 Ill. App. 370; *Allison Mfg. Co. v. McCormack*, 118 Penn. St. 509.

A brakeman claimed to have been injured by a defective brake-wheel of insufficient pattern and weakened by an old fracture not discovered by the negligence of the inspector. The court held, that the evidence did not sustain this. *Disher v. N. Y. C. & H. R. R. Co.*, 94 N. Y., 622, rev'g judg't for pl'ff.

The defendant's servant, in a caboose, fearing a collision, stepped on the platform of the car and in the collision he was injured because *the buffers of the car were useless*. The defendant was liable. *Ellis v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 546, rev'g judg't of nonsuit.

The plaintiff got on a car to brake it, and when the switch engine came to couple on the engine struck hard and made no coupling; the plaintiff was thrown off in front of the car and pushed along and injured. The brake was defective so that it did not set as usual. It was thought (1) that, if the brake had been good, it would have been left set, and (2) if left set, it would not have run over the plaintiff. The question of negligence was for the jury. It seems that the company had left the brake set.

Defendant proved that it was the duty of all employés, when the brakes of a car standing on a track were out of order so that they could not be set, to "chock" the wheels, and claimed that the omission to do so in this case was negligence of a co-employé contributing to the injury. Held, untenable; that the failure to have the brakes in order could, under the circumstances, be fairly alleged as the cause of the injury. *Lilly v. N. Y. C. & H. R. R. Co.*, 107 N. Y. 566, rev'g judg't of nonsuit.

One of the defendant's employés was injured by a collision of an engine, on which he was riding, with a freight car, which had been placed on a side track to be loaded with two others to which it was coupled. The shippers loading, for their own convenience, detached this car, and during the night it was moved on the main track, as the evidence tended to show, by the wind. It was claimed that the brakes used had worn thin, but there was no evidence that the brake could not be applied, or that it was ineffective, while there was evidence to the contrary. The defendant

was not liable. *Smith v. N. Y. C. & H. R. R. Co.*, 118 N. Y. 645, rev'g judg't for pl'ff.

A brakeman was ordered to get on a train at a given point. The snow was trampled, as if by some one, who could not catch his feet, and marked between the rails, as if some one had been dragged and along this mark the intestate's cap, gloves and overshoes and brake stick were found, and the body north of it; bloody car wheels, and at the trampled place a broken ladder rung, a part old and rusty and a portion bright and new. For jury. *Jones v. N. Y. C. & H. R. R. Co.*, 28 Hun, 364, aff'g judg't for pl'ff.

Following *Hart v. Hudson River R. Co.*, 80 N. Y. 622.

A pusher engine ran into the tender of another engine, so that the second engine became detached, ran down hill, and collided with a third engine and killed a brakeman thereon. Charge that if the jury found that the safety chains between the second engine and its tender were necessary and absence thereof produced the injury, the plaintiff could recover, was error, as there was no evidence that a tender and engine had ever separated on account of its absence of such chains. *Morse v. N. Y. C. & H. R. R. Co.*, 39 Hun, 414, rev'g judg't for pl'ff.

Fireman of an engine was shaking a grate in an engine so constructed that it was sometimes lifted from its bed when being shaken so as to allow the bar for shaking it to be thrown so far to one side as to cause it to slip from the fireman's hands; a leaky faucet had, on the day of the accident, covered the iron plate upon which the fireman stood, while shaking the engine, with water so as to make it slippery; the plaintiff did not know of the tendency of the grate to slip from its bed, although he had ridden on the engine before; he tried to fix the faucet of the leaky condition of which, several weeks existing, he did not learn until just before the accident; while he was attempting to shake the engine the grate was lifted out of its position, the bar slipped from his hands, and at the same time his feet slipped from under him, and he fell from the engine and was injured.

On previous occasions, when the plaintiff had shaken such a grate as this, he had been supplied with the means of lengthening the shaking-bar, which facilitated the shaking of the grate.

It should have been submitted to the jury whether the defendant had not failed to provide the plaintiff with proper machinery and appliances. *Fancher v. The New York, Lake Erie & Western Railroad Company*, 75 Hun, 350.

A hook of a dump car became defective and caused it to dump its contents, including plaintiff, while the train was in motion. Defendant's

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negligence was for jury. *Soderman v. Troy Steel & Iron Co.*, 70 Hun, 449, aff'g judg't for pl'ff; rev'd, 145 N. Y. 427.

Duty applies to foreign cars. *Eaton v. New York &c. R. Co.*, 163 N. Y. 391; rev'g s. c., 14 App. Div. 20.

Improper adjustment made a brake rod defective. Master liable. *Woods v. Long Island R. Co.*, 11 App. Div. 16.

Otherwise as to an accumulation of snow after the car had left the yards in good order. *Hanrahan v. Brooklyn El. R. Co.*, 17 App. Div. 588.

And as to drawheads not on a level, where they do not pass each other. *Edall v. New England &c. R. Co.*, 18 App. Div. 216.

And as to a bridge between a car and a platform that could not be hooked to the former. *D'Arcy v. Long Island R. Co.*, 34 App. Div. 275.

While attempting to couple an engine to a train of cars in the evening, plaintiff was caught between them and injured because of the absence from the engine of a bustle or bumper. Plaintiff's lantern had just gone out, and he had no time to relight it, and did not discover the absence of the bustle until it was too late to escape. Held, that the questions of plaintiff's contributory negligence, and as to defendant's negligence arising from the absence of the bustle, were for the jury to determine. *McLarney v. Long Island R. Co.*, 11 Misc. 64.

Furnishing limber brakestaffs without warning was negligence. *Louisville & N. R. Co. v. Binion*, 107 Ala. 645.

Injury to a brakeman in descending a ladder on a car through absence of some of the rungs is chargeable to the master, provided servant was ignorant of the same. *C. & N. W. R. Co. v. Jackson*, 55 Ill. 492; *Bean v. Oceanic Steam Nav. Co.*, 24 Fed. Rep. 124.

That the hand holds of cars of other railroads run crosswise does not show negligence in running them lengthwise. *Chicago &c. R. Co. v. Armstrong*, 62 Ill. App. 228.

Nor does the fact that different coupling devices on different cars made it harder to couple; both being in good repair. *Murphy v. Lake Shore &c. R. Co.*, 67 Ill. App. 527.

A drawhead permitted cars to close about seven inches nearer than usual. It was defective. *Elgin &c. R. Co. v. Eselin*, 68 Ill. App. 96.

A car having a rung in its ladder, so bent that a brakeman could not catch hold in alighting, was defective. *Lake Shore &c. R. Co. v. Ryan*, 70 Ill. App. 45.

Not negligence to receive cars of other lines whose draw bars are lower than its own for use with its own. *Wabash R. Co. v. Farrell*, 79 Ill. App. 508.

Ellsbury v. New York &c. R. Co., 172 Mass. 130; *Norfolk &c. R. Co. v. Brown*, 91 Va. 668.

Or otherwise uneven couplings or deadwoods. *Pennsylvania Co. v. Ebaugh*, 144 Ind. 687.

Rule does not apply where a car has been taken out of use and passed on the repair track. Injury was received from a defect not booked for repair, but the servant did not know what might be defective. He was not allowed to recover. *Brown v. Chicago &c. R. Co.*, 59 Kan. 70.

Defendant held negligent in using a car too high for a brakeman to stand upon it safely while passing under bridge. *Southern R. Co. v. Duvall*, (Ky.) 54 S. W. Rep. 741; see s. c., 50 id. 535.

Negligent to use a hand car so old and worn that its wheels played back and forth. *De Hart v. Chesapeake &c. R. Co.*, (Ky.) 68 S. W. Rep. 647.

Railroad company is liable to an employé for injuries caused by defective coupling. *Gibson v. Pacific R. Co.*, 46 Mo. 163.

Towns v. Vicksburg &c. R. Co., 37 La. Ann. 630; *Toledo &c. R. Co. v. Fredericks*, 71 Ill. 294; *Wedgwood v. Chicago &c. R. Co.*, 41 Wis. 478.

Friedenberg v. N. C. R. Co., 114 N. Y. 583; *Plank v. R. Co.*, 60 N. Y. 607.

A brake staff used for the purpose of mounting cars, left bent and loose in its socket, constituted a defective condition. *Prosser v. Montana C. R. Co.*, 17 Mont. 372.

Receiving another's cars having double deadwoods or buffers for use with others with single buffers, held not negligence. *Chicago &c. R. Co. v. Curtis*, 51 Neb. 442.

Use of a skeleton drawhead which is so open that the link goes in on a slant, so as to require adjustment by the hand, held negligent. *Troxler v. Southern R. Co.*, 122 N. C. 902; s. c. aff'd, 124 N. C. 189.

Failure to use self-couplers, held negligent. *Greenlee v. Southern R. Co.*, 122 N. C. 977.

An appliance able to stand a weight of 1,000 pounds if properly made and secured, was insufficient where it gave way during ordinary use. *Coley v. North Carolina R. Co.*, 129 N. C. 407.

Removal of the steps of a sleeper without fastening the gate was negligence. *Cameron v. Great Northern R. Co.*, 8 N. D. 124.

It is not negligence *per se* for a railroad company to adopt a device for coupling cars not before in use on its road, without discarding that already in use, although the use of the two together may be more hazardous than of either alone. *Railroad Co. v. Henly*, 48 Oh. St. 608.

Proof of failure to furnish the appliances for a locomotive in customary use for such purposes, established negligence. *Crumley v. Cincinnati &c. R. Co.*, 12 Oh. C. C. 164.

So where the fall of a rail was due to either its improper loading or to a defect in the car. *McCray v. Galveston &c. R. Co.*, 89 Tex. 168.

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That a coupling pin became fastened in the drawhead did not of itself show defectiveness. *Missouri &c. R. Co. v. Thompson*, 11 Tex. Civ. App. 658.

Otherwise where the coupling pin furnished, was too large. *Missouri &c. R. Co. v. Hauer*, (Tex. Civ. App.) 43 S. W. Rep. 1078.

The brake beams to cars were not high enough to avoid injury to a person lying on the track. Held not a defect. *Texas C. R. Co. v. Waller*, (Tex. Civ. App.) 66 S. W. Rep. 466.

Switch engine had not the customary continuous hand rail across its rear end; but it was simply being drawn in a train. No recovery. *Peirce v. Bane*, 80 Fed. Rep. 988.

The breaking of a standard on the fore end of a lumber car because insufficient to bear the extra weight, was held notice that, should the car be reversed, standard on the other end might break. *Pennsylvania R. Co. v. La Rue*, 81 Fed. Rep. 148.

As to negligence in failing to place a runway on a car having an oval roof. See *Rogers v. Louisville &c. R. Co.*, 88 Fed. Rep. 462.

Grab iron on a freight car broke with little strain and was only held by a stub screw in rotten wood. Whether it showed negligence in inspection was for the jury. *Felton v. Bullard*, 94 Fed. Rep. 781.

Master must use care to provide safe ladders on its cars. *Goodman v. R. &c. R. Co.*, 81 Va. 576.

Bumpers are defective where they are so badly worn and rotten that they allow the cars to close to within a few inches of each other. *Chesapeake &c. R. Co. v. Lash*, (Va.) 24 S. E. Rep. 385.

It is not *per se* negligence for a railroad company to use an engine, the draw bar of which was too short to permit the couplings to be made. *Whitman v. Wisconsin &c. R. Co.*, 58 Wis. 408.

Road Bed.—The failure of a railroad company to ballast a side track, used for storing cars and making up trains is not a breach of duty to its employes, as railroad tracks are not required to be ballasted for the purpose of making them safe for the employes to work upon.

A brakeman, perfectly experienced, was upon the tender of an engine backing slowly down a siding for the purpose of coupling with a car thereon, and he jumped from the tender into the middle of the track, as he approached the car, and his foot caught between two ties, whereupon he was run over. The defendant was not negligent, but the plaintiff was. *Finnel v. D., L. & W. R. Co.*, 129 N. Y. 669, rev'g judg't for pl'ff.

Distinguishing *Plank v. N. Y. C. &c. R. Co.*, 60 N. Y. 607, and citing *Penn. R. Co. v. Hankey*, 93 Ill. 580; *Appel v. B.*, N. Y. &c. R. Co., 111 N. Y. 550.

The plaintiff, defendant's employé, was shoveling ashes from a pit between the rails. As a locomotive approached, he attempted to get out and was struck by it. The water plug was so arranged that the locomotive, discharging ashes into the pit, could take water at the same time. The relative position of the water plug and the stopping place could not be ground for recovery for negligence. The absence of one of the two employés, provided for the locomotive running to the pit could not impute negligence on the part of the defendant. *Reichel v. N. Y. C. & H. R. R. Co.*, 130 N. Y. 682, rev'g judg't for pl'ff.

A track gave way where some ties had been placed to support it, on account of said ties burning, and defendant's brakeman was killed by a train going down. For jury to say whether defendant was negligent in protecting the track. *Near v. D. & H. C. Co.*, 32 Hun, 557, aff'g judg't for pl'ff.

In the absence of proof that the blocking of all the frogs on the line of a railway was necessary or proper, or in general use, a finding of negligence from omission to do so is improper in favor of an employé who caught his foot in an unblocked frog. The evidence showed that the employé must have known that a large portion of the frogs were not blocked; that he had been engaged around the frog in question for one and one-half hours before the injury. The frog was in plain sight and there was nothing to justify a finding that the frog was an unsafe or dangerous appliance. *Spencer v. N. Y. C. & H. R. R. Co.*, 67 Hun, 196, rev'g judg't for pl'ff.

From opinion.—"A master in the performance of his duty to his servants, is not bound to furnish the best known appliances and machinery, or the safest place in which to do their work, but such only as are reasonably safe. The test is not whether the master has omitted to do something which he might have done, but whether the machinery, appliances and place where the work was to be done were reasonably safe and proper for the use to which they were applied. *Burke v. Witherbee*, 98 N. Y. 562; *Marsh v. Chickering*, 101 id. 396; *Bajus v. S. B. & N. Y. R. R. Co.*, 103 id. 312; *Stringham v. Hilton*, 111 id. 188; *Kern v. DeCastro & D. S. R. Co.*, 125 id. 50."

A brakeman's foot caught in an unblocked frog while uncoupling cars. There was evidence that there was a block in the frog apparently on the day of the accident but that it had been removed. Question of negligence was for the jury. *Meek v. N. Y. C. & H. R. Co.*, 69 Hun, 488, aff'g judg't for pl'ff.

Hole in a walk laid out between the tracks, liable to catch one's foot, was a defect. *Bird v. Long Island R. Co.*, 11 App. Div. 134.

Tracks were so placed that one car could not pass another without striking a conductor, who might be on the running board of the latter, collecting fares. They were negligently constructed. Defendant was

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negligent also in not warning him of the danger. *True v. Niagara &c. R. Co.*, 70 App. Div. 383.

A hole, large enough to fall through, on a trestle within seven feet of the place of work, held unsafe. *Boyle v. Degnon-McLean Const. Co.*, 61 N. Y. Supp. 1043; s. c., 63 id. 1105.

A brakeman, while forcing an intoxicated passenger to get off the side step and into the car, at a curve, was knocked off and injured by the train moving in the opposite direction, on account of the tracks being improperly laid for two trains to pass safely. The plaintiff never saw two trains pass each other at this curve but twice. He had been ordered by the defendant to keep passengers off the steps. *Mulvaney v. Brooklyn City R. Co.*, 1 Misc. 425, aff'g judg't for pl'ff.

A lumber manufacturer is liable for defects in the bed of his timber road. *Bowman v. White*, 110 Cal. 23.

Curve was an irregular one, the rails were old and of different lengths, the ties were loose and the track out of alignment. Master liable. *Peters v. McKay &c. Co.*, (Cal.) 68 Pac. Rep. 478.

Drawbar left on the track so as to catch and turn under the foreboard of an engine was a defective condition which permitted recovery. *Chicago &c. R. Co. v. Delaney*, 68 Ill. App. 307; s. c. aff'd, 169 Ill. 581.

It is negligent not to fill in between ties elsewhere than at movable switches. *Illinois C. R. Co. v. Cozby*, 69 Ill. App. 256; s. c. aff'd, 174 Ill. 109.

See, also, *Toledo &c. R. Co. v. Frick*, 14 Oh. C. C. 453.

And grade grounds even with the tops of the ties. *Lake Erie &c. R. Co. v. Morrissey*, 177 Ill. 376; aff'g s. c., 75 Ill. App. 466.

Especially where tracks were too near together. *Penn. R. Co. v. McCormack*, 131 Ind. 250.

Rotten ties on a railroad track throws responsibility for engineer's injuries caused by rails spreading, upon the company. *Knapp v. Sioux City &c. R. Co.*, 65 Iowa, 91.

See *H. & T. C. R. Co. v. McNamara*, 59 Tex. 255; *Texas &c. R. Co. v. Kirk*, 62 id. 227; *Trask v. California &c. R. Co.*, 63 Cal. 96. The fact that the track is owned by another will not relieve defendant company. *Smith v. Memphis &c. R. Co.*, 18 Fed. R. 304.

Railroad failed to box its signal wires where considerable car handling was done. Negligence was for the jury. *Indiana &c. Co. v. Bundy*, 152 Ind. 590.

It was negligence to permit water from a hydrant to run across its roadbed, so as to cause a sinking of the ties. *Louisville &c. R. Co. v. Kemper*, 153 Ind. 618.

Railroad allowed its water tank to overflow its tracks in winter where its brakeman had to uncouple cars. Question of negligence was for the jury. *McFall v. Iowa C. R. Co.*, 104 Iowa, 47.

Removal of all the ballast between the ties was negligence. *Louisville &c. R. Co. v. Bowcock*, (Ky.) 51 S. W. Rep. 580; s. c. aff'd, 53 id. 262.

It is the duty of a railroad corporation to use reasonable care and diligence to keep its tracks in a safe condition for its employes to work upon. So far as the work of keeping its tracks in repair is left to its servants it is its duty to exercise reasonable supervision to see that the work entrusted to them is properly done. How far into details this supervision must go before the domain which belongs exclusively to the master is passed and the domain which may be left to servants is entered, depends upon what it is reasonable to require of a master who is charged with the duty of providing safe works, machinery, tools, and appliances for his employes. In some cases this may be a difficult question to decide. But undoubtedly a jury may find that a railroad corporation should so far supervise the work of its servants in repairing its tracks, as to see that a pile of sleepers three or four feet wide is not left for a long time within eighteen inches of the rails in the freight yard of an important station. The condition of the road under the circumstances shown was evidence of negligence of the defendant corporation. *Babcock v. Old Colony R. Co.*, 150 Mass. 467.

Citing *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Holdern v. Fitchburg R. Co.*, 129 Mass. 268; *Elmer v. Locke*, 135 id. 575; *Ferren v. Old Colony R. Co.*, 143 id. 197; *Griffin v. Boston & Alb. R. Co.*, 148 id. 143.

Brakeman slipped on snow and ice accumulated near defendant's depot. No liability. *Piguegno v. Chicago &c. R. Co.*, 52 Mich. 40.

Maintenance of cattle guards are enjoined by statute—and a railroad is not bound to indicate their presence (*e. g.* by joining them with a fence). *Fuller v. Lake Shore &c. R. Co.*, 108 Mich. 690.

See, also, *Galveston &c. R. Co. v. Slinkard*, (Tex. Civ. App.) 39 S. W. Rep. 961.

A ridge of ice was allowed to remain on the track between the rails in a switch yard. Negligence was for the jury. *Rifley v. Minneapolis &c. R. Co.*, 72 Minn. 469.

Ditch from 4 to 6 inches deep on the track where brakemen are likely to go in coupling cars, was held to constitute a defect. *Hollenbeck v. Missouri P. R. Co.*, 141 Mo. 97.

That other causes contributed does not prevent recovery for the part rotten cross ties played in derailing a tender. *Wright v. Southern R. Co.*, 122 N. C. 959.

See, also, *Texas &c. R. Co. v. Magrill*, 15 Tex. Civ. App. 353.

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A defective road bed is negligence *per se*. *Wilkie v. Raleigh &c. R. Co.*, 127 N. C. 203.

Crude oil in large quantities causing brakemen to slip, was ground for recovery. *Cincinnati &c. R. Co. v. Criss*, 15 Oh. C. C. 398.

So as to maintenance of a side track next to a main one at a distance of a foot or a foot and a half, less than the regulation distance. *Voorhees v. Lake Shore &c. R. Co.*, 193 Pa. St. 115.

The track does not have to be safe as a footway; hole was left between ties by the ballast washing out. *Kerrigan v. Pennsylvania R. Co.*, 194 Pa. St. 98.

A track is in a negligent condition where it is liable to catch the foot of a brakeman engaged in the performance of his duties. *San Antonio &c. R. Co. v. Brooking*, (Tex. Civ. App.) 51 S. W. Rep. 537.

See, also, *Missouri &c. R. Co. v. Kirkland*, 11 Tex. Civ. App. 528.

Sufficient culverts were not provided for the escape of water accumulated by embankments, liable to deposit sand upon the track and cause derailment. Negligence. *Union P. R. Co. v. O'Brien*, 161 U. S. 451.

Fireman injured by a hole one foot away from the engine. Defendant's negligence for jury. *Hall v. Union &c. R. Co.*, 16 Fed. Rep. 744.

Failure to block the space between main and guard rails so as to prevent shoes catching thereon, was negligence. *Curtis v. Chicago &c. R. Co.*, 95 Wis. 460.

Putting in a switch without lock or target on a temporary siding when such switches are in general use, did not constitute negligence. *Bennett v. Long Island R. Co.*, 163 N. Y. 1; rev'g s. c., 21 App. Div. 25.

Failure to watch a switch while turned off and locked held not negligence. *Donnelly v. New York &c. R. Co.*, 3 App. Div. 408.

So, if the projection of a frog above the track, where it was apparent to casual observation, and plaintiff had an opportunity to observe it. *Walker v. Atlanta &c. R. Co.*, 103 Ga. 820.

So, as to a failure to have a buttpost at the end of a stub switch, in a switch yard. *Chicago &c. R. Co. v. Driscoll*, 176 Ill. 330; rev'g s. c., 70 Ill. App. 91.

Safety of tracks does not prevent having switches as near together in yards as the necessities of business requires. *St. Louis &c. Yards v. Burns*, 97 Ill. App. 175.

Defendant was not liable for derailment by a stub switch where the train was run through it, in a direction opposite to that which it was intended to be used, nor for placing a switch signal target on the side of the main track nearest a sidetrack. *Grattis v. Kansas City &c. R. Co.*, 153 Mo. 380; s. c., 48 L. R. A. 399.

Construction of railway with unblocked frogs is not *per se* negligent. *Mo. &c. R. Co. v. Lewis*, 24 Neb. 848.

Failure to close a switch is not a defect in a roadbed. *Pleasants v. Raleigh &c. R. Co.*, 121 N. C. 492.

A switch on a curved grade did not increase the danger in operating the cars. Negligence was for the jury. *International &c. R. Co. v. Johnson*, 23 Tex. Civ. App. 160.

But where a company once undertakes to block its switch frogs it may be held for allowing them to get out of repair. *Hunt v. Kane*, 100 Fed. Rep. 256.

The duty to block new switches does not arise until the work of construction is completed. *Hauss v. Lake Erie &c. R. Co.*, 105 Fed. Rep. 733.

Placing a switch in an unnecessarily dangerous proximity to passing cars was ground for recovery. *Morrisette v. Canadian P. R. Co.*, (Vt.) 52 Atl. Rep. 520.

Plaintiff's evidence was to the effect that he was instructed to ride on top of the cars at places where it might be necessary to apply the brakes, and that on approaching such a point he went on top of a box car and sat down where the brake was, and remembers nothing more. It appears that a tunnel is located at that particular spot on defendant's road, which for two hundred feet from its west end, at which plaintiff's train entered, is twenty feet high; and that a brick arch commences and continues for eighty-five feet, reducing the height of the tunnel to fifteen feet nine inches, measuring from the rail, and the space between the top of the car and the bottom of the arch was four feet and seven inches. Plaintiff was found beside the track, about three hundred feet from the east end of the tunnel, with a gash in his forehead, which, if received from having come in contact with the arch while sitting as he testified, would have called for a height of body of four feet eight inches, or a full height of over eight feet. No evidence was given as to plaintiff's height. The court charged the jury that if plaintiff was sitting down it was for them to say whether his head would reach as high as the bottom of the arch. A motion to dismiss the complaint, made on the ground that the facts proved were insufficient to constitute a cause of action, was denied. Held (Bradley and Vann, JJ., dissenting), error; that the court will take judicial notice of the height of the human body, and that it would be impossible for a man, unless of a height unprecedented, sitting as plaintiff testified, to strike his head against the arch. *Hunter v. N. Y. O. & W. R. Co.*, 116 N. Y. 615, rev'g judg't for pl'ff.

From opinion.—"It has been held that courts will take judicial notice of matters of public history, such as the existence of the late civil war and the

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particular acts which led to it. *Swinnerton v. Columbian Ins. Co.*, 37 N. Y. 174; *Woods v. Wilder*, 43 id. 164. Of the general course of business in a community, including the universal practice of the banks. *Nat. Bank v. Hall*, 83 N. Y. 338; *Yerkes v. Nat. Bk.*, 69 id. 382, 387. That books of general record giving descriptions and standing of all ships, known as 'American Lloyds,' 'The Green Book' and 'The Record Book,' are referred to by business men for the purpose of ascertaining the condition, capacity and value of ships. *Slocovich v. Orient Mutual Ins. Co.*, 108 N. Y. 56, 63. Of the value of 'pounds' in our money and in rendering judgment convert them into dollars. *Johnston v. Hedden*, 2 Johns. Cas. 274. Of the expectation of human life. *Johnson v. Hudson R. R. Co.*, 6 Duer 634. Of the course of seasons and husbandry, and the general course of agriculture, and that a crop at a certain date would not have matured. *Ross v. Boswell*, 60 Ind. 235; *Floyd v. Ricks*, 14 Ark. 286. Of the time of the rising and setting of the sun and moon. *Case v. Perew*, 46 Hun 57.

And generally of those things which happen according to the ordinary course of nature; the course of time and the movements of the heavenly bodies, the coincidence of the days of the week with the days of the month, ordinary public fasts and festivals and legal weights and measures. 1 Greenl. on Ev. chap. 11, sec. 5."

On a second trial the plaintiff supplied the facts necessary.

See S. C., 130 N. Y. 669, aff'g judg't for pl'ff.

The plaintiff, a brakeman, while climbing up the side of a car in the discharge of his duties, was struck and injured by the arm of a mail crane which projected within twelve inches of such car.

The mail crane had been erected for about four weeks, and the plaintiff had passed it three times before the accident. He had received no notice of its erection and there was no evidence of any necessity for the projecting arm to come within twelve inches of the side of the car.

Held, that it was proper for the trial court to refuse to charge that the nearness of the structure to the track was no evidence of negligence. *Sisco v. The Lehigh & Hudson River Railway Co.*, 75 Hun, 582; rev'd, 145 N. Y. 296.

Malott v. Laufman, 89 Ill. App. 178.

Sagging wire not obviously dangerous strung across the track by a third party did not constitute negligence. *Richmond v. New York &c. R. Co.*, 8 App. Div. 382.

The duty in regard to obstructions is one of reasonable care. *True v. Lehigh Valley R. Co.*, 22 App. Div. 588.

Negligence in erecting a cross beam on the entrance of a switch track, which was but four or five feet higher than the top of its box cars, was for the jury. *McGovern v. Standard Oil Co.*, 11 App. Div. 588.

The test is whether it is dangerous to persons in the exercise of ordinary care under the circumstances. *New York &c. R. Co. v. Ostman*, 146 Ind. 452.

Telegraph pole slanting over track to within three inches of a passing

locomotive is a defect. *Benthin v. New York &c. R. Co.*, 24 App. Div. 303.

So, as to an oil box in a yard allowed to project within dangerous proximity to the foot board of an engine. *Louisville &c. R. Co. v. Bouldin*, 121 Ala. 197.

Whipple v. New York &c. R. Co., 19 R. I. 587; *Crandall v. New York &c. R. Co.*, 19 R. I. 594.

Brakeman was knocked off car by projecting awning of station house. Superintendent and division engineer knew of danger but it was of a nature to escape the knowledge of the plaintiff, who had been two months on the road and had always, but twice, passed the place in the night. The company was liable. *Ill. Cent. Co. v. Welch*, 52 Ill. 183.

See, also, *Chicago &c. R. Co. v. Clark*, 11 Ill. App. 104; *Central Trust Co. v. East Tennessee &c. R. Co.*, 73 Fed. Rep. 661.

It is contradictory to charge that if defendant by reasonable care could have learned the fact that the arrangement of track and platform was dangerous, and the person injured by reasonable care could not have learned that they were dangerous, the former was negligent and the latter was not negligent. It was claimed that platform was too near track. *Chicago &c. R. Co. v. Clark*, 108 Ill. 113.

Maintenance of a footboard to a coal shed 7 feet from the ground and but 16½ inches from the ladders on passing freight trains held a defect. *Chicago &c. R. Co. v. Stevens*, 189 Ill. 226; aff'g s. c., 91 Ill. App. 171.

Railroad company is responsible for death caused by such close proximity of a shed to its track that employé standing on passing car was knocked off. *Illinois &c. R. Co. v. Whelen*, 19 Bradw. (Ill.) 116.

See *Allen v. B. C. &c. R. Co.*, 57 Iowa, 623.

Where witnesses had testified that a certain "cattle chute" was constructed dangerously near the track, the evidence offered by the defendant that persons had frequently ridden past it holding to the side of the car was improperly rejected. When a company erects "cattle chutes" in such close proximity to its track as to endanger the lives of its employés, in the proper operation of its trains, it is negligence. If the "chutes" are constructed so as to be reasonably safe for employés operating trains in a reasonable and prudent manner, the company is not chargeable with negligence. *Allen v. B. C. R. & N. R. Co.*, 57 Ia. 623.

Defendant's station agent, who lived with his family in the station, had erected on the platform, near a side track, some posts, for domestic purposes solely, and plaintiff, a brakeman, while descending from a moving freight car in the discharge of his duty, collided with one of the posts and was injured. As the posts were in no way connected with the use of the railway, plaintiff had a right to presume there was no such obstruc-

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tion there, and in the absence of knowledge on his part that the posts were there, he was not negligent in not looking out for them, and defendant was negligent in allowing the posts to be erected and maintained so dangerously near the track. *Kearns v. Chicago &c. R. Co.*, 66 Ia. 599.

A switch stand, whose arrow when turned toward the track, is within nine inches thereof, was held a dangerous object. *Southern &c. R. Co. v. Michaels*, 57 Kan. 474.

So, as to a guy wire so close over a street car track as to endanger employes. *Erslew v. New Orleans &c. R. Co.*, 49 La. Ann. 86.

New York &c. R. Co. v. O'Leary, 93 Fed. Rep. 737.

So, as to a pile of stones from one-half a foot to three feet high and only seventeen inches from the track near a switch, which a brakeman had to throw and then jump upon the passing engine. *Donahue v. Boston &c. R. Co.*, 178 Mass. 251.

Chicago &c. R. Co. v. Kinnare, 91 Ill. App. 508; s. c. aff'd, 60 N. E. Rep. 57; *Linck v. Louisville &c. R. Co.*, 107 Ky. 370; *Kennedy v. Lake Superior Terminal &c. R. Co.*, 93 Wis. 32.

Railroad company allowed a depression to remain in its track, in which water collected and froze. Negligence was for the jury. *Balhoff v. Michigan C. R. Co.*, 106 Mich. 606.

Whether defendant was negligent in building a section house in such dangerous proximity to a side track that the eaves struck a brakeman, descending the ladder on the side of a moving car, and whether the brakeman was negligent, were for the jury. *Flanders v. R. Co.*, 51 Minn. 193.

Brakeman in performance of his duty put his head out of window and was injured by a water tank. Recovery was allowed. *Walsh v. Oregon R. Co.*, 10 Ore. 250.

A stack of ties were left in such a condition as to render them liable to topple over. Recovery was allowed. *Texas &c. R. Co. v. Echols*, 17 Tex. Civ. App. 677.

An independent contractor was permitted to maintain a source of danger over defendants' tracks. (A derrick supported by guys fastened to an insufficient fence post.) Recovery was permitted. *Gulf &c. R. Co. v. Delaney*, 22 Tex. Civ. App. 427.

So, where cattle chutes were located in dangerous proximity to its tracks. *Wood v. Louisville &c. R. Co.*, 88 F. R. 44; *Keist v. Chicago &c. R. Co.*, (Iowa) 81 N. W. 181.

So, as to failure to prevent stones, from overhanging rocks or loose slopes of cuts, getting on the track. *Clune v. Ristine*, 94 Fed. Rep. 745.

So, as to the unnecessary maintenance of a water spout in dangerous

proximity to the track. *Choctaw &c. R. Co. v. McDade*, 112 Fed. Rep. 888.

See *Pittsburg &c. R. Co. v. Parish*, (Ind. App.) 62 N. E. Rep. 514, (limbs of trees allowed to so project); *Louisville &c. R. Co. v. Tucker*, (Ky.) 65 S. W. Rep. 453, (overhead bridge).

Employé stepped on some lumber while pushing a car and was injured by the car running over his foot. Defendant's negligence for jury. *Besser v. Chicago &c. R. Co.*, 45 Wis. 477.

Defendant company permitted blocks of wood, etc., to lie near its track and brakeman was injured by stumbling over them. Not safe place to work. *Hulehan v. Green Bay &c. R. Co.*, 58 Wis. 319.

See *Ditberner v. Chicago &c. R. Co.*, 47 Wis. 138.

Bridges and Trestles.—There were four low bridges on the defendant's road near together; warning signals were placed before the first and last, as warnings for all. A brakeman was killed at the second bridge. He had been in defendant's employ three months and knew about the bridges. Defendant not liable for failure to place warning signals to each bridge pursuant to chap. 439, Laws 1884. *Ryan v. L. I. R. Co.*, 51 Hun, 607, rev'g judg't for pl'ff.

Citing *DeForest v. Jewett*, 88 N. Y. 264; *Gibson v. Erie R. Co.*, 63 id. 449.

If a trespasser on a railroad causes an injury to the employés or passengers of the railroad company the trespasser will be liable for the damages he has thus caused.

A superstructure across the tracks of a railroad, of a height insufficient to allow brakemen on freight trains passing under it to stand on the top of the freight cars, is not *per se* illegal.

If it be conceded that the use of "tell-tale" signals on a bridge is so general that a failure to maintain them may be deemed negligence, even in the absence of a statute requiring their use, the duty of maintaining them devolves upon the railroad corporation whose tracks run under the bridge, and not upon the corporation whose tracks are upon the bridge. *Neff v. New York Central & Hudson River Railroad Co.*, 80 Hun, 394.

When a railroad company constructs a covered bridge it should build it of sufficient height so that brakemen required to go on top of cars may pass under in safety. *Chicago &c. R. Co. v. Johnson*, 116 Ill. 206.

When a company builds a bridge over its track with knowledge that it is of insufficient height and dangerous to brakemen ignorant of the danger, it is liable for injuries resulting therefrom. *Baltimore &c. R. Co. v. Ravan*, 104 Ind. 88.

Louisville &c. R. Co. v. Cooley, (Ky.) 49 S. W. Rep. 339.

But see, *contra*, *Baylor v. D., L. &c. R. Co.*, 40 N. J. L. 23; *Baltimore &c. R. Co. v. Stricker*, 51 Md. 47; *Devitt v. Pacific R. Co.*, 50 Mo. 302; *Pittsburg &c. R.*

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Co. v. Sentmeyer, 92 Pa. St. 276; *Clark's Adm'r v. Richmond &c. R. Co.*, 78 Va. 709; *Gibson v. Erie &c. R. Co.*, 63 N. Y. 449. See, also, *Altee v. S. C. R. Co.*, 21 S. C. 550.

The mere fact of a defect in a board used in the construction of a bridge, no other negligence being shown, evidence showing that all planks were tested before use, does not of itself fix liability upon defendant. *Kelly v. Detroit Bridge Works*, 17 Kas. 558.

Failure to erect "tell-tale" before a low bridge did not cause injury where the brakeman not only knew of the danger but got on the car after passing the place where it should have been, *Allen v. Boston &c. R. Co.*, 69 N. H. 271.

Company need not build bridges so that servants standing upright will not be endangered. *Baylor v. D., L. & W. R. Co.*, 40 N. J. L. 23.

S. P., Baltimore &c. R. Co. v. Stricker, 51 Md. 47.

Fireman leaning out of the cab of his engine struck a bridge, because of its defective condition in connection with that of the track. He was allowed to recover. *Texas &c. R. Co. v. Taylor*, (Tex. Civ. App.) 53 S. W. Rep. 362.

Notification of the danger is sufficient where the tracks can not be lowered and the city will not permit the bridges to be raised. *Myers v. Chicago &c. R. Co.*, 95 Fed. Rep. 406.

Yards and Stations.—The plaintiff, three days in the defendant's employ, in coupling a car in the evening, just pushed from the scales, fell in a cattle guard. For jury. *Fredenburg v. N. C. R. Co.*, 114 N. Y. 582, aff'g judg't for pl'ff.

A platform on an elevated railway, which is 2½ feet wide, is reasonably safe without a guard rail. *Nugent v. Brooklyn &c. R. Co.*, 64 App. Div. 351.

Failing to keep a platform, at times used as part of a weighing apparatus in switch yard, free from defects, showed negligence. *Rome &c. R. Co. v. Thompson*, 101 Ga. 26.

But failure to guard pits in a roundhouse which would render work about engines thereon impracticable did not. *McDonnell v. Illinois C. R. Co.*, 105 Iowa, 459.

The duties of the foreman of the owner of a spur track to a mill required the former to stand on the steps of the mill. The fact that the place of work was beyond his ownership or control did not relieve him of the duty of making the place where the servant's duty took him, safe. *Harding v. Transfer &c. Co.*, 80 Minn. 504.

Where a platform has been constructed with reasonable care, the master

has performed his duty. *Missouri &c. R. Co. v. Baker*, (Tex. Civ. App.) 37 S. W. Rep. 94.

Defendant was not liable for the negligent piling of boxes on its platform by a connecting carrier, for loading in the cars, having no duty to perform in regard thereto. *Carolan v. Southern P. Co.*, 84 Fed. Rep. 84.

Cattle on track.—Derailment was caused by a cow on the unfenced track. Injury was within the statutory liability for failure to fence and servant of company recovered. *Terre Haute &c. R. Co. v. Williams*, 172 Ill. 379; aff'g s. c., 69 Ill. App. 392.

Quill v. Houston &c. R. Co., (Tex. Civ. App.) 46 S. W. Rep. 847; s. c. aff'd, 48 id. 168.

Defendant was negligent in allowing cotton seed to remain near the track so as to attract cattle. Cow got on the track causing the derailment of an engine and injury of engineer. *Illinois C. R. Co. v. Seamans*, 79 Miss. 106.

That a cow on the track contributed to the injury did not prevent recovery, where a defect in the track was the efficient cause thereof. *New York &c. R. Co. v. Green*, 90 Tex. 257.

Faulty construction of a cattle pen built by another adjoining the right of way did not make defendant liable for the escape of cattle therefrom to the track, causing a wreck. *Newsom v. Receivers &c.*, 78 Fed. Rep. 94; s. c. aff'd, 81 id. 133.

Operation of Road.—Plaintiff's intestate, riding to his work on gravel train, with other of defendant's employes, was killed by a collision with a hand car; it was claimed that if the check chains, i. e., chains to hold up truck of derailed car, had been used, the injury would not have happened. No evidence that such absence of such chains caused or contributed to the accident; even so, the workman knew of this absence and he took the risk. Not negligent to back gravel train; negligence of co-employé; rules applicable to completed road not applicable to railroad in course of construction. *Carr v. North River Construction Co.*, 48 Hun, 266, aff'g judg't of nonsuit.

Plaintiff's intestate, working on defendant's gravel train, was killed in a collision. Charge that if the defendant had not taken proper precautions to protect its servants, it was liable even though the employé in charge of the train was negligent. Judgment was reversed as the charge did not leave it to the jury to say whether such proper precautions would have prevented injury. *Hall v. Cooperstown &c. R. Co.*, 49 Hun, 374, rev'g judg't for pl'ff.

Defendant is negligent in sending cars over a track upon which employes are at work on others, without warning or without giving them an

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opportunity to get out of the way. *Floetttl v. Third Ave. R. Co.*, 10 App. Div. 308.

See, also, *Atchison &c. R. Co. v. Butler*, 56 Kan. 433; *Louisville &c. R. Co. v. Grubbs*, (Ky.) 49 S. W. Rep. 3; *Louisville &c. R. Co. v. Adams*, (Ky.) 51 S. W. Rep. 577; *Ragland v. St. Louis &c. R. Co.*, 49 La. Ann. 1166; *Andrews v. Toledo &c. R. Co.*, 8 Oh. C. D. 584; *Pool v. Southern Pac. Co.*, 20 Utah, 210; *Pier v. Chicago &c. R. Co.*, 94 Wis. 357.

As the defendant's servants were backing a train to couple onto a sleeping car, the plaintiff, an inspector employed by the company which owned said car, had his hand caught while attempting to replace a dog in the drawhead which was out of position, and while he was in that condition the cars came together and his hand was crushed. Plaintiff's evidence tended to show that defendant's servants were warned of his position and inability to escape danger, while this was denied by defendant's witnesses. Held, that the defendant's servants, in what they did, were acting in the discharge of their duty, and that, upon the evidence, a verdict characterizing their conduct as negligent and not as criminal was proper. *Rhodes v. New York Central & Hudson River R. Co.*, 8 Misc. 366.

An engineer failed to stop in time to avoid injury to another employed in a position of peril. But as the testimony left the question of his ability to do so, in doubt, the question of negligence was left to the jury. *Louisville &c. R. Co. v. Banks*, (Ala.) 31 South. Rep. 573.

Track was obscured by smoke for a distance of 250 or 300 yards. It was not due care to give but a single whistle, 50 yards before entering the bank of smoke. *Woodward Iron Co. v. Herndon*, 114 Ala. 191.

Moore v. Great Northern R. Co., 67 Minn. 394.

Giving each of two hand cars, 12 to 20 feet apart, at the same time signals to check their speed was not negligence *per se*. *Alabama Min. R. Co. v. Jones*, 121 Ala. 113.

Liability for negligence of an engineer in not stopping in time to avoid a trespasser whom he saw, was extended to an employé by the track who was struck by his flying body. *Western &c. R. Co. v. Bailey*, 105 Ga. 100.

Ordinance requiring the constant ringing of a bell within a city limits, inured to the benefit of railroad employés. *Illinois C. R. Co. v. Gilbert*, 157 Ill. 354.

Gulf &c. R. Co. v. Calvert, 11 Tex. Civ. App. 297.

Violation of ordinance as to speed and the ringing of the bell, is applicable as to defendant's employés on its private premises. *East St. Louis Connecting R. Co. v. Eggman*, 170 Ill. 538; aff'g s. c., 71 Ill. App. 32.

Running a train without a headlight is gross negligence. *Baltimore &c. R. Co. v. Alsop*, 176 Ill. 471; aff'g s. c., 71 Ill. App. 54.

Otherwise where a lantern in good order unexpectedly goes out. *Elgin &c. R. Co. v. Maloney*, 59 Ill. App. 114.

It is negligence to back a coal train on the main track without signal and contrary to custom. *Chicago &c. R. Co. v. Anderson*, 67 Ill. App. 386; s. c. aff'd, 166 Ill. 572.

Car partly off the track was pulled along it so as to collide with a car on an adjoining track causing injury complained of. It was negligent operation. *Chicago &c. R. Co. v. Driscoll*, 70 Ill. App. 91.

Signal for a train to back was not negligent because it did not precisely indicate the distance, where it was such as to give notice of the approximate distance. *Kelsey v. Chicago &c. R. Co.*, 106 Iowa, 253.

Engineer may assume that a section hand will clear the track in time until it is reasonable apparent that he will not. *Neeling v. Chicago &c. R. Co.*, 98 Iowa, 554.

Nye v. Pennsylvania R. Co., 178 Pa. 134.

A push car was placed a safe distance from the track, but was taken near to it by boys without its knowledge or consent. No negligence. *Atchison &c. R. Co. v. Slattery*, 57 Kan. 499.

Tender was heaped with coal so that it was liable to fall off, in passing slight inequalities in the track. Negligence was shown. *Croll v. Atchison &c. R. Co.*, 57 Kan. 548.

A train approached a train ahead in plain view at such speed as to require a dangerously sudden and violent application of air brakes to avoid collision. Judgment for plaintiff. *Atchison &c. R. Co. v. Carter*, 60 Kan. 65.

But, see, *Bruen v. Uhlmann*, 44 App. Div. 620; *Terre Haute &c. R. Co. v. Leeper*, 60 Ill. App. 194.

Order to push a hand car faster over a trestle, in view of a train's approach was justified. *Louisville &c. R. Co. v. Bass*, (Ky.) 43 S. W. Rep. 403.

Negligence of an engineer in backing cars without a signal and without knowing a brakeman's whereabouts, was for the jury. The signal to "slack" by the latter to the former indicated that he was probably between the cars. *Cincinnati &c. R. Co. v. Cook*, (Ky.) 67 S. W. Rep. 383.

To start a train ahead in the dark on a side track, without waiting for signals, though it was late and was done to avoid collision, showed lack of due care. *Richards v. Louisville &c. R. Co.*, (Ky.) 49 S. W. Rep. 419.

So, as to backing a train, which has parted, rapidly in the dark, in search of the lost cars. *Southern R. Co. v. Barr*, (Ky.) 55 S. W. Rep. 900.

So, as to simply tagging cars condemned for repair, which is not of

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such a character as to appraise one engaged in night service, of their condition. *Meyers v. Illinois C. R. Co.*, 49 La. Ann. 21.

So, as to leaving cars standing on main tracks within the yard limits without lights, or other notice of their presence. *McGraw v. Texas &c. R. Co.*, 50 La. Ann. 466.

An engineer must "take in" the whole situation before starting off. *Wilson v. Louisiana &c. R. Co.*, 51 La. Ann. 1133.

A railroad's duty increases in proportion to the defectiveness of its track. *Wilson v. Louisiana &c. R. Co.*, 51 La. Ann. 1133.

Use of defective car stakes to load lumber did not contribute to plaintiff's injury where the proximate cause of the injury was another's breaking them. *Pollard v. Maine C. R. Co.*, 87 Me. 51.

Semaphore might have been better placed but it had always proved sufficient. No liability. *Whalen v. Michigan C. R. Co.*, 114 Mich. 512.

A railroad in failing to inspect a load of lumber was responsible to a brakeman injured and not the shipper in negligently loading. *Fowles v. Briggs*, 116 Mich. 425; s. c., 40 L. R. A. 528.

Failure to remove snow or cover it with ashes in switch yards, where it is not permitted to accumulate in dangerous ridges or banks, above the level of tracks, was not negligence. *Fay v. Chicago &c. R. Co.*, 72 Minn. 192.

Eleven men besides two switch joints were placed on the platform of a hand car having 12 or 16 inches on each side of the levers and a foot at each end. Negligence in overcrowding was for the jury. *Haworth v. Kansas City R. Co.*, 94 Mo. App. 215.

Failure to ring a bell or whistle in switch yard where yardmen are constantly at work was negligent. *Union P. R. Co. v. Elliot*, 54 Neb. 299.

A car secured on siding by brakes, got upon the track and caused the injury complained of. Defendant's negligence for jury. *Smith v. N. Y. &c. R. Co.*, 46 N. J. L. 7.

Furnishing a passenger coach to freight train operators, does not *per se* require the furnishing of a conductor. *Means v. Carolina C. R. Co.*, 122 N. C. 990.

Defendant's conductor was negligent in ordering a brakeman to collect fares on a coach and bring them to him over intervening flat freight cars. *Means v. Carolina Cent. R. Co.*, 126 N. C. 424.

Removal of a flag signal by third parties held a good defense. *Gulf &c. R. Co. v. Whittig*, (Tex. Civ. App.) 35 S. W. Rep. 857.

The extra care a railroad owes to the public by allowing it to make use of pathways in its yard, extends to its employes. *Houston &c. R. Co. v. Powell*, 41 S. W. Rep. 695.

Failure to have sufficient brakes on a train as well as a flagman's failure to give the proper signal combined to cause injury. Fireman warranted in acting on the appearance of danger recovered. *Galveston &c. R. Co. v. Jackson*, (Tex. Civ. App.) 44 S. W. Rep. 1072.

Failure of a yard master to properly make up a train, held not the proximate cause of injury to conductor, while remaking it. *St. Louis &c. R. Co. v. Nelson*, 20 Tex. Civ. App. 536.

A push cart left unlocked beside a track was placed on the track and caused injury. Defendant's negligence for jury. *Harris v. Union &c. R. Co.*, 4 McCrary, (U. S.) 454.

That a safer method might have been adopted, not ground of recovery, where deceased was familiar with the practice of making flying switches. *Hunt v. Hurd*, 98 Fed. Rep. 683.

A car, difficult to mount and pass over, was placed first in a train. As there was no necessity to pass over it there was no negligence in so locating it. *Harris v. Chesapeake &c. R. Co.*, (Va.) 23 S. E. Rep. 219.

Street Railways.—No room was left between a passing car and an adjoining girder. The track was temporary, however, and the workman could have stepped to the other side of it. No recovery. *Sullivan v. Third Ave. R. Co.*, 19 App. Div. 195.

An elevated car was defective where it could only be started with a lunge in turning on the current. *Murdock v. Oakland &c. R. Co.*, 128 Cal. 22.

A company is not bound to anticipate that a conductor will fall between two cars run together. *Denver Tramway Co. v. Nesbit*, 22 Colo. 408.

The removal of a tower wagon while an employé is engaged at work thereon, without notice to him, was negligence. *North American R. &c. Co. v. Patry*, (Kan. App.) 51 Pac. Rep. 871.

Plaintiff could not complain of the dangerous proximity of a tree where the company did not locate the track or have the right to remove the tree. *Hall v. Wakefield &c. Street R. Co.*, (Mass.) 59 N. E. Rep. 668.

Failure of a foreman in starting cars to see the dangerous position of a gripman in the rear, was not negligent. *Keown v. St. Louis R. Co.*, 141 Mo. 86.

Factories, mills and machine shops:

A hook in a hoisting apparatus held sufficient. *Burke v. Witherbee*, 98 N. Y. 562.

Dobbins v. Brown, 119 N. Y. 188 (hoisting apparatus); *Harley v. Buffalo Car Co.*, 142 N. Y. 41 (belt fasteners); *Dingley v. S. K. Co.*, 134 N. Y. 552; *Clark v.*

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Barnes, 37 Hun 389 (usual way of collecting dripping where servant slipped on accumulation and was injured relieved the master from liability). But see Rice v. King Philip Mills, 144 Mass. 229.

Where a servant was killed by an overhanging bank of earth, the question was not whether the master omitted something, which he *might* have done but, did he do anything which, in the exercise of ordinary care, he ought not to have done, or did he omit any precaution which a prudent and careful man would have taken? *Leonard v. Collins*, 70 N. Y. 90, rev'g judg't for pl'ff.

The defendant's servant fell through a trap door, which was, contrary to instructions, raised from below by a co-servant. The door was used for passing up lumber from the floor below. The defendant had a right to have a trap door and the injury was from negligence of the co-employé. *Anthony v. Leeret*, 105 N. Y. 591, rev'g judg't for pl'ff.

Plaintiff, defendant's employé, went from the first floor of a factory to the second in the course of his employment. A co-servant had been ordered to put a heavy plainer in place, and, without specific orders so to do, but necessarily, he undertook to change the position of the stairs, in doing which he for a moment left them unfastened, while he went for hammer and nails. While absent the plaintiff undertook to come up and the stairs fell. Defendant liable. *Tendrup v. John Stephenson Co.*, 51 Hun, 462, aff'g judg't for pl'ff.

See *Brown Stone Co. v. Kraft*, 31 Oh. St. 287.

A pile of rolls of cloth seven feet high fell and injured an employé; a recovery against the master was maintained upon the grounds that it was the duty of the master to provide for safe piling of the cloth and its continued security. *Stephens v. Hudson Valley Knitting Co.*, 69 Hun, 375; aff'd, 143 N. Y. 633.

In an action for personal injuries caused by alleged defective machinery used by the plaintiff while in the defendant's employment, the plaintiff testified that the machine which she was operating was one which was put in motion by her placing her foot on a treadle; that when she was injured, the machine started when her foot was not on the treadle, which could not have happened unless the machine was out of order. The defendants introduced testimony to show that the machine was in perfect condition at the time of the accident. For jury. *Van Sickel v. Ilsley*, 75 Hun, 537.

Maintenance of a rag pulley having loose ends hanging down was negligence where placed near an old worn out belt, liable to require attention at any moment. *Dodd v. Bell*, 15 App. Div. 258.

The convexity of the die used for a wire machine was almost imper-

ceptible. Master was not chargeable, in absence of knowledge of its liability to cause explosions. *Scanlan v. Kahn*, 40 App. Div. 62.

Absence of a guard to prevent a saw's throwing wood forward, was not negligence, where it was not designed with the view of having one. *Arizona &c. R. Co. v. Mooney*, (Ariz.) 42 Pac. Rep. 952.

Failure to provide a steam cooker in a canning factory with the customary safety valve. *Empson Packing Co. v. Vaughn*, 27 Colo. 66.

Master was liable where his agent's plan for the construction of a scaffold, on which to remove heavy machinery, was not only defective but executed by unskilled workmen. *Blackman v. Thomson-Houston Electric Co.*, 102 Ga. 64.

That the plaintiff's slipping, the immediate cause of the injury, was accidental, did not prevent recovery for the failure to provide means of throwing machinery out of gear while at work about it. *Taylor v. Felsing*, 164 Ill. 331; aff'g s. c., 63 Ill. App. 624.

Slipperiness caused by glue, as well as failure to guard an excavation opening into an adjacent crushing machine, was negligence. *Armour v. Czischki*, 59 Ill. App. 17.

But, see, *Dene v. Arnold Print Works*, 181 Mass. 560.

Unguarded shaft of an engine in a room where several girls were at work was not a safe place. *Flatbank v. Haentzche*, 73 Ill. 236.

See *Chicago &c. R. Co. v. Russell*, 91 Ill. 398.

Master was negligent where the pin on which a bucket of salt turned was defective. *Morton v. Zwierzykowski*, 192 Ill. 328; aff'g s. c., 91 Ill. App. 462.

Defendant's superintendent was negligent in failing to stop the blast in the furnace upon directing the substitution of "bash" plates therein. *Illinois Steel Co. v. McFadden*, 98 Ill. App. 296; s. c. aff'd, 63 N. E. Rep. 671; Same v. Sitar, 98 Ill. App. 300.

Failure to secure the wheels of a traveler for the moving of a heavy stone, by the usual wedges, so as to prevent its moving, was negligence. *Salem-Bedford Stone Co. v. O'Brien*, 150 Ind. 656.

Plaintiff was not permitted to recover for injury from unnecessarily applying pressure to a loose running belt. *Phillips v. Romona Oolitic Stone Co.*, 19 Ind. App. 341.

Negligence of proprietor of a paper mill kept running at night without constant light, was for the jury. *Sawyer v. Rumbord Falls Paper Co.*, 90 Me. 354.

Knuth v. Weiss Malting &c. Co., 72 Ill. App. 389; *Dene v. Arnold Print Works*, 181 Mass. 560.

Failure to guard cog wheels was not negligence, as to one whose duties

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did not take him within three feet thereof. *Cunningham v. Bath Iron Works*, 92 Me. 501.

Not negligence to guard against broken castings flying 25 to 30 feet, when 10 feet was the usual distance. *Wood v. Heiges*, 83 Md. 257.

Failure to box a shaft projecting through a passage way, or to warn an inexperienced hand of the danger therefrom, was negligent. *American Tobacco Co. v. Strickling*, 88 Md. 500.

When the injury was due to neglect of defendants' servants to keep a machine in order the court said: "It was a question for the jury, whether the defendant used reasonable care in supervising its servants who were employed to repair the machine and in ascertaining the condition in which its machinery was left, as well as whether these servants used due care in inspecting the machine from time to time, and in repairing it, or in giving persons using it warning of danger, if the condition of the machine made it dangerous. If these servants used all the care that was reasonably required in keeping the machine in proper condition, the defendant is not liable unless it knew of the defect and unreasonably neglected to remedy it, or to give notice of the danger. If these servants did not use all the care that was reasonably required, it was for the jury to say whether the defendant had exercised a reasonable supervision over its servants, and over the manner in which the machinery was kept in repair." *Rogers v. Ludlow Man. Co.*, 144 Mass. 198.

Mere failure to provide guards for dangerous machinery does not make master liable. *McGuerty v. Hale*, 161 Mass. 51.

Carroll v. Willstons, 44 Minn. 287; *Sullivan v. Man. Co.*, 113 Mass. 396; *Gilbert v. Guild*, 144 id. 601; *Ciriack v. Woolen Co.*, 146 id. 182; *Townsend v. Langles*, 41 Fed. Rep. 919; see, however, *Roesner v. Hermann*, 10 Biss. 486; *Nadau v. White R. L. Co.*, 76 Wis. 120.

Where a belt shifter is of the kind in ordinary use, master is not liable, though the accident might have been prevented by the use of contrivances sometimes used in connection therewith. *Ross v. Pearson Cordage Co.*, 164 Mass. 257.

Wabash Paper Co. v. Webb, 146 Ind. 303; *Donahue v. Washburn &c. Man. Co.*, 169 Mass. 574; *Keenan v. Waters*, 181 Pa. St. 247.

Plaintiff slipped while carrying a load and fell upon uncovered cog-wheel. Not safe place to work. *Swoboda v. Ward*, 40 Mich. 420.

Coombs v. New Bedford Cordage Co., 102 Mass. 572.

A hood covering revolving knives in a planing machine was not sufficient where it had become so worn as to loosen and to require frequent adjustment. *Jaroszeki v. Osgood &c. Man. Co.*, 80 Minn. 393.

Maintenance of defective steam clothes wringer rendered defendant liable for all the direct and probable consequences, though the particular act could not have been foreseen. *Hoepper v. Southern Hotel Co.*, 142 Mo. 378.

Failure to guard a circular saw in the usual manner was negligent. *Lemser v. St. Joseph &c. Man. Co.*, 70 Mo. App. 209.

Myers v. Lumber Co., 129 N. C. 252.

Master was negligent in allowing shavings to accumulate in a passageway between two dangerous machines, the regular passage way being stopped thereby altogether. *Myers v. Concord Lumber Co.*, 129 N. C. 252.

It was negligent to use a chain nearly double its natural life. *Honifus v. Chambersburg Engineering Co.*, 196 Pa. St. 47.

Where a master had separated a place of danger so as to exclude all but the engineer, another employé could not raise the question of its safety. *Casey v. Pennsylvania Asphalt &c. Co.*, 198 Pa. St. 348.

Plaintiff contended that the accident was caused by a nipple not being screwed on a flange far enough. No negligence was shown where it appeared that if the material was of proper quality and the threads properly cut the distance testified to would have been sufficient. *Alexander v. Pennsylvania Water Co.*, 201 Pa. St. 252.

Master was not negligent in removing a device of his own which was not in general use to secure greater safety, giving proper instructions and warning in regard thereto. *Reese v. Hershey*, 12 Lanc. L. Rev. 353.

Master was negligent where the controlling grooves of a machine were in such condition as to be apt to throw one's hands against the saw. *Central Man. Co. v. Cotton*, 108 Tenn. 63.

Master was not liable where the defect in a wire cable could not have been discovered before or after it was placed in its hook socket. *Quintona v. Consolidated &c. R. Co.*, 14 Tex. Civ. App. 347.

Platform was too close to rollers of an oil mill and the teeth were dull. Owner was liable. *Ladonia Cotton Oil Co. v. Shaw*, (Tex. Civ. App.) 65 S. W. Rep. 693.

Evidence that a machine which when properly constructed, would not run when thrown out of gear, started of its own accord shows negligence on the part of the master. *Gulf &c. R. Co. v. Haden*, (Tex. Civ. App.) 68 S. W. Rep. 530.

Master is not bound to provide against a danger from projecting bolts on a fly wheel which a servant of 14 months' experience about it has not discovered. *Detroit Crude-Oil Co. v. Grable*, 94 Fed. Rep. 73.

Riverside Cotton Mills v. Green, 98 Va. 58.

Master not liable for use of dangerous method to manipulate machinery when a safe one was provided. *Rysdorph v. Pankratz Lumber Co.*, 95 Wis. 622.

Huffer v. Herman, 66 Ill. App. 481.

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Failure to guard a sprocket wheel just above the floor over which move chains adjoining the place where an inexperienced boy of 17 is set to work, held negligence. *Klatt v. N. C. Foster Lumber Co.*, 97 Wis. 641.

Failure to spike the bottom of a ladder used on a factory floor was not negligence. *Borden v. Daisy Roller Mill Co.*, 98 Wis. 407.

Mines, tunnels and excavations:

A machinist employed to repair an engine in a sub-cellar, unwarned of a hole beside it, fell into it and was hurt. It was for the jury. *Homer v. Everett*, 91 N. Y. 641, aff'g judg't for pl'ff.

A hook fastening the cable to cars to draw it from a mine became detached and an employé was killed. It was the usual fastening for such purposes and was in constant and successful use. The defendant was not liable. *Burke v. Witherbee*, 98 N. Y. 562, rev'g judg't for pl'ff.

A master must furnish suitable tools and a safe place to work, and competent workmen, and his duty in this regard cannot be delegated. The defendant's superintendent was aware of a crack in the rock in a mine; the plaintiff was not aware of it, and was injured by the falling thereof. Verdict for the plaintiff was sustained. *Pantzar v. Tilly Foster I. N. Co.*, 99 N. Y. 368, aff'g judg't for pl'ff.

In an action to recover damages for the death of "D.," plaintiff's intestate a servant in defendant's employ, alleged to have been caused by defective apparatus provided by the latter, it appeared that "D.'s" death was caused by a fall from a bucket, which was being lowered in a shaft to convey workmen to a tunnel, their place of labor. The only survivor of the accident testified, that after the bucket got about half way down the shaft, something came from above and knocked him out of it. After the accident the cable supporting the bucket and dummy yoke was found to be broken at a point above the bucket, where a chain connected with the cable, and a shoulder had been placed for the support of the dummy yoke when in position; the dummy yoke broken, with the bucket and a portion of the chain, were found lying together at the bottom of the shaft. There was no evidence but that similar apparatus and appliances were generally in use in deep shafts for mining purposes in this country, and in some instances it appeared they were required by law to be used. There was no proof of any defect in the plan or structure of the apparatus used, or that it was not well constructed. The court charged that the jury might infer that the accident occurred from the accidental stoppage of the dummy yoke or follower at some point in the course of its descent, and its sudden fall thereafter from a great distance upon the bucket.

Held, error; that the evidence was insufficient to support such an inference; also, that it was for plaintiff to show how the accident occurred, and to prove negligence of defendants in respect to some matter which caused it; and that the evidence failed to show this. *Dobbins v. Brown*, 119 N. Y. 188, rev'g judg't for pl'ff.

A trench had been opened to furnish the defendant's servants a proper place to work in cleaning pipes. The earth caved in and he was suffocated. For jury. *Kranz v. L. I. R. Co.*, 123 N. Y. 1, rev'g judg't of nonsuit.

Distinguishing *Murphy v. B. & A. R. Co.*, 88 N. Y. 152; *Cook v. N. Y. C. & H. R. R. Co.*, 119 id. 653.

Sheathing would have made the trench safer, but no accident had occurred during three or four years' experience. No liability. *Farrell v. Middletown*, 56 App. Div. 525.

It was not negligent *per se* not to provide a means of access to a mine different from that by which coal was hoisted. *Whatley v. Zenida Coal Co.*, 122 Ala. 118.

The finished portion of a tunnel becomes an appliance for the further prosecution of the work. *Hanley v. California &c. Const. Co.*, 127 Cal. 232.

A shaft 12 feet deep caved in while plaintiff, an experienced miner, was timbering it. No recovery. *Stiles v. Richie*, 8 Colo. App. 393.

To make the master liable for failure to furnish props of sufficient length, he must have been notified of their insufficiency. *Sugar Creek Min. Co. v. Peterson*, 177 Ill. 324; rev'g s. c., 75 Ill. App. 631.

Knowledge that the dangerous condition of the coal made it an unsafe place to work, makes the employer negligent in setting a crew at work. *Consolidated Coal Co. v. Gruber*, 188 Ill. 584; aff'g s. c., 91 Ill. App. 15.

Prop in a mine was in a defective condition where it fell by itself or was knocked out by a jar from a passing car. *Consolidated Coal Co. v. Lundak*, 196 Ill. 594; aff'g s. c., 97 Ill. App. 109.

Statute construed not to impose the duty of propping the roof of a mine. *Consolidated Coal Co. v. Carson*, 66 Ill. App. 434.

That a sudden gust of wind contributed to the injury did not relieve the owner for the part his failure to guard the air shaft played therein. *Springside Coal Min. Co. v. Grogan*, 67 Ill. App. 487.

Failure to guard a well within 91 feet of a lodging tent within the same enclosure was negligence. *Indiana Pipe-Line &c. Co. v. Neusbaum*, 21 Ind. App. 361.

Part of a mine caved in and killed a servant, who was there as a visitor and not as a laborer. No liability. *Wright v. Rawson*, 52 Iowa, 329.

See *Atlanta &c. R. Co. v. Ray*, 70 Ga. 674.

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Owner must prop the roof of a sloping mine entrance so as to prevent rocks falling on the track while coal is being removed along it. *Corson v. Coal Hill Coal Co.*, 101 Iowa, 224.

As to when it is otherwise, where it is by usage or otherwise the servant's duty to look after the roof, see *Taylor v. Star Coal Co.*, (Iowa) 110 Iowa, 40.

Furnishing an iron tamping rod for use in a mine, was negligence where a wooden one would have greatly reduced the danger. *Ohio Valley R. Co. v. McKinley*, (Ky.) 33 S. W. Rep. 186.

Master was negligent, where a timber in a mine fell when a mule shied against it. *Koltinsky v. Wood*, (Ky.) 65 S. W. Rep. 848.

Failure to guard an open ditch of scalding water was negligence. *Powers v. Calcasieu Sugar Co.*, 48 La. Ann. 483.

Failure to prevent volunteers from assisting to push street cars over an excavation was not negligence. *Craven v. Mayers*, 165 Mass. 271.

Where a gas company had no control over an excavation made by a city, plaintiff could not expect it to make the excavation safer than it was. *Hughes v. Malden &c. Light Co.*, 168 Mass. 395.

Operators were not negligent where a nut on an eyebolt to a cross beam was sufficient for the purpose for which it was intended, though not for other use. *Jayne v. Sebewaing Coal Co.*, 108 Mich. 242.

Master was negligent where the boom of a derrick contained several knots, impairing its strength. *Attix v. Minnesota Sandstone Co.*, 85 Minn. 142.

Mine owner need not go beyond indicating the presence of dangerous gas in a room in the mine by the usual danger signal. He is not required to station watchman. *Cerrillos Coal R. Co. v. Deserant*, 9 N. M. 49.

Master was liable for the driving of wedges in a bank though a rainfall undermining the bank contributed to the injury. *Thomas v. Ross*, 75 Fed. Rep. 552.

Failure to shore the sides of a trench deep enough, in view of the softness of the earth, to prevent from caving was negligence. *Baird v. Reilly*, 92 Fed. Rep. 884.

Bartholomeo v. McKnight, (Mass.) 59 N. E. Rep. 804.

An owner's duty is to provide "all appliances readily attainable, known to science" to prevent explosion. *Western &c. Min. Co. v. Berberich*, 94 Fed. Rep. 329.

Operators of a mine are bound to use reasonable care to see that a platform for the use of miners across a narrow, dark fissure, 70 feet from the bottom is adequate and safe. *Westland v. Gold Coin Mines Co.*, 101 Fed. Rep. 59.

Master was liable for directing employ es to go into an up-raise in a mine known to be filled with gas and foul air. *Portland Gold Min. Co. v. Flaherty*, 111 Fed. Rep. 312.

See *Kless v. Youghiogheny*, 18 Pa. Super Ct. 551.

The elevator in a shaft of a mine used to remove miners out of the way of a blast was stopped because the motive power was cut off by defendant's foreman. The ladder to the shaft was gone as defendant had taken it out for the purpose of replacing it with a new one. Defendant had failed to provide a safe place to work. *Alaska &c. Min. Co. v. Muset*, 114 Fed. Rep. 66.

Negligence was for the jury where injury was received from the sudden operation of safety appliances by the giving way of the cables to a cage which had for some time been loose and shaky. *Mangum v. Bul lion &c. Min. Co.*, 15 Utah, 534.

Removal of waste supporting an upright of a ladder in a dark passage of a mine is gross negligence. *Dryburg v. Mercur &c. Min. Co.*, 18 Utah, 410.

Mine foreman was negligent in making and leaving a hole at the foot of a ladder leading down to it. *Downey v. Gemin Min. Co.*, (Utah) 68 Pac. Rep. 414.

Where an error of judgment in stopping the fan of an air shaft was due to the excitement incident to discovery of fire in a mine, the owner was not chargeable with negligence. *Hughes v. Oregon Imp. Co.*, 20 Wash. 294.

See, also, *Bessemer Land &c. Co. v. Campbell*, 121 Ala. 50.

Failure to provide props in a mine did not render master liable, where the injury occurred through tapping the stone prior to propping. *Massie v. Peel-Splint Coal Co.*, 41 W. Va. 620.

Building operations:

A staging or scaffolding for workmen *is not a place in which work is to be done*, within the rule requiring the master to furnish his servants a suitable and safe place in which to work, but it is *an appliance or instrumentality* by the means of which the work is to be done. When a master places a servant upon a scaffold for the construction of which he has contracted with an experienced and skillful builder, he is at liberty to accept it without inspection, and is not liable to a servant for injury resulting from negligence in its construction.

The caulking of a vessel requires two classes of workmen known as "lumbers" and "caulkers." The foreman of the "lumber" gang contracted to do all the "lumber's" work, including the erection of a sta-

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ging, at a fixed price. The defendant furnished a sufficient supply of suitable material for the staging, and one plank was deemed unsafe. The "lumpers," however, negligently used this plank which broke when "B," a "caulker," was standing upon it. The "lumper" gang were not the defendant's servants, but even so, the negligence was that of a fellow servant of the injured "caulker." *Butler v. Townsend*, 126 N. Y. 105, rev'g judg't for pl'ff.

An apparently safe scaffold fell. It was erected improperly by unskilled persons. Presumption that plaintiff's employer, owning the place where scaffold was erected, procured such erection, and the burden was therefore on the defendant to show that a competent person had been employed. *Brickner v. N. Y. C. R. Co.*, 2 Lansing, 506, rev'g nonsuit.

A workman in building under construction was hit by a brick or other substance falling from above, on account of the defective covering, to prevent injury from same. Master must provide such covering; contributory negligence for jury. *Ford v. Lyons*, 41 Hun, 512, aff'g judg't for pl'ff.

Pioneer Fireproof Const. Co. v. Howell, 189 Ill. 123; aff'g s. c., 90 Ill. App. 122.

The plaintiff was at work for the defendant on the foundation of a building within three feet of which was a tree forty feet high. While the defendant, who was a builder, was supervising the work of cutting down the tree started by his foreman, the tree fell, striking and injuring the plaintiff. There was no evidence to show that the direction in which the tree fell was due to any negligence on the part of the workmen who cut it down. On appeal from a judgment of nonsuit.

Held, that the nonsuit was improperly granted, as the jury might have found the act itself to have been inherently dangerous to persons who were near the tree, and that ropes or other appliances should have been used.

That testimony of the defendant, to the effect that he gave warning to his workmen some minutes before the tree fell, and the plaintiff's denial that he received any word in regard to the same until the tree was actually falling, should have been submitted to the jury. *McGonigle v. Canty*, 80 Hun, 301.

A derrick in use throughout the work is a permanent structure which must be made safe. *Yaw v. Whitmore*, 46 App. Div. 422.

Duty as to safety did not apply to a part of the structure worked on which workmen had adopted as a seat. *Stourbridge v. Brooklyn C. R. Co.*, 9 App. Div. 129.

Knowledge that a foundation was insufficient makes it negligence to erect walks thereon. *Cochran v. Sess*, 40 App. Div. 223.

An employer was bound to take usual and reasonable precaution to secure a structure of platform on which an employé was obliged to work. *Davidson v. Cornell*, 10 N. Y. Supp. 521.

Employé was injured by the giving way of a wooden slat on a ladder and the master was not liable in absence of proof of negligence in building the ladder or inspecting the same. *Shorning v. Knickerbocker Ice Co.*, 13 N. Y. Supp. 434.

A contractor providing a sufficient scaffold for his work was not liable for the death of an employé from giving way of an insufficient scaffold not adopted by him. *Mauer v. Ferguson*, 44 N. Y. St. Rep. 372.

Where a contractor directing the work subjected a scaffold to more than twice the weight intended to be borne by it, he was liable for injuries caused by the falling thereof. *Flynn v. Harlow*, 46 N. Y. St. Rep. 872.

And so where scaffold was defectively built. *Kaspari v. Marsh*, 74 Wis. 562.

Scaffolding fell while plaintiff was upon it. Not safe place to work. *Henry v. Brady*, 9 Daly, 142.

See *Giles v. Diamond &c. Co.*, 6 Cent. (Del.) 867.

An employé engaged on the top of a framework of timber, standing on a plank supported by cross timbers, fell a distance of forty feet by a cross timber breaking. There was sufficient evidence that the timber broke by reason of defects perfectly apparent on examination of the timber. It was the defendant's duty to have made a structure safe and sufficient for the purpose for which it was intended. *Ernst v. The Brown Hoisting & Conveying Co.*, 4 Misc. 450, aff'g judg't for pl'ff.

Removal of a pile driver on a car along a track by attaching a rope to a pile ahead and setting the machine agoing instead of by means of crow bars, held negligence. *Southern R. Co. v. Shields*, 121 Ala. 460.

The defendant could not exonerate himself by showing that his servant, injured by the insufficiency of a structure, disobeyed orders whereby structure became unsafe. *C. I. Machine Co. v. Kiefer*, 134 Ill. 481.

Failure to strengthen a scaffold by placing in position foot locks or braces thereto, held negligence. *Chicago &c. R. Co. v. Maroney*, 170 Ill. 520; aff'g s. c., 67 Ill. App. 618.

It was not negligent to raise a platform by means of cross pieces instead of blocks and tackle where there is a diversity of opinion as to which was the safer. *East St. Louis &c. R. Co. v. Sculley*, 63 Ill. App. 147.

Failure to provide a beam of sufficient strength to support blocks and

WHAT CONSTITUTES REASONABLY SAFE MACHINERY, chain in hoisting an iron tank, was negligence. *Fraser v. Collier*, 75 Ill. App. 194.

Where defendant directed what lumber was to be used in erecting a staging, and superintended the work generally, although not personally, injuries received by a servant in consequence of unsuitable material attributable to master. *Arkerson v. Dunnson*, 117 Mass. 407.

Failure to provide planking for uncovered girders to facilitate moving a derrick across them, did not render employer liable where the injury was due rather to a miscalculation and an accidental slip in using the girders. *Holloran v. Union Iron & Co.*, 133 Mo. 470.

Permitting a carpenter to mount a ladder placed against an iron pillar, knowing it to be insufficiently braced, was negligence. *Herdler v. Buck's Stove & Co.*, 136 Mo. 3.

Failure to anticipate that a brick passage for gas pipes might contain poisoned water likely to injure a servant, was not negligence. *Lawless v. Laclede Gas Light Co.*, 72 Mo. App. 679.

Failure to have the mullion of a window on a flat roof, strong enough to bear the weight of a servant was not negligence. *Saunders v. Eastern & Co.*, (N. J. L.) 44 Atl. Rep. 630.

The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows. No liability. *Armour v. Hahn*, 111 U. S. 313.

Failure to detect a latent defect which the appearance of the rope gave no indication of, was not negligence. *Erskine v. Chino Valley Beet-Sugar Co.*, 71 Fed. Rep. 270.

Failure to provide a scaffold of sufficient strength to stand the strain of the superstructure of a bridge which it was designed to sustain as well as the strain of placing the different parts in position, was negligence. *Austin Man. Co. v. Johnson*, 89 Fed. Rep. 677.

Failure to provide adequate danger signals or watchmen where a guy rope to a derrick used in building operations at night was run across the street in reach of passing wagons was negligence. *Grace & Co. v. Kennedy*, 99 Fed. Rep. 679.

Buildings and grounds:

If a master knew, or ought have known, of the defects in the building in which the servant rendered service, he is liable to the servant for injury therefrom.

An outhouse attacked in an insecure and dangerous manner to the factory fell and injured the plaintiff. The master was liable. *Ryan v. Fowler*, 24 N. Y. 410, aff'g judg't for pl'ff.

The judge charged, that the defendant must provide a safe cable for the hoisting derrick. The charge was too broad but the judgment was sustained because there was no evidence of care on the part of the master in selecting the cable and attention of court was not called to error claimed. *Probst v. Delamater*, 100 N. Y. 266, aff'g judg't for pl'ff.

In common law and prior to the passage of the act requiring the construction of fire escapes, etc., upon the outside of all factories three stories or over in height and of scuttles leading to the roof (chap. 409, Laws of 1886, as amended by chap. 462, Laws of 1887), the owner of such factory, not particularly exposed to the danger of fire from the character of the work carried on within it, was not bound to anticipate such danger, or to provide anything more than the ordinary means of egress, *i. e.*, stairs, halls, door-ways, and windows. *Jones v. Granite Mills*, 126 Mass. 84; *Bajus v. S. B. & N. Y. R. Co.*, 103 N. Y. 312; *Keith v. Granite Mills*, 126 Mass. 90.

It seems that said act imposed a duty upon the owners or occupants of the prescribed class of factories, for an omission to perform which an operative injured because thereof, may recover damages.

This duty, however, being created by the act, is measured by it and cannot be made to exceed its terms. No actionable negligence was shown by following facts:

In an action for the death of "P.," caused by the destruction by fire of defendant's factory, in which "P." was employed, it was claimed that defendant had neglected to comply with said act, and that this operated to cause the death. It appeared that defendant had placed two fire escapes upon its factory, which connected with each floor above the first, and were well fastened, perfectly secure, and of sufficient strength; their number, character and location were examined and approved after careful inspection by the proper officer, and reported by him as meeting the requirements of the law. The building had no scuttle leading to the roof with a stationary ladder, but one of the fire escapes, which was a ladder of iron rungs, was carried up to the roof, giving access to it. An inside ladder and scuttle would have been an utterly unavailable means of escape from the fire however it might have been constructed. Held, that no omission of duty on the part of defendant was shown which rendered it liable.

It was claimed by plaintiff that the blinds to the windows were open, that when open they closed over one of the fire escapes, making access to it difficult, and that this established negligence. The inspector, with

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full knowledge of the presence and effect of the blinds, did not order them removed, but deemed the escape sufficient. One of defendant's workmen escaped by that route. There was no proof that anyone was turned back because he could not reach the escape. Held, that the presence of the blinds did not establish negligence on the part of defendant.

The specific negligence charged by plaintiff was the existence of a chute leading into the basement of the factory beneath one of the fire escapes, so that a person dropping from one of its lower rungs would be likely to fall into the opening and be returned to the factory. The evidence showed that "P." did not meet his death from this cause; that he did not descend the fire escape, but was suffocated in the smoke which filled the building, which granted new trial after nonsuit.

Pauley v. Steam Gauge and Lantern Company, 131 N. Y. 90, rev'g 61 Hun, 254.

Fastening windows leading to fire escapes did not render the place dangerous for work where they might easily have been broken through in case of emergency. *Huda v. American Glucose Co.*, 154 N. Y. 474; aff'g s. c., 12 App. Div. 624.

Intestate was employed on the fifth floor of the defendant's factory when the fire broke out, and he was burned. The ordinance required a scuttle through the roof, and a suitable stairway or ladder. It was for the jury to say whether non-compliance with this ordinance, or other omission to provide means of escape, rendered the defendant liable. Intestate, aged nineteen, could not be said to have taken the risks. *Schwander v. Birge*, 33 Hun, 186, rev'g nonsuit.

Sec. 16 of title 14, ch. 583, L. 1888, directs that certain factories "shall be provided with such fire escapes as shall be directed and approved by the commissioner." The owner of the building cannot await the directions of the commissioner, but must take steps to procure such directions. *McLaughlin v. Armfield*, 58 Hun, 376, rev'g judg't for pl'ff.

Where the owner or occupant of a building designated in sec. 10, ch. 409, L. 1886, amended by ch. 462, L. 1887, and 560, L. 1889, has neglected to provide a fire escape, as prescribed by statute, he will be liable to an operative injured through his neglect, unless he has substituted some other safe way of escape, and the question is one for a jury. Most of the employés, at the time of a fire, escaped on to a neighboring roof and thence through a scuttle to the street. The plaintiff testified that he did not know of such way, nor discovered it during the smoke and confusion. The burden of proving proper substitution for fire escape is on the defendant. (*Mayes v. The Chicago, R. I. & Pacific R. R. Co.*, 63 Iowa, 566.) Distinction between assuming the risk in case of absence

of fire escapes and in case of machinery where the dangers are apparent and is beneath the servant's observation and measurably able to be guarded against, was pointed out. *Gorman v. McArdle*, 67 Hun, 484, aff'g judg't for pl'ff.

Ordinary glass in a skylight on a roof from which snow had to be shoveled was not safe. *Garety v. King*, 9 App. Div. 443.

Passageway provided with sufficient lights was held to be safe in the absence of proof as to what put them out. *Dorney v. O'Neill*, 34 App. Div. 497.

Failure to inform an employé of the nature of a flooring constructed partly of wood and partly of glass which was concealed by being covered with dust was negligence. *Raftery v. Central Park &c. R. Co.*, 14 Misc. 560.

A wardrobe in a locked inclosure under the guard of a competent employé is as safe a place for the deposit of garments as a master is bound to provide. *Cantancarito v. Seigel-Cooper Co.*, 23 Misc. 664.

Safe place to work does not extend to a place without the field to which the servant unnecessarily goes to hang his coat. *Kennedy v. Chase*, 119 Cal. 637.

That a meat hook was slightly turned toward another on which an employé was attempting to hang meat, did not make it unsafe. *Armour v. Ryan*, 61 Ill. App. 314.

The existence of a defect in a floor in which one servant stepped throwing a load on another assisting him was the remote cause of injury therefrom. *Louisville &c. R. Co. v. Southwick*, 16 Ind. App. 496.

Failure to keep factory stairs in good condition, was negligence. *Feris v. Hershheim*, 51 La. Ann. 178.

Where no one knew that bricks of a chimney were loose, though the top had fallen over shortly before by reason of a fire, master was not liable. *Pilucki v. Detroit &c. Works*, 117 Mich. 111.

A statute imposing upon the owner of factories the duty of providing fire escapes did not apply to leased premises. *Lee v. Smith*, 42 Oh. St. 458.

The tenant of a particular floor was held liable for injury from an insufficient fire escape. *Neeley v. O'Conner*, 106 Pa. St. 321.

Where the statute requires fire escapes *under a penalty*, and an operative necessarily jumped from a building having no fire escapes, he did not recover for injury therefrom, as the act did not give the operative a cause of action. *Grant v. Slater Co.*, 14 R. I. 380.

Maintenance of a cistern in the mill yard surrounded by a coping and protected, in addition, by a chain fence all the way around except a small gap to gain access to it, was not negligence. *McCann v. Atlantic Mills*, 20 R. I. 566.

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Where failure to sufficiently prop a building was not due, as the evidence showed, to carelessness or negligence of employés, but it appears that all was done that was thought necessary, master is not liable to servant for injuries by falling of the same. *Sanders v. Etiwan Phosphate Co.*, 19 S. C. 510.

Where several modes of access to a building are provided the master is bound to keep them all in a reasonably safe condition. *Rinake v. Victor Man. Co.*, 58 S. C. 360.

Defendant was not *per se* free from negligence where plaintiff was injured in removing a wall which was defective, of which the latter had no knowledge. *Proffett v. Missouri &c. R. Co.*, (Tex.) 68 S. W. Rep. 979.

Master is liable for the decayed condition of a plank used to wheel heavy loads over. It had broken before. *Johnson v. Bellingham Bay Imp. Co.*, 13 Wash. 455.

Failure to sufficiently light the place of work about dangerous machinery, was negligence. *Jensen v. Hudson Saw Mill Co.*, 98 Wis. 73.

Elevators:

Where a general agent in entire control of a mill received notice of a defective elevator and did not repair it, the master was liable for an injury therefrom. *Corcoran v. Holbrook*, 59 N. Y. 517, aff'g judg't for pl'ff.

Plaintiff, defendant's miner, while being lowered into a shaft in a bucket, was injured by the rope breaking owing to a defective lowering system. The arrangement was not safe. *Boardman v. Brown*, 44 Hun, 336, aff'g judg't for pl'ff.

A clamp of an elevator fell and injured an employé. There was an utter failure to show that there was any cause for the accident except the breaking of the clamp, but why it broke was left wholly unexplained by the evidence. *Lawson v. Merrall*, 69 Hun, 287, aff'g judg't of nonsuit.

Freight elevators provided with safety appliances usual in such cases is sufficient. *Boess v. Clausen &c. Co.*, 12 App. Div. 366.

Scaffold for repairing in an elevator shaft was constructed through the loop of a rope suspended from the car. Such construction was not necessary and master was not liable for the raising of the car. *Simpson v. Gerken*, 19 App. Div. 68.

Looseness of a bar to an elevator shaft was not a defect, where it was necessary to secure its usefulness. *Tisch v. Hirsch*, 32 App. Div. 635.

Elevator was reasonably safe, though its motion was somewhat eccen-

tric and its floor slightly inclined. *Montgomery v. Bloomingdale*, 34 App. Div. 375.

Repair of an elevator did not relieve master where it was of a poor class and the manager knew of defects which were not touched. *Goggin v. Osborne & Co.*, 115 Cal. 437.

A child of fifteen employed as a factory hand fell through unprotected elevator shaft. Not safe place to work. *Atlanta Cotton Factory Co. v. Speer*, 69 Ga. 137.

Elevator was entirely open in front, with the operating cable only a foot therefrom, with the floor openings protected only by a single wooden bar and the horizontal edge of the wooden lining of the shaft improperly constructed. Negligence was for the jury. *Dallemand v. Saalfeldt*, 175 Ill. 310; aff'g s. c., 73 Ill. App. 151.

Failure to guard an elevator shaft at night was not negligent where there was no reason to apprehend that anyone would use the room containing it. *Jorgenson v. Johnson Chair Co.*, 67 Ill. App. 80.

Permission for employ  s to use a freight elevator to go to and from their work only imposes ordinary care as to its safety. *Sievers v. Peters Box &c. Co.*, 151 Ind. 642.

By requiring the use of an elevator in a laundry the master must use ordinary care to see that it is safe as to the construction and operation. *Wilson v. Williams*, (Ky.) 58 S. W. Rep. 444.

Master was negligent, where one of the safety clutches was off and the shaft carrying the other was broken besides and the clutches and springs were themselves defective. *Kleibaz v. Middletown Paper Co.*, 180 Mass. 363.

Skelley v. Crutchfield, 17 Pa. Super. Ct. 198.

Master was not negligent, where the elevator, properly inspected, did not fall, but the elevator boy failed to stop it before reaching the basement. *Spees v. Boggs*, 198 Pa. St. 112.

The *bona fide* use of elevator cables beyond the time at which it is safe to do so, is not negligence, where there is no way of telling how long they may be so used. *Bruce v. Beall*, 99 Tenn. 303.

Where a stevedore in loading a ship uses the latter's appliances, he owes his men the duty of seeing that such appliances are sufficient. *Young v. Hahn*, (T. C. A.) 69 S. W. 203.

Electrical appliances:

Master was negligent where telegraph pole fell while employ   was on it, either because it was not set deep enough in the ground, or the ground had been allowed to wear away from it. *Riker v. New York &c. R. Co.*, 64 App. Div. 357.

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A limb of a tree upon which a lineman goes in the process of stringing wire, is not an appliance for the safety of which the master is liable. *Yearsley v. Sunset Teleph. &c. Co.*, 110 Cal. 236.

Failure to insulate a "span" wire, which employes are required to handle, where it is so located as to be liable to touch a trolley wire and become charged with electricity, was negligence. *McAdam v. Central R. &c. Co.*, 67 Conn. 445.

Master had performed its duty to a lamp trimmer in providing a cut-off switch to prevent danger from contact of its wires with others, charged with electricity and instructing him in regard thereto. *Carr v. Manchester Electric Co.*, 70 N. H. 308.

Knowingly permitting an electric crane to remain without proper insulation, was negligence and liability extended to injury through accidental contact of its wire with another that carried a dangerous current. *Moran v. Corliss Steam Engine Co.*, 21 R. I. 386; s. c., 45 L. R. A. 267.

Where one company uses the poles of another to string its wire on, it is bound to give them reasonable inspection before sending its servants up them to work. *San Antonio Edison Co. v. Dixon*, 17 Tex. Civ. App. 320.

Horses and vehicles:

Footboard of a wagon gave way while teamster was holding onto it to prevent his falling from the tongue of the wagon on which he was standing. No recovery. *Deane v. Buffalo*, 42 App. Div. 205.

Defendant's driver was negligent in hitching a horse to a wagon and starting on without looking to see whether any one was in danger. *Laying v. Mt. Shasta &c. Co.*, 135 Cal. 141.

Failure to warn a night crew of the change in the formation of a dump pile, was negligence. *Iroquois Furnace Co. v. McCrea*, 91 Ill. App. 337.

Defect in a pin fastening a wheel to the axle of a cart for carrying lumber about a yard, showed negligence. *Boyce v. Schroeder*, (Ind.) 51 N. E. Rep. 376.

An employé, sent to drive a truck hired for use in a procession, knowing his master did not build the superstructure thereon, was not in a position to complain of defects therein. *Hardy v. Shedden Co.*, 78 Fed. Rep. 610.

Signaling a team, hitched to a log, which held fast, to start without warning to plaintiff, who was working at it, was negligence. *Sweain v. Donahue*, 105 Wis. 142.

Shipping:

Slings for unloading ship, insufficient to sustain the strain, were held defective. *Hannegan v. Union Warehouse Co.*, 3 App. Div. 618.

See *Olsen v. Starin*, 43 App. Div. 422.

An appliance, called a mouthpiece, was used to keep in place a gang plank, extending to a vessel, but was not, as it should have been, made properly fast to the gang plank, whereby a servant going down the gang plank with a truck was thrown down by the wheels of the truck catching in the gap between the mouthpiece and the gang plank. The load upon his truck fell upon and injured him. For jury. *McC Campbell v. The Cunard S. S. Co.*, 69 Hun, 131. Rev'g judg't of nonsuit.

It was for the jury to decide whether the defendants undertook to supply safe tackling to men hoisting out the cargo from their ships; and if they did, whether that duty was discharged in furnishing ropes apparently defective. *Rooney v. Compagnie Generale &c.*, 10 Daly, 241.

See *Tennessee Coal &c. Co. v. Herndon*, 14 So. (Ala.) 287.

It was negligence to supply a defective reefing pennant. *Silveira v. Iverson*, 125 Cal. 266.

It was negligence to order plaintiff and seven others to go out on a poplar plank 11 inches wide, 3¼ inches thick and 16 feet long, without braces. *Louisville &c. Packet Co. v. Samuels*, (Ky.) 59 S. W. Rep. 3.

Warehouseman was not negligent in failing to inspect a rope supporting a platform. *Moynihan v. King's Cement &c. Co.*, 168 Mass. 450.

Employer failed to inform an employé of the custom to leave hatchways open though, in the dark, while the boat was out of commission. Negligence for the jury. *Brown v. Ann Arbor R. Co.*, 118 Mich. 205.

Master was negligent where the wrench for turning a draw was of insufficient strength and did not fit properly. *Galveston &c. R. Co. v. Newport*, (Tex. Civ. App.) 65 S. W. Rep. 657.

Defendant was negligent, where its derrick was insufficient to swing a sling load directly over the proper hatch, but had to stop at a place near another hatch under which plaintiff was working, through which a load fell. *Young v. Hahn*, (Tex. Civ. App.) 69 S. W. Rep. 203.

Duty to light a passageway to a coal bunker by an open hatch was not fulfilled by merely supplying lanterns without seeing that they are properly lighted. *The Saratoga*, 87 Fed. Rep. 349.

Failure to use staging or connecting planks in transferring cotton from a barge to a steamboat was not negligence, where their use was neither customary or practical. *Red River Line v. Smith*, 99 Fed. Rep. 520.

Nor was the unexpected failure of the electric lights provided, as it was a common incident to their employment and lanterns furnished as a

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substitute had been regarded as sufficient. *Red River Line v. Smith*, *supra*.

Sending a longshoreman through a dark passage having an open trap door to it was negligence. *Sansol v. Compagnie Generale Transatlantique*, 101 Fed. Rep. 390.

Dangerous gases and explosives:

Gas company liable to employé's representatives for his death, caused by inhaling gas permitted to escape with knowledge of the company in a room where deceased was at work. *Citizens' Gas Company v. O'Brien*, 118 Ill. 174.

Owner of a blast furnace was not bound to anticipate the over-sensitiveness of plaintiff's lungs to gas. *Parlin &c. Co. v. Finfrouck*, 65 Ill. App. 174.

Direction to thaw charge of dynamite with hot water, did not charge the employer with liability, where an attempt was made to remove it without direction. *Welch v. Grace*, 167 Mass. 590.

Dynamite was directed to be placed in a hole in a rock heated by a recent explosion. Negligence was question for the jury. *Green v. Smith*, 169 Mass. 485.

Direction to drill a hole in a rock toward where a loaded charge was known to have been placed, presented a question for the jury. *Dean v. Smith*, 169 Mass. 569.

Superintendent was not negligent in starting a current of air which raised a dust in an elevator well, in which plaintiff was sent with a lantern, in the absence of knowledge or inexcusable ignorance of its inflammable or explosive character. *O'Reilly v. Bowker Fertilizer Co.*, 174 Mass. 202.

That dust from an iron railing in a packing house, from which plaintiff was cleaning dried blood, contained injurious bacteria, did not make defendant liable, where it was never before known to be dangerous and did no damage to fifteen others in the room. *Hysell v. Swift & Co.*, 78 Mo. App. 39.

Where the proprietor of a laundry did not know of the poisonous effects of fumes from certain acids used therein, and it was not shown that their use was not customary, he was not liable. *Corcoran v. Wanamaker*, 185 Pa. St. 496.

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It is a usual rule that the master must use the same degree of care in keeping machinery, appliance and place to work in a proper condition of repair and safety, as is required in originally furnishing the same.

A railroad company owes its employes the duty of using suitable care in furnishing engines, safe road bed, properly laid tracks, and reasonable care in keeping the track free from animals and suitably fenced. *Donnegan v. Erhart*, 119 N. Y. 468, aff'g judg't for pl'ff.

Appliance must be kept safe. *Egan v. Dry Dock &c. R. Co.*, 12 App. Div. 556; *Larkin v. Washington Mills Co.*, 45 App. Div. 6.

Master is not relieved because the danger arises by reason of subsequent alterations. *Strauss v. Haberman Man. Co.*, 23 App. Div. 1.

Where trainmen noticed that the door of a car was in a dangerous condition and continued to use it without reporting the fact, the defendant was liable for its failure to remedy it whereby an employe on the track was injured. *Chicago &c. R. Co. v. Cullen*, 187 Ill. 523.

See, also, "Assumption of Risk by Servant," *post*, p. 1540.

Ordinary care in inspecting and repairing appliances depends on the danger reasonably to be apprehended from failure to do so. *Stockwell v. Chicago &c. R. Co.*, 106 Iowa, 63.

Master's duty was performed by providing a sufficient supply of suitable links for coupling cars. *Miller v. New York &c. R. Co.*, 175 Mass. 363.

Reasonable care extends to keeping the place in a safe condition as well as furnishing it so. *Comben v. Belleville Stone Co.*, 59 N. J. L. 226.

Pioneer Fireproof Const. Co. v. Howell, 189 Ill. 123; *Pennsylvania Co. v. Witte*, 15 Ind. App. 583; s. c. aff'd, 44 N. E. Rep. 377; *Clark County Cement Co. v. Wright*, 16 Ind. App. 630.

Duty of inspection and repair of shafting to secure its safe support belongs to the master; it is not the inspection and repair incident to its use, due from a servant. *Hustis v. Banister Co.*, (N. J. L.) 43 Atl. Rep. 651.

Where there is no defect in the apparatus used, master is sufficiently diligent in using reasonable care to keep the house free from gas. *Meany v. Standard Oil Co.*, (N. J. L.) 47 Atl. Rep. 803.

Where the defect was caused by the malicious interference of a trespasser, the master was not liable in the absence of ability to prevent accident by the exercise of reasonable diligence. *Marcom v. Raleigh &c. R. Co.*, 126 N. C. 200.

Ordinary care is the measure of the duty to repair. *Galveston &c. R. Co. v. Gormley*, 91 Tex. 393.

Lincoln Street R. Co. v. Cox, 48 Neb. 807; *Texas &c. R. Co. v. Rhodes*, 71 Fed. Rep. 145; *Houston &c. R. Co. v. Kelley*, 13 Tex. Civ. App. 1.

Railroad is bound to take into account the fact that its track may be interfered with by outsiders and exercise vigilance to prevent it in pro-

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 portion to the danger thereof. *International &c. R. Co. v. Johnson*, 23 Tex. Civ. App. 160.

That a railroad was prohibited by ordinance from using a crossing for the storage of cars, etc., was no defense to an injury caused by its failure to repair. *Herrick v. Quigley*, 101 Fed. Rep. 187.

Failure to restore to safety the couplings of cars injured in a wreck, was negligence. *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108.

Duty requires reasonable inspection:

Where a railroad corporation purchased the line of another company, of which an existing bridge formed a part, which bridge, at the time of the purchase, was unsafe and dangerous by reason of defects in its original plan and construction, and such defects were obvious to the eye of a skilled inspector, and could have been easily and surely ascertained by proper examination, held, that it was negligence on the part of the corporation to continue its use without such an inspection and a correction of the defects; that it was liable to an employé upon one of its trains for injuries received by a fall of the bridge; and this, although the bridge had been in use for several years before the purchase. *Devlin v. Smith*, 89 N. Y. 470, distinguished.

It seems that the prior use might have justified a continuance of the use until a competent inspection could reasonably have been had, but did not justify a neglect to observe and remedy the defects when an inspection was made. *Vosburgh v. Lake Shore & M. S. R. Co.*, 94 N. Y. 374, aff'g judg't for pl'ff.

Inspection is the duty of the master. *Bailey v. Rome &c. R. Co.*, 139 N. Y. 302.

A master is under a continuing duty of inspection.

Chicago &c. R. Co. v. Jackson, 55 Ill. 492; *Chicago &c. R. Co. v. Bragonier*, 11 Ill. App. 516; *Brann v. Chicago &c. R. Co.*, 53 Iowa 595; *Atchison &c. R. Co. v. Holt*, 29 Kas. 149; *Solomon R. Co. v. Jones*, 30 id. 601; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Snow v. Housatonic R. Co.*, 8 Allen 441; *Ford v. Fitchburg R. Co.*, 110 Mass. 241; *Drymala v. Thompson*, 26 Minn. 40; *Lewis v. St. Louis &c. R. Co.*, 59 Mo. 495; *Fifield v. Northern R. Co.*, 42 N. H. 225; *R. Co. v. Fitzpatrick*, 42 Oh. St. 318; *Baker v. Alleghany &c. R. Co.*, 95 Pa. St. 211; *Lasure v. Graniteville Man. Co.*, 18 S. C. 275; *King v. Ohio &c. R. Co.*, 14 Fed. Rep. 277; *Brabbitts v. Chicago &c. R. Co.*, 38 Wis. 289; *Buzzell v. Manufacturing Co.*, 48 Me. 113; *Kennedy v. Chicago &c. R. Co.*, 58 N. W. (Minn.) 878; *Sheedy v. Chicago &c. R. Co.*, 57 id. 60; *Mo. Pac. R. Co. v. Herbet*, 116 U. S. 642; *Lehigh Valley Coal Co. v. Kizel*, 80 Fed. Rep. 470; *Bessex v. R. Co.*, 45 Wis. 477; *VanDusen v. Letellier*, 78 Mich. 492; *Houston v. Brush*, 29 Atl. (Vt.) 380. But, see, *Baird v. Reilly*, 92 Fed. Rep. 884.

An engineer was killed by a derailment, caused either by a defective

track or a broken flange, undiscoverable at the time of the accident. If the accident was caused by the *latter* defect the defendant was not liable, but the jury should determine the real cause. The master was liable for defective track, unless it had been properly inspected by a *competent* inspector and found to be in order. *Durkin v. Sharp*, 88 N. Y. 225, aff'g judgment for pl'ff.

Master not liable for injuries from defects discoverable only by careful inspection. *Probst v. Delamater*, 100 N. Y. 266.

Baxley v. Satilla Man. Co., 114 Ga. 720; *Atz v. Newark &c. Man. Co.*, 59 N. J. L. 41.

Master liable for boiler explosion where defects could have been discovered by proper examination. *Stevanson v. Jewett*, 16 Hun, 210.

A laborer, employed by the defendants to work on a threshing machine, was on a table to cut the bands off the bundles of wheat thrown to that point from the mow. The cleat used to prevent the table from slipping back broke; the table dropped, the plaintiff was thrown on the machine and injured. There was evidence, that the break in the cleat was not recent; that the cleat was worn weak by use and that this would not have been disclosed by careful examination. The question of negligence was for the jury. *Sneider v. Treichler*, 56 Hun, 309, rev'g judg't for def't.

An apparent irregularity in the running of machinery reasonably calls for inspection and repair if necessary. *Kaplan v. New York Biscuit Co.*, 5 App. Div. 60.

A boiler in a building used by employes requires frequent inspection to prevent its becoming unsafe. *Egan v. Dry Dock &c. R. Co.*, 12 App. Div. 556.

Otherwise as to an ordinary push pole on a railroad. *Miller v. Erie R. Co.*, 21 App. Div. 45.

Or a load of timber on gondola cars projecting beyond their ends. *Bailey v. Delaware &c. Co.*, 27 App. Div. 305.

Duty of inspection arises after machinery has been repaired, to see that it has been properly done. *Hoes v. Ocean S. S. Co.*, 56 App. Div. 259.

Westbrook v. Crowdus, (Tex. Civ. App.) 58 S. W. Rep. 195.

Where a brakeman stepped upon the foot rest of a brake step, which gave way and precipitated him upon the bumper of the engine, it appeared that the foot rest had become defective from exposure so that it had sprung lengthwise, so that its defective condition, although not apparent on the surface, could have been detected upon an inspection from below, the question was for the jury. *Van Tassel v. New York &c. R. Co.*, 1 Misc. 299.

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Plaintiff, a laborer employed by the defendant, was injured while moving a heavy steel plate by its falling from the clamp which held it. The clamp was fastened by a set screw, which tapered to a blunt point, with a concave depression in the end leaving a sharp rim. It appeared that the screw had been used for some years, and that the sharp edge had worn down so as to leave a smooth surface projecting on one side. There was no evidence that his tool had been inspected, and the evidence was conflicting as to whether similar accidents had happened before. Plaintiff had been employed on this work only two days before the accident. Questions of negligence were for jury. *Daley v. The Union Dry Dock Co.*, 9 Misc. 394.

When the appliance to be repaired is a simple tool it is often the duty of the servants using it either to repair it or deliver it to a proper person to be repaired; and where minor and changeable parts of machinery need replacing, and the master has supplied the same so that they are available, it is the duty of the servant using the machinery to obtain and refit the parts needing removal, or cause it to be done.

See, also, *Walsh v. Commercial Co.*, 11 Misc. (N. Y.) 3.

That a machine has been in daily use for a long time without proving inefficient, does not excuse failure to inspect. *Silveira v. Iverson*, 128 Cal. 187.

Bruce v. Beell, 99 Tenn. 303.

Defendant was not relieved of the duty of seeing that a bank of earth was safe to work under, because plaintiff had examined it before going to work. *Western Stone Co. v. Muscial*, 196 Ill. 382; aff'g s. c., 96 Ill. App. 288.

Ferris v. Hershheim, 51 La. Ann. 178.

It may be necessary to employ an authorized official, where the character of the place requires it. *Baltimore &c. R. Co. v. Spaulding*, 21 Ind. App. 323.

Due inspection of cars is not measured by the rules of the company. *Kentucky &c. R. Co. v. Carr*, (Ky.) 43 S. W. Rep. 193.

Subsequent inspection required, where the appearance of a new grindstone would have raised suspicion in a reasonably prudent mind. *Hall v. Emerson-Stevens Man. Co.*, 94 Me. 445.

Where inspection of a hook used for raising weights, would have disclosed the defect, liability attaches to the employer. *Spicer v. South Boston Iron Co.*, 138 Mass. 426.

Failure of employers, while present, to make such inspection of a derrick as to discover the displacement of a key which was in plain sight, was negligence. *McMahon v. McHale*, 174 Mass. 320.

One who employs a method for staging less safe than other methods, should adopt such inspection as will prevent accidents. *Eddy v. Aurora &c. Co.*, (Mich.) 46 N. W. 17.

The duty does not extend to small common tools in every day use. *Wachsmuth v. Shaw Electric Crane Co.*, 118 Mich. 275.

Master's knowledge should not be measured by the servant's, as there is a duty as to inspection resting upon the former. *Hester v. Dold Packing Co.*, 84 Mo. App. 451.

If the appliances require only the attention and repair occasioned by ordinary use or wear, it is a part of the ordinary business of the servant; but if, in addition to this, practical knowledge and skill is required, the master must furnish it both in inspection and repair. *Jacques v. Mfg. Co.*, 66 N. H. 482.

Duty to keep appliances in a safe condition requires inspection and tests at reasonable intervals. *Comben v. Belleville Stone Co.*, 59 N. J. L. 326.

Cameron v. Great Northern R. Co., 8 N. D. 124; *Chicago &c. R. Co. v. Healy*, 46 id. 245.

The master's duty is not wholly discharged by furnishing a competent architect and builder. *Cole v. Warren Man. Co.*, (N. J. L.) 44 Atl. Rep. 647.

Defendant was not negligent, where the defect in a brake rod was one which was not discoverable by means of its usual inspection. *Read v. New York &c. R. Co.*, 20 R. I. 209.

Inspection is necessary where safety depends upon the condition of apparatus. *Chesson v. Roper Lumber Co.*, 118 N. C. 59.

Where a defect is not latent, an allegation of actual or constructive knowledge is unnecessary, it being the master's duty to make reasonable inspection. *Morriss v. Bowers*, 105 Tenn. 59.

If it is possible to test a wheel of a railroad car separated from contact with the track, it should be done; and failure to do so renders company liable. *T. & P. R. Co. v. Hamilton*, 66 Tex. 92.

The closest inspection necessary to reveal the defect, is required. *Galveston &c. R. Co. v. Davis*, (Tex. Civ. App.) 65 S. W. 217.

See, also, *San Antonio &c. R. Co. v. Lindsey*, (Tex. Civ. App.) 65 S. W. Rep. 668; *Galveston &c. R. Co. v. Buch*, id. 681; *Southern R. Co. v. Winton*, 66 id. 477; *Dupree v. Tamborilla*, id. 595.

Railroad does not relieve itself of the duty of inspection by making a rule that employes must do the inspecting. *Bookrum v. Galveston &c. R. Co.*, (Tex. Civ. App.) 57 S. W. Rep. 919.

See, also, *Dupree v. Alexander*, (Tex. Civ. App.) 68 S. W. Rep. 739; *Western Union Tel. Co. v. Tracy*, 114 Fed. 282; aff'g s. c. 110 id. 103.

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Failure to exercise proper care to inspect a car, was negligence, though it was a foreign one. *Galveston &c. R. Co. v. Nass*, (Tex. Civ. App.) 57 S. W. Rep. 910.

Felton v. Bullard, 94 Fed. Rep. 781.

A railroad is not required to go beyond making the practical and ordinary tests used by other prudently managed roads in making inspection of its engine boilers. *Texas &c. R. Co. v. Barrett*, 166 U. S. 617.

Louisville &c. R. Co. v. Bates, 146 Ind. 564.

Master must apply all reasonable and usual inspection and tests. *Richmond R. Co. v. Elliott*, 149 U. S. 266.

Ardesco &c. Co. v. Gilson, 63 Pa. St. 150; *Ill. Cent. R. Co. v. Phillips*, 49 Ill. 234; *Smith v. R. Co.*, 42 Wis. 520.

So of brake chains; where the same were of insufficient size and strength. *Morton v. R. Co.*, 81 Mich. 423.

Rodman v. R. Co., 55 Mich. 57; *Baldwin v. R. Co.*, 75 Iowa, 297; *Capper v. R. Co.*, 103 Ind. 305; *R. Co. v. Jones*, 30 Kan. 601; *Luke v. Mining Co.*, 71 Mich. 364.

So of premises, where defect in planking of dock could have been discovered. *Van Dusen v. Letellier*, 78 Mich. 492.

Parkhurst v. Johnson, 50 Mich. 70; *Huizega v. Lumber Co.*, 51 id. 272; *Swoboda v. Ward*, 40 id. 420; *Smith v. Car Works*, 60 id. 502; *Quincey &c. Co. v. Kitts*, 42 id. 39; *Marhull v. Furniture Co.*, 67 id. 167; *Ryan v. Bagalay*, 50 id. 179.

So of track, and keeping in repair. *Bessex v. R. Co.*, 45 Wis. 477.

Hulehan v. R. Co., 68 Wis. 520; *Wedgewood v. Chicago &c. R. Co.*, 41 id. 478; 44 id. 44; *Smith v. R. Co.*, 42 id. 520; *Schultz v. R. Co.*, 48 id. 375; *Dorsey v. Const. Co.*, 42 id. 583.

So of wearing of machinery. *City of Ind. v. Scott*, 72 Ind. 196.

Rapho v. Moore, 68 Pa. St. 404.

So to keep track free from obstructions. *McClarney v. Chicago &c. R. Co.*, 80 Wis. 277.

Where a drum had become weakened which a leakage tended to show, master was negligent in failing to inspect it and cause it to be repaired. *In re California Nav. &c. Co.*, 110 Fed. Rep. 670.

Where by the exercise of reasonable diligence the master could discover the defect it is his duty to do so. *Houston v. Brush*, 66 Vt. 331.

Missouri &c. R. Co. v. Walker, 26 S. W. (Tex.) 513; *Chicago &c. R. Co. v. Branyan*, 10 Ind. App. 570; *Lake Erie &c. R. Co. v. McHenry*, (Ind.) 10 N. E. Rep. 186; *Union Pac. R. Co. v. James*, 56 Fed. Rep. 100; *Monmouth &c. Man. Co. v. Erling*, 148 Ill. 521; *Atchison &c. R. Co. v. Kingseott*, 65 Kan. 131; *International &c. R. Co. v. Elkins*, (Tex. Civ. App.) 54 S. W. Rep. 931.

Foreign Cars.—Defendant's road was so arranged that both broad and standard gauge cars could run upon it on the same train, and there were

both kinds of cars upon the train in question. It broke in two in the night time, and the two cars which plaintiff was required to couple were of different gauge; failing to make the coupling the draw-heads passed each other, and the bumpers, which the evidence tended to show were intended to protect brakemen, and should be wide enough for that purpose, being but three inches wide, and entirely insufficient to protect him, plaintiff received the injury complained of. Held, that where trains are so made up of cars of different gauge, as the draw-heads are more apt to pass each other, it is more important that the bumpers should be well looked to, that they may afford the intended protection, and the defect being an obvious one, and easily remedied, the testimony authorized a finding of negligence on the part of defendant.

The two cars in question did not belong to defendant but to other railroad companies, which were received by defendant and were being transported over its road; they were in good repair, and the defect was in their original construction. Held, that this did not relieve defendant from liability.

A railroad company, drawing the cars of another company over its road, owes a duty to its employes in reference thereto. It is bound to inspect such cars the same as its own, and is responsible for the consequences of such defects as would have been disclosed by ordinary inspection, as it is its duty either to remedy them or to refuse to take the cars. The employé no more assumes the risks of such defects than those in cars belonging to his employer. *Gottlieb v. N. Y., L. E. & W. R. Co.*, 100 N. Y. 462, aff'g 29 Hun, 637, and judg't for pl'ff.

From opinion.—"In *Baldwin v. Railroad Co.*, 50 Iowa, 680, it was held that it does not constitute negligence for a railroad company in the ordinary course of business to receive and transport the cars of other roads in general use which may not be constructed with the most approved appliances; and that the transportation or use of such cars by the company is one of the risks which an employé assumes in undertaking the employment. In *Ballou v. Railroad Company*, 54 Wis. 257, it was held that one railroad company receiving a loaded car from another and running it upon its own road is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which appear to be in good condition are so in fact. The judge writing the opinion, said:

'In such case it would seem, upon principle, that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and that it was reasonably fit for the use to which it was devoted when so received.' In *O'Neil v. Railroad Co.*, 9 Fed. Rep. 337, it was held that the defendant was bound that no car, whether its own or a foreign car, should be otherwise than reasonably and adequately safe for its employes to handle and to manage in the ordinary conduct of its business; that when a railroad company hauls over its road cars

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not belonging to it, if an accident occurs from their not being reasonably safe or adequate, under any circumstances, for the business for which they are employed, and the accident occurs without the negligence of the employé, the company must respond thereto; and that the question in such a case is, was the car reasonably and adequately safe for the employé in handling the same? In *Mackin v. Railroad Co.*, 135 Mass. 201, it was held that the defendant was bound as a common carrier to receive and draw cars brought to it from other roads, but that its obligation to draw such cars did not extend to such as were unsafe, and that as to cars so received it simply owed to its employés the duty of suitable inspection. In *Jetter v. Railroad Co.*, 2 Abb. Ct. App. Dec. 458, the defective car causing the injury belonged to another company, and the judge writing the opinion said: 'The party assuming to use it was responsible for its fitness to the use to which it was put. If the brakes were defective, the defendants were legally chargeable with any consequences that resulted from such defect while they were using the car for their own purposes,' and that 'railroad companies cannot escape responsibility from any defective carriages by borrowing them from one another.' In *Jones v. Railroad Co.*, 28 Hun 364, affirmed in this court (92 N. Y. 628), plaintiff's intestate, a brakeman, was attempting to climb upon a freight car, and one of the iron rungs, which was defective broke and he fell to the ground and was killed, and it was held that the defendant was liable although the car belonged to another company."

See, also, *Miller v. N. Y. C. & H. R. R. Co.*, 99 N. Y. 657.

A railroad corporation owes to its employés the same duty of inspecting the cars of another company used upon its road as if they were its own, and is responsible for the consequences of such defects as would be discovered by ordinary inspection. It must either remedy the defects or refuse to take or use the cars; and when furnished to its employés for use they have the right to assume that, so far as ordinary care can accomplish it, the cars are equipped with safe and suitable appliances.

The link in the bumper, at the time of the accident, was a straight one and plaintiff was unable to make it enter the bumper of the other car. It appeared that it was customary in coupling cars with bumpers of different heights to use a crooked link, and that such links were supplied by defendant and were in the caboose of plaintiff's train; after the accident the cars were coupled with a crooked link. Held, that the furnishing of such links did not fill the measure of defendant's obligation; that the duty of examination to ascertain whether the coupling appliances were in proper condition rested, in the first instance, upon the master, and in the absence of evidence to that effect it could not be presumed that it had been devolved upon plaintiff; and unless it had, he had a right to assume that the master's duty had been performed.

It appeared that it frequently happens when cars come together with great force the bumpers are pressed in and such an accident as the one in question might happen, but that when cars approach each other at

"ordinary speed" the bumpers receive the shock and sufficient space is left to protect the brakeman. It was claimed that the accident was one of the ordinary risks of plaintiff's employment, and so that he could not recover. Held, untenable, the testimony showing that the train was moving slowly at the time of the accident, and that if the bumper had been in order it would not have happened, and so, that the defective bumper was the proximate cause. *Goodrich v. N. Y. C. & H. R. R. Co.*, 116 N. Y. 398, rev'g judg't of nonsuit.

Foreign cars must be inspected before turning them over to employes for use. *McDonald v. Fitchburg &c. R. Co.*, 19 App. Div. 577.

Denver &c. R. Co. v. Smock, 23 Colo. 456; *Chicago &c. R. Co. v. Armstrong*, 62 Ill. App. 228; *Chicago &c. R. Co. v. Gillison*, 72 Ill. App. 207; *Keith v. New Haven &c. R. Co.*, 140 Mass. 175; *Gottlieb v. N. Y., L. E. & W. R. Co.*, 100 N. Y. 462; *Reynolds v. Boston &c. R. Co.*, 64 Vt. 66; *Dewey v. R. Co.*, 97 Mich. 329; *Leak v. Carolina C. R. Co.*, 124 N. C. 455; *Jones v. Shaw*, 16 Tex. Civ. App. 290.

One railroad company is not liable for injuries to servants for defects from cars received from another railroad. *Baldwin v. Chicago &c. R. Co.*, 50 Iowa, 680.

If found out of repair it must restore them to safety or give notice of their condition. *Louisville &c. R. Co. v. Bates*, 146 Ind. 564.

Wherever cars come from, company should see they are properly loaded. *Haugh v. R. Co.*, 73 Iowa, 66. (See "Risks Assumed by Servants," p.1540.)

That it is not bound to repair, is no excuse for failing to ascertain their condition by inspection, and the shortness of the time during which they will be in its use is no excuse for failure to do so. *Atchison &c. R. Co v. Penfold*, 57 Kan. 148.

Where company furnishes safe cars and competent car inspector, it is not liable to brakeman for injuries received while attempting to couple a properly constructed car accepted by the inspector from another company for transportation, by reason of the projecting over the end of the car of lumber loaded upon it. *Dewey v. Detroit R. Co.*, 97 Mich. 329.

Distinguishing *Smith v. Potter*, 46 Mich. 258. Citing *Railroad Co. v. Baugh*, 149 U. S. 368; *Ford v. Railroad Co.*, 117 N. Y. 638; *Byrnes v. Railroad Co.*, 113 id. 257; *Railroad Co. v. Block*, 88 Ill. 112; *Railroad Co. v. Gower*, 85 Tenn. 465; *Railroad Co. v. Husson*, 101 Penn. 1. The dissenting opinion is well fortified by citations, and holds that it is the duty to provide a safe place to work, and that the master cannot delegate his duty so as to exempt himself. Citing *Van Dusen v. Letellier*, 78 Mich. 492, 502; *Adams v. Iron Cliffs Co.*, id. 271, 288; *Brown v. Gilchrist*, 80 id. 56, 63, 65; *Morton v. Railroad Co.*, 81 id. 423; *Sadowski v. Car Co.*, 84 id. 100; *Tangney v. Wilson*, 87 id. 453, 455; *Dougherty v. Railroad Co.*, 18 N. Y. Supp. 841; *Bushby v. Railroad Co.*, 107 N. Y. 374; *Ashman v. Railroad Co.*, 90 Mich. 567, 571; *Quincy Co. v. Kitts*, 42 id. 34, 39.

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Defendant having the opportunity, failed to discover and repair dangerous defects. It was negligent. *Bender v. St. Louis &c. R. Co.*, 137 Mo. 240.

Jones v. New York &c. R. Co., 20 R. I. 210.

But the duty is not greater in respect to such cars than it is to its own. *Dooner v. Delaware &c. Canal Co.*, 171 Pa. St. 581.

Being liable for defects which would have been revealed by ordinary inspection. *Railroad Co. v. Reagan*, 96 Tenn. 128.

The company is not negligent in receiving into its yards, in passing over its line, cars, freight or passenger, different from those it owns and uses, and when the difference in construction is obvious the risk is that of the servant. *Kohn v. Receiver &c.*, 147 U. S. 238.

Tuttle v. Detroit &c. R. Co., 122 U. S. 189; *Ladd v. New Bedford &c. R. Co.*, 119 Mass. 412; *DeWitt v. Pacific R. Co.*, 50 Mo. 305; *Ind. &c. R. Co. v. Flanigan*, 77 Ill. 365; *Baldwin v. Chicago &c. R. Co.*, 50 Ia. 680; *Mich. Cent. R. Co. v. Smithson*, 45 Mich. 212; *Hathaway v. Mich. Cent. R. Co.*, 51 id. 253; *Thomas v. R. Co.*, 109 Mo. 187; *Kelly v. Abbott*, 63 Wis. 307.

The duty is not confined to cars which are to be hauled over its own road, but extends to such as are simply switched thereon for the purpose of loading. *Texas &c. R. Co. v. Archibald*, 170 U. S. 665; aff'g s. c., 75 Fed Rep. 802.

But the same amount of care in the inspection of a foreign car is not required as in the case of its own where the former comes as one actually on trial, showing its fitness. *Alabama &c. R. Co. v. Carroll*, 84 Fed. Rep. 772.

A railroad company receiving a loaded car from another and running it upon its own road, is not bound to repeat the tests which are proper to be used in the original construction, but may assume that all parts of the car which appear to be in good condition are so in fact. *Ballou v. Chicago &c. R. Co.*, 54 Wis. 257.

Citing *Baldwin v. R. Co.*, 50 Iowa 680. The dissenting opinion as to foreign cars cites, *Stetler v. Railroad Co.*, 49 Wis. 609; 46 id. 497-503; *Railroad Co. v. Barron*, 5 Wall, 90; *McElroy v. Railroad Corp.*, 4 Cush. 400; *Nelson v. Railroad Co.*, 26 Vt. 717; 2 Redf. on Railroads, 302, 303; *Ill. Cent. R. Co. v. Kanouse*, 39 Ill. 272; *Schopman v. Railroad Corp.* 9 Cush. 24.

But when company uses a foreign car as its own, it must care for it as it would its own. *Cowan v. Chicago R. Co.*, 80 Wis. 284.

Gutridge v. R. Co., 94 Mo. 468.

What amounts to reasonable inspection:

Defendant's inspectors were in the habit of inspecting brake chains to see if they were safe, but did not test their strength. Master not liable

for defect. *De Graff v. N. Y. C. R. Co.*, 76 N. Y. 125, distinguishing *Webb v. Renine*, 4 Foster & Fin. N. P. R. 608.

Brake wheel weakened by an old fracture not discovered by inspector; inspection held sufficient. *Disher v. N. Y. C. R. Co.*, 94 N. Y. 622.

The superintendent ascertained that the grain had not been entirely discharged from one of the bins of the elevator, and that the grain was heated; he knew that when heated it was liable to stick together and adhere to the sides of the bin; also, that, when detached, it would fall into the bottom of the bin and jeopardize the life of any one who might be there. He sent McG., a laborer, employed by defendant to shovel grain into the bin, through a trap-door at the bottom thereof, which had been constructed to allow workmen to enter for the purpose of clearing out the bin, having opened the door himself and placed the ladder in position. The bin might have been examined from the top to ascertain the quantity of grain in it and its location, but the superintendent omitted to do this. After McG. entered the bin the grain fell and buried him, causing his death. *McGovern v. Central Vermont R. Co.*, 123 N. Y. 280, rev'g judg't for def't.

From opinion.—"The master is required to furnish the servant adequate and suitable tools and implements for his use, a safe and proper place in which to prosecute his work, and when they are needed, the employment of skillful and competent workmen to direct his labor and the performance of his duties. *Pantzer v. T. F. I. M. Co.*, 99 N. Y. 376.

It has been held that reasonable care on the part of a servant in the performance of his work presupposes the performance by the master of his duty to do all that reasonably lies within his power to protect the servant while so engaged. *Bulkley v. P. H. I. O. Co.*, 17 N. Y. S. R. 436; 117 N. Y. 645; *Booth v. B. & A. R. Co.*, 73 id. 40; *Pantzer v. T. F. I. M. Co.*, 99 id. 376.

When directing the performance of work by the servant in a place which may become dangerous, and such danger may be foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master, it is his duty to exercise such care and adopt such precautions as will protect the servants from avoidable danger. This is the master's duty, and however he may choose to exercise it, whether through the supervision of a superintendent or some lower grade of employment, it still continues his duty, and not until he shows that it has been properly performed, can he claim exemption from liability for injuries occasioned by its non-performance. *Laning v. N. Y. C. R. Co.*, 49 N. Y. 521-532; *Corcoran v. Holbrook*, 59 id. 517."

Evidence that other brakes on similar cars on the same train were in useless condition was proper, as bearing upon the question whether the cars had been properly inspected. *Bailey v. Rome &c. R. Co.*, 132 N. Y. 302.

A master must use suitable care in furnishing proper machinery and in keeping it in repair; for this a proper inspection is required, and a rule directing such inspection is not sufficient.

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Upon the trial of an action to recover damages for injuries received by plaintiff, a brakeman, while in the employ of defendant, a railroad corporation, and resulting from a defect in a brake, which, if a proper inspection had been made, plaintiff claimed, would have been discovered, plaintiff offered to prove that other brakes on similar cars on the train were in a defective condition, which rendered them useless. This was rejected. Held, error; that such evidence was competent as bearing upon the point whether the cars had been properly inspected. *Bailey v. R., W. & O. R. Co.*, 139 N. Y. 302, rev'g judg't for def't.

Master not liable for latent defect in boiler obtained from reputable makers, where quality of the iron could only be discovered by breaking. *Ballard v. Hitchcock &c. Co.*, 51 Hun, 188.

There was evidence that a break in the cleat whereby the injury was caused was not recent, but that the same was caused by use and would have been disclosed by careful examination. Defendant's negligence was for the jury. *Sneider v. Treichler*, 56 Hun, 309, rev'g judg't for def't.

Where engine and tender separated by hidden fault in coupling pin, inspected by a competent person eight days before, when it showed but slight wear and no defect, master was not liable. *Powers v. N. Y. C. R. Co.*, 60 Hun, 19.

A fireman was killed by the collapse of the crown-sheet of a locomotive. While on her journey and while taking water the engine exploded, after which explosion the crown-sheet was found reversed, originally having been oval, and without other break in it. It had dropped into the fire box and the stay bolts pulled out. There was evidence that there was, during the trip, water enough in the boiler to cover the crown-sheet all the time. The burning or scorching of the steel crown-sheet would cause the crown-sheet to leak into the fire-box around the stay bolts, and there was evidence to show leakage. There was evidence only of a general exterior inspection, done either by the engineer or an employé at the round house, the latter of whom seems to have only inspected when the engineer reported a defect, as the engineers had each the duty of inspecting his own engine and reporting each trip. The verdict for the plaintiff was sustained. *Hudson v. Rome, Watertown & Ogdensburgh R. Co.*, 73 Hun, 467, aff'g judg't for pl'ff; rev'd, 145 N. Y. 408.

That a boiler has been tested on installation does not relieve master of subsequent inspection. *Egan v. Dry Dock &c. R. Co.*, 12 App. Div. 556.

Superintendent failed to discover that a steam pipe in plain view for several weeks, had been plugged up so as to create danger. Was negligent. *Crowell v. Thomas*, 18 App. Div. 520.

Elevator apparatus had been inspected only a week before the accident. Held sufficient. *Bucher v. Prybil*, 19 App. Div. 126.

So where it had been carefully overhauled and tested a month previous. *Biddiscomb v. Cameron*, 35 App. Div. 561.

Platform had been in use nine years without repairs or inspection. Negligence was established. *Berry v. Atlantic Storage Co.*, 50 App. Div. 590.

Engine had not been inspected for several days. Negligence. *Pierson v. New York &c. R. Co.*, 53 App. Div. 363.

Where a defect in a step could have been discovered by examination, it may follow that the question of negligence was for the jury. *Van Tas-sel v. N. Y. R. Co.*, 1 Misc. 299.

Inspection at the time of the installment of an elevator and continued at frequent intervals, was sufficient. *Sullivan v. Poor*, 32 Misc. 575.

Inspection at stated intervals by city officers as well as an agent of an indemnity company was not sufficient. Frequent examinations and tests required. *McGreagor v. Reid &c. Co.*, 178 Ill. 464; rev'g s. c., 76 Ill. App. 610.

A test of strength is not required of every timber; external examination raising no suspicion of a defect is sufficient. *Bannon v. Sanden*, 68 Ill. App. 164.

Failure to inspect a defective elevator because it was not apparent that it was dangerously so, was no excuse. *Union Show Case Co. v. Blindauer*, 75 Ill. App. 358; s. c. aff'd, 175 Ill. 325.

Such inspection as the exigencies of traffic will permit in the exercise of reasonable care, is sufficient. *Wabash R. Co. v. Farrell*, 79 Ill. App. 508.

Ordinary care required a more careful inspection of an old and dilapidated car than one apparently in good condition. *Louisville &c. R. Co. v. Bates*, 146 Ind. 564.

Failure to inspect a foreign car properly, which had been in defendant's yards for two or three hours, was negligence. *Missouri &c. R. Co. v. Murphy*, (Kan.) 52 Pac. Rep. 863; s. c., 59 Kan. 774.

Failure to detect defect discoverable by ordinary inspection was negligence. *Illinois C. R. Co. v. Hilliard*, 99 Ky. 684.

Master was not negligent in not inspecting stone delivered from quarry where inspection was made at the quarry. *Moonney v. Beattie*, 180 Mass. 451.

The car had been in its yard for 20 days and the defect, an old break in the coupling, was easily discoverable. Negligence for the jury. *Munch v. Great Northern R. Co.*, 75 Minn. 61.

Duty of application of physical force to test the sufficiency of grab

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irons on a car, does not arise until a careful inspection with the eye raises a suspicion of weakness. *Thompson v. Great Northern R. Co.*, 79 Minn. 291.

Felton v. Bullard, 94 Fed. Rep. 781.

Failure to inspect a crowbar after it had been subjected to heat and water in a fire, was negligence. *Miller v. Great Northern R. Co.*, 85 Minn. 272.

Failure to use reasonable care to inspect a heavy machine and discover its condition before ordering its removal, constituted negligence. *Carroll v. Tidewater Oil Co.*, (N. J. L.) 52 Atl. Rep. 275.

Inspection of appliances for one purpose does not relieve a master for failing to see that they are also sufficient for an entirely different purpose. *Stewart v. Toledo Bridge Co.*, 15 Oh. C. C. 601.

Failure to inspect the inside of a car which was necessary to ascertain the safety of a ladder on the outside, where the exterior appearance raised a suspicion as to its safety, presents a question for the jury. *Missouri &c. R. Co. v. Chambers*, 17 Tex. Cix. App. 487.

A general daily inspection held insufficient. *Gulf &c. R. Co. v. Haden*, (Tex. Civ. App.) 68 S. W. Rep. 530.

A brakeman may recover for injuries sustained by failure of inspector to notice a defect in the cars which permitted them to approach one another too closely. *King v. Ohio &c. R. Co.*, 14 Fed. Rep. 277.

Riceman v. Havemeyer, 84 N. Y. 647; *Homer v. Everett*, 91 id. 641.

The nature of the work being notice to servants of the likelihood of the existence of "missed shots," while blasting in a mine, the duty of inspection after each explosion is not imposed on the master. *Browne v. King*, 100 Fed. Rep. 561.

Failure to remove a bolt which would have discovered latent defects, was not negligence, where it had been used only for a year and defendant had observed it daily for the last six months. *Killman v. Palmer &c. R. Co.*, 102 Fed. Rep. 224.

To fix liability, master must have notice of defect, actual or constructive, and opportunity to repair:

It must appear that the master either knew, or in the exercise of the care required of him ought to have known, of the defect which caused the injury.

Wright v. N. Y. Cent. R. Co., 25 N. Y. 566; *Warner v. Erie R. Co.*, 39 id. 468; *Malone v. Hathaway*, 64 id. 5; *De Graff v. N. Y. Cent. R. Co.*, 76 id. 125; *Ryan v. Fowler*, 24 id. 110; *Faulkner v. Erie R. Co.*, 49 Barb. 324; *Gibson v. Pac. R. Co.*, 46 Mo. 163; *Wharton on Negligence*, secs. 211, 212, 232; *Jones v. N. Y. Cent. R. Co.*, 22 Hun 284; *Monmouth &c. Man. Co. v. Erling*, 148 Ill. 521; *Union Pac.*

R. Co. v. James, 56 Fed. Rep. 100; Hayden v. Smithfield Man. Co., 29 Conn. 548; Cook v. R. Co., 34 Minn. 47; Chicago &c. R. Co. v. Beevins, 46 Kans. 370; Georgia R. Co. v. Nelius, 83 Ga. 70; White v. Eidlitz, 19 App. Div. 256; Stourbridge v. Brooklyn C. R. Co., 9 App. Div. 129; Clements v. Alabama R. Co., 127 Ala. 166; Myers v. American Steel Co., 64 Ill. App. 187; Lanyon Zinc Co. v. Bell, 64 Kan. 739; Railroad Co. v. Swarts, 58 Kan. 235; Cherokee &c. Coal Co. v. Britton, 3 Kan. App. 292, (loose rock on the roof of a mine); Atchison &c. R. Co. v. Taylor, 60 Kan. 758; Cowan v. Umbagog Pulp Co., 91 Me. 26; Purdy v. Westinghouse &c. Man. Co., 197 Pa. St. 257; Dwyer v. Shaw, 22 R. I. 648; Erskine v. Chino Valley &c. Co., 71 Fed. Rep. 270.

The defendant having employed a competent person to supervise and construct the road-bed and bridges, is not liable to an employé for the falling of the bridge from a defect not apparent and of which it had no notice. *Warren v. Erie R. Co.*, 39 N. Y. 468, rev'g judg't for pl'ff.

Master was not negligent where there was no evidence to show that he knew or might have known of the defect in the clamp holding the guy rope of a derrick. *Welsh v. Cornell*, 168 N. Y. 508, rev'g s. c., 49 App. Div. 203.

Negligence in failing to repair for three weeks after notification, was for the jury. *Larkin v. Washington Mills Co.*, 45 App. Div. 6.

Recovery for injuries caused by defective tool allowed only where knowledge of defect was brought home to the master. *Louisville &c. R. Co. v. Allen*, 47 Ill. App. 465.

Chicago &c. R. Co. v. Dixon, 49 Ill. App. 292; *Williams v. St. Louis &c. R. Co.*, 179 Mo. 316; *Ohio &c. R. Co. v. Heaton*, 137 Ind. 1; *Quinn v. Fish*, 6 Misc. (N. Y.) 105.

Actual knowledge that an attempted repair was ineffectual was not necessary, where a master knew a machine was dangerously defective and only made a futile attempt to repair it. *Pioneer Cooperage Co. v. Romanowicz*, 85 Ill. App. 407.

Failure to touch upon the question of notice of a defect and the effect of the lack thereof, makes an instruction erroneous. *Chicago &c. R. Co. v. Merriman*, 86 Ill. App. 454.

Hester v. Jacob Dold Packing Co., 84 Mo. App. 451.

Knowledge of a defective construction of a runway was not sufficient to fix liability, where there is not shown to have been sufficient time thereafter to have prevented the accident. *Alabaster Co. v. Lonergan*, 90 Ill. App. 353.

Lake Shore &c. R. Co. v. Stupak, 123 Ind. 210; *Blake v. R. Co.*, 70 Me. 60; *Dwyer v. Shaw*, 22 R. I. 648.

Otherwise where there is sufficient time therefor. *Kerrigan v. Chicago &c. R. Co.*, (Minn.) 90 N. W. Rep. 976.

Elmore v. Seaboard Air Line Co., 130 N. C. 506; *Texas &c. R. Co. v. Echols*, 17 Tex. Civ. App. 677.

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Master was not liable for break of a brakestaff caused by a hidden defect which an inspection would not have revealed. *Chestnut v. Southern Ind. R. Co.*, 157 Ind. 509.

See *Galveston &c. R. Co. v. Buch*, (Tex. Civ. App.) 65 S. W. Rep. 681.

The following instruction was held good: "If the jury find from the testimony that defendant used upon its cars the same kind of oil generally used upon the cars of railroad companies at the time of said alleged injury, and had no knowledge, and, by the exercise of ordinary care would not have obtained any knowledge, that there was any poisonous substance on the brasses in question, then the plaintiff cannot recover." *Kitteringham v. Sioux City &c. R. Co.*, 62 Iowa, 285.

Master is not liable where the defect is a latent one which it could not have discovered by the use of ordinary care and which the employé had the same means of knowing. *Missouri &c. R. Co. v. Young*, 4 Kan. App. 219.

Nor where there is nothing to show how the obstruction arose or how long it had existed, all the appliances being sufficient and the fellow workmen competent. *Murphy v. Great Northern R. Co.*, 68 Minn. 526.

Railroad company is liable for injuries caused by the wearing out of the rope attached to a bridge guard, so that plaintiff had no notice of defects liable to be occasioned by its use. *Warden v. Old Colony R. Co.*, 137 Mass. 204.

Master was not liable, where it did not appear that his means of acquiring knowledge was greater than the servants. *Dube v. Gay*, 69 N. H. 670.

In addition to proof of the tendency of a machine to act in a dangerous and unaccountable manner, it must be shown that it had so acted sufficiently long to constitute notice to master. *Bien v. Unger*, (N. J. L.) 46 Atl. Rep. 593.

That the ordinary danger of a machine was obvious, was not sufficient to charge a master with knowledge of apprehension that it might act in an unusual and unaccountable manner which was not obvious. *Carrington v. Mueller*, 65 N. J. L. 244.

Master was not liable where it could not have known of the danger by the exercise of ordinary care. Effect of poisonous gases, generated by coal fires in a roundhouse, enhanced by extreme cold air. See *Maitland v. Cleveland &c. R. Co.*, 3 Oh. Leg. News, 289.

Defendant was not relieved of the duty of providing a safe track because it did not know of the temporary incompetency of the party assigned to duty in that respect. *St. Louis &c. R. Co. v. Kelton*, (Tex. Civ. App.) 66 S. W. Rep. 887.

Actual Notice.—Notice of defective locomotive—master liable. *Keegan v. Western R. Co.*, 8 N. Y. 175. *Perry v. Ricketts*, 55 Ill. 234.

Defective elevator; notice to general agent in entire control; master liable. *Corcoran v. Holbrook*, 59 N. Y. 517.

Lacking v. Washington Mills Co., 45 App. Div. 6.

Defendant's superintendent was warned of a crack in the rock of a mine, and a boy not aware of it was injured by falling material. Verdict for plaintiff sustained. *Pantzar v. Tilly Foster Co.*, 99 N. Y. 368.

A cracked draw bolt broke and let a car back on another track, where the plaintiff was working. Notice of the defective bolt had been given to the actual superintendent. Notice was sufficient. *Rima v. Rossie Iron Works*, 120 N. Y. 433, aff'g 47 Hun, 153, and judg't for pl'ff.

A fireman was killed by a derailment due to the defective condition of the track, of which notice had been given to the foreman of the track gang. Question of defendant's negligence and contributory negligence was for jury. *Gage v. D., L. & W. R. Co.*, 14 Hun, 446, rev'g judg't of nonsuit.

Plaintiff, defendant's employé, was injured on a defective hand-car. The section boss (and foreman of track gang) whose duty it was to keep it in repair, knowing of defect but not reporting it, did not represent defendant so as to make it liable. *Barringer v. D. & H. C. Co.*, 19 Hun, 216, granting new trial after verdict for pl'ff.

Citing *Malone v. Hathaway*, 64 N. Y. 5.

Statement of defendant's chief engineer that the chain of an elevator was not strong enough to perform its work, was such as to raise a question for the jury as to sufficiency of the chain and as to notice to the defendants. *Delancy v. Hilton*, 50 N. Y. Super. Ct. 341.

Notice to superintendent of a mine of the dangerous condition of the roof was notice to the company so as to charge it for injuries received thereafter by employé. *Quincy Coal Co. v. Hood*, 77 Ill. 68.

Notice to a foreman charged with the duty of providing a safe place to work, was notice to the master. *Chicago &c. R. Co. v. Scanlan*, 170 Ill. App. 106; aff'g s. c., 67 Ill. App. 621.

So as to notice to a foreman in charge of workmen using an elevator. *Falkenau v. Abrahamson*, 66 Ill. App. 352.

Notice of a defect to a fellow servant is not notice to the master. *Chicago &c. R. Co. v. Merriman*, 95 Ill. App. 628.

Notice of a defect or dangerous condition was held to have been brought home to the master, or was for the jury, when delivered to master mechanic, with power to hire and discharge men. *Ohio &c. R. Co. v. Collarn*, 73 Ind. 261.

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Pittsburg &c. R. Co. v. Ruby, 38 Ind. 294; Harper v. Indianapolis &c. R. Co., 47 Mo. 567; Patterson v. R. Co., 76 Pa. St. 389.

Notice to a city inspector superintending the digging of an excavation of the danger of digging bell holes therein, was notice to the city. *Ft. Wayne v. Christie*, 156 Ind. 172.

If appliance was originally defective, no notice to company is required. *Morton v. Detroit R. Co.*, 81 Mich. 423.

Notice to foreman of servant's intemperance was for the jury on question of master's knowledge. *Williams v. R. Co.*, 109 Mo. 475.

Notice to train dispatcher was sufficient. *Reiser v. Penn. Co.*, 152 Pa. St. 38.

Michigan R. Co. v. Dolan, 32 Mich. 510.

Notice to an employé of a place of danger is not notice to his employer, unless the former is charged with the duty of seeing to its safety. *St. Louis &c. R. Co. v. Threat*, 12 Tex. Civ. App. 375.

Notice of the looseness of an eye-bolt was not notice of a latent defect therein having no connection with its looseness. *Killman v. Palmer &c. R. Co.*, 102 Fed. Rep. 224.

Complaint of another's incompetency to shift boss with no power to hire and discharge, was not notice to master. *Weeks v. Scharer*, 111 Fed. Rep. 330.

See, also, *Szotak v. Berwind-White &c. Min. Co.*, 36 Misc. 98.

Brake-chains—chains had broken before; master not liable. *De Graff v. N. Y. Cent. R. Co.*, 76 N. Y. 125.

Locomotive frequently taken to shop, and unable to hold water or full head of steam, exploded; master liable. *Kirkpatrick v. N. Y. Cent. R. Co.*, 79 N. Y. 240.

Defective eye-bolt of brake-rod not discoverable by inspection, but in course of manufacture. The breaking of chains had been of frequent occurrence and larger eye-bolts were used at time of trial. *Painton v. No. Cent. R. Co.*, 83 N. Y. 7, verdict for plaintiff sustained.

The plaintiff, thirteen years old, was injured by the table, at which she worked, being thrown out of place by defective machinery. It had happened twice before in eight years; once three months before. Verdict for the plaintiff was sustained. *McCarragher v. Rogers*, 120 N. Y. 526, aff'g judg't for pl'ff.

An employé of the defendant, for several years, and for a part of the time as a line-man, in which occupation he had frequent occasion to climb the poles and work about the arms, sat on the outer end of a cross arm, pounding with a hammer, when the arm broke and he fell to the ground. The arm had been in use of the company for six years, and was of the

grade and strength used by telegraph companies. It did not appear that there was evidence of a defect, or weakness discernible by ordinary inspection. When the arm was new the defendant had a system of inspection of arms when they were purchased. The plaintiff was not entitled to recovery. *Flood v. W. U. T. Co.*, 131 N. Y. 603, rev'g judg't for pl'ff.

Citing *Learey v. B. & A. R. Co.*, 139 Mass. 580; *Goodnow v. Walpole Emery Mills*, 146 id. 261.

Notice that a piston stuck in a cylinder did not charge master with notice that the cylinder tilted while the piston entered it. *Schulz v. Rohe*, 149 N. Y. 132.

A boiler exploded by reason of defects. It had been at the repair shop six weeks before. Its defects could have been discovered by proper examination and yet necessary repairs were not made. Superintendent of repairs was *alter ego*, and defendant was liable for his negligence whereby his servant was killed. *Stevenson v. Jewett*, 16 Hun, 210, rev'g judg't of nonsuit.

Where injury arose from engine and tender parting and there was no evidence that such a thing had before happened, the company was not liable for absence of safety chains. *Morse v. N. Y. Cent. R. Co.*, 39 Hun, 414; *Carr v. N. R. Construction Co.*, 48 id. 266.

A brake-rod slipped up, from pin being out below; the plaintiff, a brakeman, was thrown from the train. There was no evidence of how or when it was lost. Nonsuit should have been granted. *Bailey v. Rome, W. & O. R. Co.*, 49 Hun, 377, rev'g judg't for pl'ff.

A block had been removed from a frog during the day, whereby a servant was injured; negligence was for jury. *Meek v. N. Y. Cent. R. Co.*, 69 Hun, 488, aff'g judg't for pl'ff.

The foreman of the lessee of a railway was killed by the locomotive plunging into the stream where the bridge had washed away during a heavy storm. The case was properly submitted to the jury upon the theory that although the defendant was not liable for defects in the original construction of the bridge, it was liable if such defects existed and ought to have been ascertained by the defendant by proper inspection; but that if, under the evidence, the jury found the cause of the accident was the extraordinary flow of the water in some way causing the destruction, plaintiff could not recover. *Bogart v. Delaware & Lack. R. Co.*, 74 Hun, 412; s. c. aff'd, 145 N. Y. 283.

It is the duty of a railroad corporation to furnish a reasonably safe place and appliances for its employés to perform the duties incumbent upon them

Even if it is obliged to block its guard rail for the protection of its employés, an employé, in order to recover damages in an action brought

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against such company for personal injuries for the alleged failure to keep its guard rail properly blocked, must show that such corporation had either actual notice that the blocking was out of place for such a length of time as would have enabled it to restore the blocking, or that the blocking had been out of place for such a length of time as to constitute constructive notice thereof to the railroad company, where there is no evidence that the blocking was not properly constructed in the first place, or that it was displaced through negligence. *Haskins v. The New York Central & Hudson River Railroad Co.*, 79 Hun, 159.

Master was chargeable with knowledge of what a careful inspection would have disclosed. *Perry v. Rodgers*, 91 Hun, 243; *Mayer v. Liebmann*, 16 App. Div. 54.

Louisville &c. R. Co. v. Howell, 147 Ind. 266; *Chesson v. Roper Lumber Co.*, 118 N. C. 59; *Smith v. Gulf &c. R. Co.*, (Tex. Civ. App.) 65 S. W. Rep. 83; *Galveston &c. R. Co. v. Davis*, id. 217; *Gray v. Commutator Co.*, 85 Minn. 463; *Chicago &c. R. Co. v. Merriman*, 95 Ill. App. 628.

Existence of a hole in pitch kettle for six or eight weeks charged master with notice thereof. *Stapf v. Loewer's &c. Brew. Co.*, 1 App. Div. 405.

Existence of defect for twelve years did not permit recovery where inspection would not have revealed it. *Boess v. Claussen &c. Co.*, 12 App. Div. 366.

Employer had no reason to anticipate that blasting in an adjoining street would loosen the rock near which servant was set to work; servant was in a position to notice the effects. No recovery. *Dolan v. McLoughlin*, 33 App. Div. 628.

Master must be affected with knowledge of specific acts showing incompetency to perform the duties assigned. General reputation is insufficient. *Lambrecht v. Pfizer*, 49 App. Div. 82.

Defendant's superintendent was chargeable with notice of the unsafe condition of an embankment when deceased had protested to him that it was unsafe. *Eicholz v. Niagara Falls Hydraulic Power &c. Co.*, 68 App. Div. 441.

Knowledge of one having charge of the department, of an unsafe condition of the place where he sets an employé to work, was imputable to the master. *Hess v. Rosenthal*, 160 Ill. 621.

Actual knowledge of the defective condition of a track was not necessary where the exercise of reasonable care would have discovered it. *Lake Shore &c. R. Co. v. Conway*, 67 Ill. App. 155.

Pioneer Cooperage Co. v. Romanowicz, 85 Ill. App. 407; s. c., aff'd, 57 N. E. Rep. 864; *Paine v. Eastern R. Co.*, 91 Wis. 340.

Failure to discover draw bar which had lain on the track for six hours

was negligence. *Chicago &c. R. Co. v. Delaney*, 68 Ill. App. 307; s. c. aff'd, 169 Ill. 581.

As to failure to discover the condition of a switch rail which has existed for a month, establishing negligence. See *Chicago &c. R. Co. v. Hartmann*, 71 Ill. App. 427.

Notice of a defective draw-bar of a car was imputed to the company where the train had just been inspected. *Chicago &c. R. Co. v. Knapp*, 74 Ill. App. 148; s. c. aff'd, 176 Ill. 127.

Where the boards in question were half rotten, the master was chargeable with notice of the condition a sufficiently long time to have enabled it to repair. *McLean &c. Coal Co. v. Simpson*, 97 Ill. App. 21; s. c. aff'd, 63 N. E. Rep. 626.

Fluhrer v. Lake Shore &c. R. Co., 121 Mich. 212.

Master is chargeable with the duty of guarding against accident, where the fact that ice cakes run off the runway, shows him that there is a danger. *Knickerbocker Ice Co. v. Bernhardt*, 95 Ill. App. 23.

Master was negligent, where his attention was called to the dangerous condition of the place, but he failed to make a proper inspection which would have revealed the defect. *Indiana Iron Co. v. Cray*, 19 Ind. App. 565.

Master was chargeable with notice of danger where a heavy fall of rock in a mine had occurred a month previous and small pieces occasionally since. *Cushman v. Carbondale Fuel Co.*, (Iowa) 88 N. W. Rep. 817.

Defective condition of a coupler for a month or more, showed negligence. *Bradshaw v. Chicago &c. R. Co.*, 58 Kan. 618.

Where work for a trestle was perfectly sound in appearance, although rotten within, and had been in use for several years, defendant was not liable, as most careful inspection would not have disclosed defect. *Reinder v. B. & P. Coal Co.*, 12 Ky. L. R. 30.

Master was liable where ordinary inspection would have shown that the wood selected for a lever handle to a hand car, was knotty and worm-eaten, and unsafe for the purpose. *McGhee v. Bell*, (Ky.) 38 S. W. Rep. 702.

Injuries of plaintiff caused by overturning of an oven in which he was at work is not chargeable to defendant, unless knowledge of insecure condition of the same be fixed upon him, or he should have had knowledge of it. *Nason v. West*, 78 Me. 253.

Failure to discover that a plank along the top of a fence was out at place a mile from the nearest station within fifteen hours after its displacement was not negligence. *Goodrich v. Kansas City &c. R. Co.*, 152 Mo. 222.

Knowledge by a servant of a defect in a co-servant's appliances is not

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imputable to the master where the former had not been vested with authority to act in reference thereto. *Brown v. Hershey Land & Co.*, 65 Mo. App. 162.

Negligence in failing to inspect electric wire poles for two years was for the jury. *Essex County Electric Co. v. Kelley*, 60 N. J. L. 306; s. c. aff'd, 61 N. J. L. 289.

Where failure to discover a defect was due to hastiness in inspection, which should have been known to defendant's officers, who should have required reinspection. Defendant was liable. *Lake Shore & R. Co. v. Gilday*, 16 Oh. C. C. App. 649.

Master is chargeable with knowledge of danger from a bolt unnecessarily projecting from a rapidly revolving shaft. *Miller v. Inman & Co.*, 40 Or. 161.

If rope has been used two or three years upon a derrick, master will be presumed to know of its defective condition. *Baker v. Allegheny & R. Co.*, 95 Pa. St. 211.

Failure to inspect the condition of the rope supporting a gate weight in constant use, for six months, was negligence, especially in connection with the absence for a long time of the block, intended to catch the weight in case it fell. *McGuigan v. Beatty*, 186 Pa. St. 329.

It was not shown that the use of a chain for hoisting an iron bucket was such as to weaken it and it was apparent that the break might have occurred by reason of a latent defect therein. Weakness was not to be anticipated. *McClain v. Henderson*, 187 Pa. St. 283.

Failure to inspect a plank apparently good and sufficient and which had been used off and on for two years without accident, did not charge defendant with liability. *Ehui v. National Tube Works Co.*, (Pa. St.) 52 Atl. Rep. 166.

Grease had lain on the floor of a mill for three hours. Knowledge of its existence was not imputed. *Burke v. National India-Rubber Co.*, 31 R. I. 446.

Failure to discover a missing bolt to a switch for a long time, though displaced by a third party, was negligence. *Houston & R. Co. v. Gaither*, (Tex. Civ. App.) 43 S. W. Rep. 266.

Failure to test a rope before using, which had been in use for several voyages and had been subjected to the action of heat and smoke, was negligence. *The Ethelred*, 96 Fed. Rep. 446.

Master was not chargeable with knowledge of a defect not apparent at the last inspection. *Mexican C. R. Co. v. Townsend*, 114 Fed. Rep. 737.

An embankment built by another company had stood for 40 years and

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Railroad was not negligent in ordering the removal of a wrecked tender where ordinary diligence by those in charge would not have revealed the fracture, making such removal dangerous. *Skidmore v. West Virginia &c. R. Co.*, 41 W. Va. 293.

4. WHETHER THE DUTY TO PROVIDE AND MAINTAIN REASONABLY SAFE MACHINERY, &C., CAN BE DELEGATED.*

A master cannot delegate his duty so as to exempt himself from liability. *Laning v. N. Y. C. R. Co.*, 49 N. Y. 521.

Corcoran v. Holbrook, 59 id. 517; *Fuller v. Jewett*, 80 id. 46; *Slater v. Jewett*, 85 id. 61; *Pantzer v. Tilly Foster Mining Co.*, 99 id. 368; *Ellis v. N. Y. Cent. R. Co.*, 95 id. 546; *Flike v. R. Co.*, 53 id. 549; *Benzing v. Steinway & Sons*, 101 id. 547, rev'g judg't of non-suit; *Sellick v. Langdon*, 13 N. Y. Supp. 855; *New Orleans &c. R. Co. v. Clements*, 100 Fed. Rep. 415; in re *California Nav. &c. Co.*, 110 id. 670.

"J. T. S.," a painter, having no knowledge of the scaffold building, employed "J. S." to construct one. A servant of "J. T. S." was injured by a defect of the scaffold. "J. S.," the contractor, was liable, but not "J. T. S." *Devlin v. Smith et al.*, 89 N. Y. 470, aff'g in part 25 Hun, 206, and rev'g judg't of nonsuit as to one def't.

Distinguishing Mayor v. Cunliff, 2 N. Y. 165; *Loop v. Litchfield*, 42 id. 351; *Losee v. Clute*, 51 id. 494.

Failure of another servant, to whom employé had been referred for instructions, to give a warning, did not absolve master, as the duty to give such warning should have been discharged by him personally. *Eastland v. Clarke*, 165 N. Y. 420.

The duty is one that cannot be delegated to a fellow servant. *Cavanagh v. O'Neill*, 27 App. Div. 48; s. c. aff'd, 161 N. Y. 657.

Scandell v. Columbia Const. Co., 50 App. Div. 512; *Brown v. Todd*, 46 App. Div. 546; *Pursley v. Edge Moor Works*, 56 App. Div. 71; *Cole v. Warren Man. Co.*, (N. J. L.) 44 Atl. Rep. 647; *Frost Man. Co. v. Smith*, 98 Ill. App. 308; *Rock Island &c. Works v. Pohlman*, 99 Ill. App. 670; *Baltimore &c. R. Co. v. Amos*, 20 Ind. App. 378.

A master made proper regulations and employed a competent superintendent. The master mechanic gave proper instructions for the thorough repair of a locomotive; the negligence of a mechanic left it defective so that it exploded and injured engineer; as it was the personal duty of the master to put it in order, he was liable. *Fuller v. Jewett*, 80 N. Y. 46, aff'g judg't for pl'ff.

Citing *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Malone v. Hathaway*, 64 N. Y.

*NOTE — See, also, "Fellow Servant," *post*, p. 1600.

WHETHER DUTY TO PROVIDE AND MAINTAIN SAFE MACHINERY CAN BE DELEGATED. 5; *Filke v. Boston &c. R. Co.*, 53 id. 549; *Booth v. Same*, 73 id. 38; *Mehan v. Syracuse &c. R. Co.*, id. 585.

Defendant simply gave the station agent general directions to see that everything was in order, and to correct everything he saw out of the way, in the loading of cars, and to the conductor or brakeman to report to the station agent any delay that might be seen; the defendant did not appear to have made any rules or directions as to the inspection of its cars, and as the stakes furnished were necessary appliances to the car, the defendant was chargeable with negligence in failing to exercise proper care, and providing proper and suitable ones for the purpose of loading; it was no defense that it was the custom on the road to delegate to shippers the duty to properly stake the car. One of the stakes broke and precipitated a part of the load on one of the defendant's employés. *Bushby v. N. Y., L. E. & W. R. Co.*, 107 N. Y. 374, aff'g 37 Hun, 104, granting new trial and rev'g judg't of nonsuit.

It is the duty of a railroad corporation to exercise due care to provide proper cars for the transportation of powerful explosives over its road, and it cannot escape liability for damages caused by its failure to exercise such care by delegating its duties to an employé of inferior grade who happens to be a co-laborer with a person injured. *Bernardi v. N. Y. C. & H. R. R. Co.*, 78 Hun, 454.

It has been held, however, that a rule requiring conductors to see that switches are properly set after use by their trains, absolves master from liability. *Davis v. Staten Island &c. Co.*, 1 App. Div. 178.

Master is liable for negligence of servants in inspecting. *Hoes v. Ocean S. S. Co.*, 56 App. Div. 259; s. c. aff'd, 63 N. E. Rep. 1118.

Spring Valley Coal Co. v. Rowatt, 196 Ill. 156; aff'g 96 Ill. App. 248; *Eicholz v. Niagara Falls Hydraulic Power &c. Co.*, 68 App. Div. 441; *Galveston &c. R. Co. v. Buch*, (Tex. Civ. App.) 65 S. W. Rep. 681; *Atchison &c. R. Co. v. King-scott*, 65 Kan. 131; *Norfolk &c. R. Co. v. Phillips*, 100 Va. 362; *Baird v. Reilly*, 92 Fed. Rep. 884; *Ellis v. Northern Pac. R. Co.*, 103 id. 416.

In using and repairing appliances, the servants to whom the duty is confided do not represent the master. *Mobile &c. R. Co. v. Thomas*, 42 Ala. 672.

Mobile &c. R. Co. v. Smith, 59 id. 245.

In Arkansas the master may delegate the duty of keeping appliances in repair, so as to be relieved from liability for negligence; but it seems to be the master's duty to exercise a proper inspection and execute any general repairs. *St. Louis R. Co. v. Gaines*, 46 Ark. 555.

Whatever it is the master's duty to do, he cannot delegate to another to do so as to escape liability; for then the duty would become one of the servant and not the master. There may be a difference of opinion

as to what is or is not a master's duty, especially in the matter of repairs; but if it be determined that it was the master's duty, then, whether he be doing it through another or himself, he is regarded as present and doing it in person. Therefore the expression obtains that a master cannot delegate the performance of his personal duties so as to escape liability for any negligent act or omission concerning him. *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642, *Wheeler v. Wason & Co.*, 135 Mass. 294; *Lewis v. Seifert*, 116 Penn. St. 628; *Fox v. Iron Co.*, 84 Mich. 393; *Sadowski v. Car Co.*, 84 Mich. 100.

Master is liable to a servant for negligence of his agent entrusted with the performance of duties which the master should perform. *Beeson v. Green Mountain & Co.*, 57 Cal. 20.

Where the necessity for telegraphing for flooding apparatus for a mine, suddenly caught fire arises, the superintendent thereof is chargeable with the exercise of the duty of doing so, and the mine owner is chargeable with his failure to do it, owing to the supersensitiveness of his nerves. *Bessemer Land & Co. v. Campbell*, 121 Ala. 50.

The duty as to safety being capable of delegation it is necessary to charge defendant with negligence to allege incompetence in the parties intrusted with the duty. *Woodward Iron Co. v. Cook*, 124 Ala. 349.

Where employ  s, charged with the duty of selecting boilers, are skilled and competent, defendant was not liable for an error of judgment on their part. *Chicago & C. R. Co. v. DuBois*, 65 Ill. App. 142.

Duty to keep track in safe condition cannot be delegated. *Chicago & C. R. Co. v. Eaton*, 96 Ill. App. 570; s. c. aff'd, 62 N. E. Rep. 784.

Or to prevent an emery wheel from becoming defective. *Ide v. Fratcher*, 194 Ill. 552; aff'g s. c., 96 Ill. App. 549.

North Chicago & C. R. Co. v. Dudgeon, 83 Ill. App. 528.

Master is not relieved merely by selecting an experienced hand. *Hearn v. Quillen*, 94 Md. 39.

Cleveland & C. R. Co. v. Ward, 147 Ind. 256; *International & C. R. Co. v. Hawes*, (Tex. Civ. App.) 54 S. W. Rep. 325; *Felton v. Bullard*, 94 Fed. Rep. 781.

Nor can master set up that he relied on the plans of a competent architect. *Snedda v. Liberia*, 65 Minn. 337.

"The rights of a plaintiff who has been injured by defective machinery of a defendant for whom he was working, depend upon the contract, express or implied, under which he was employed. * * * In the absence of an express stipulation, the master impliedly agrees to provide and maintain reasonably safe and suitable machinery and appliances, so far as the exercise of proper care on his part will secure them, and the servant agrees to assume all the ordinary risks of the business, and among them the risk of injury from negligence of his fellow servants. * * * It has been repeatedly held that he (the master) cannot discharge it by delegating the performance of his duty to another." *Moynihan v. Hills Co.*, 146 Mass. 586.

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Citing *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Kelley v. Norcross*, 121 id. 508; *Killea v. Faxon*, 125 id. 485; *Elmer v. Locke*, 135 id. 575; *Lawless v. Conn. R. R. Co.*, 136 id. 1; *Flike v. Boston & Alb. R. Co.*, 53 N. Y. 549; *Hough v. R. Co.*, 100 U. S. 213.

Liability for injuries caused by want of repair in planking is not shifted from the master by delegation of authority to vice-principal. *Van Dusen v. Letellier*, 78 Mich. 492; *Sadowski v. Car. Co.*, 84 id. 100; *Lyttle v. R. Co.*, 84 id. 289.

An excavation in front of a boiler was left open by the negligence of fellow servants who dug it, but injury was through master's failure to see that it was covered or guarded. *Frye v. Bath Gas &c. Co.*, 94 Me. 17.

A master cannot avoid its duty of inspecting its engines by imposing that duty on its engineers using them. *McDonald v. Michigan C. R. Co.*, 108 Mich. 7.

Southern R. Co. v. Winton, (Tex. Civ. App.) 66 S. W. Rep. 477.

Duty as to the safety of appliances, etc., cannot be delegated to superintendents or independent contractors, so as to avoid responsibility. *Herdler v. Buck's Stove &c. R. Co.*, 136 Mo. 3.

Sackewitz v. American Biscuit Man. Co., 78 Mo. App. 144; *Toledo Brew. &c. Co. v. Bosch*, 101 Fed. Rep. 530.

By delegating his duties upon an ordinary employé, a boss vests the latter with power of receiving notice of dangers which may bind the master. *Wellston Coal Co. v. Smith*, 65 Oh. St. 70.

Master is not liable where the construction of a skid as well as the selection of the materials therefor is left entirely to the workmen themselves. *Cunningham v. Ft. Pitt Bridge Works*, 197 Pa. St. 625.

Statutory duty to appoint a competent examiner, cannot be delegated. *Kless v. Youghiogheny Min. Co.*, 18 Pa. Super. Ct. 551.

Master cannot exempt himself from the statutory duty of ventilating a mine by shifting its performance on to another. *Sommer v. Carbon Hill Coal Co.*, 89 Fed. Rep. 54.

Duty to select competent servants cannot be delegated. *Weeks v. Scharer*, 111 Fed. Rep. 330.

Telegraph company cannot delegate the duty to inspect its poles no matter how competent one, whom it engages so to do, is. *Western Union Teleg. Co. v. Tracy*, 114 Fed. Rep. 282; aff'g s. c., 110 id. 103.

So of duty of informing servant of peculiar dangers. *Mercantile Trust Co. v. Pittsburg &c. R. Co.*, 115 Fed. Rep. 475.

Where the work is usually done by independent contractors and is not inherently dangerous, the master may delegate the duty, provided he use reasonable care in selecting his contractor. *Norfolk &c. R. Co. v. Stevens*, 97 Va. 631.

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It is not necessary to vest with authority to employ and discharge to hold a master liable for the acts of one with whom he has intrusted the duty of providing a safe place to work. *Allend v. Spokane Falls &c. R. Co.*, 21 Wash. 324.

Ice house built by independent contractor fell; master was liable. *Meier v. Morgan*, 82 Wis. 289.

(b). INSTRUCTIONS AND WARNING.

1. TO THE MATURE AND EXPERIENCED NONE REQUIRED WHERE DANGER IS INCIDENT TO EMPLOYMENT.

The doctrine of the liability of the employer because of his failure to prescribe rules for the conduct of his servants, has no application to the case of a servant who is injured through an act in which he himself alone is engaged.

The master is not required to exercise the highest possible diligence to instruct his servant in every conceivable particular of the circumstances in which he may be placed, or in every possible detail of his conduct in the performance of his duties.

The master may assume that the servant brings to the work ordinary intelligence and powers of observation, and the capacity to learn something from observation and experience.

The duty of the master to instruct the servant against dangers incident to his work, extends only to such dangers as are known to the master himself, or which are reasonably to be apprehended from the nature of the employment.

In an action brought by an employé to recover for injury resulting from an explosion of gases in a tank, in which parafine was being heated by the application of steam, it appeared that the explosion was caused by the act of the plaintiff, while carrying a lighted lantern, in raising the lid of the tank to cool the contents, before adding fresh material, and that the plaintiff had had a practical experience of a year and a half in the performance of the same duties.

From his experience the plaintiff must have become acquainted with the properties of the substances with which he was engaged, and with the generation of explosive gases therefrom, and with the fact that it was unsafe to bring fire into contact with those gases. Defendant not liable. *Benfield v. Vacuum Oil Co.*, 75 Hun, 209, rev'g judg't for pl'ff; s. c. aff'd, 151 N. Y. 671.

Failure to warn one of mature age and ordinary intelligence, of an

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obvious danger incident to the use of the machine (a buzz-saw) was not negligence. *Vilas v. Vanderbilt*, 20 Misc. 51.

Sladky v. Marinette Lumber Co., 107 Wis. 250.

Where the boy was sixteen, aware of the dangers incident to the work and able to perform it, he could not complain of lack of instruction in regard to such dangers. *Worthington v. Goforth*, (Ala.) 26 South. Rep. 531.

Where the opening and closing of spaces between cars is an incident to their being shifted in a railroad yard the company is not bound to give notice thereof. *Plunkett v. Central of Ga. R. Co.*, 105 Ga. 203.

By applying for a position a servant represents his fitness and understanding of the dangers incident to the employment. *Pittsburg Co. v. Adams*, 105 Ind. 152.

Lyttle v. Chicago &c. R. Co., 84 Mich. 289; *Huber v. Jackson &c. R. Co.*, 1 Marv. (Del.) 374; *McDermott v. Atchison &c. R. Co.*, 56 Kan. 319; *Omaha Bottling Co. v. Theiler*, 59 Neb. 257; *Keenan v. Waters*, 181 Pa. St. 247; *McCormick Harvesting Machine Co. v. Liter*, (Ky.) 66 S. W. Rep. 761.

Experienced engineers are held to greater knowledge of their duty than inexperienced engineers; hence, company not bound to give notice of post erected four feet outside the line of passage of a train. *Thain v. Old Colony R. Co.*, 161 Mass. 353.

Lovejoy v. R. Co., 125 Mass. 79; *Fisk v. R. Co.*, 158 id. 238; *Goldthwait v. R. Co.*, 160 Mass. 554; *Brown v. R. Co.*, 69 Iowa, 161; *Randall v. R. Co.*, 109 U. S. 478; *Tuttle v. R. Co.*, 122 id. 189; *Bellows v. Penn. &c. R. Co.*, 157 Pa. St. 51.

Failure to instruct a woman of 30 as to the danger of getting her hands caught in cog wheels in plain sight, was not negligence. *Ruchinsky v. French*, 168 Mass. 68.

So as to a man of 27. *Wilson v. Massachusetts &c. Mills*, 169 Mass. 67.

So as to failure to warn an experienced workman of a temporary condition incident to the construction of a building, as to which he should be on the lookout. *Beique v. Hosmer*, 169 Mass. 541.

So as to failure to warn experienced workmen not to let their hands or feet get under a heavy stone in letting it down. *La Belle v. Montague*, 174 Mass. 453.

So as to failure to warn one engaged in piling boards of uneven length even at one end, of the liability of a longer top board to project beyond lower shorter ones. *Campbell v. Dearborn*, 175 Mass. 183.

So as to failure to warn one oiling a saw in motion of danger in letting his hand come in contact with its teeth. *Buttle v. George G. Page Box Co.*, 175 Mass. 318.

So as to failure to point out a set screw on a shaft in plain sight. *Demers v. Marshall*, 178 Mass. 9.

KNOWN TO SERVANT OR DISCOVERABLE BY HIM.

Failure to warn a brakeman against the obvious danger of coupling cars having double deadwoods, was not negligence, especially where he represented upon entering the service that he had had 27 years of experience. *Fenlon v. Duluth &c. R. Co.*, 108 Mich. 284.

One engaged in general work was not entitled to warnings of danger upon being called upon for assistance in a certain line within the scope of his employment, the dangers of which were perfectly obvious. *Findlay v. Russel Wheel &c. Co.*, 108 Mich. 286.

Where an employé of 27 had been working about wheat crushing rollers for six months and knew the danger of getting his fingers caught therein, he could not complain of a failure to give warnings thereof. *Nugent v. Kauffman Mill Co.*, 131 Mo. 241.

Failure to warn operators of hand cars to look out for section men on the track, was not negligence. *Brunell v. Southern Pac. Co.*, 34 Or. 256.

Failure to warn one of the obvious danger of the moving by hand heavy and unwieldy pieces of iron on the edges is not negligence, especially where plaintiff has been engaged in that kind of work before. *Cunningham v. Ft. Pitt Bridge Works*, 197 Pa. St. 625.

No duty as to warnings is due where the materials are those in ordinary use. *Dillman v. Hamilton*, 14 Mont. Co. L. Rep. 92.

Nor to one of mature age and ordinary intelligence, as to how to use a wrench in screwing nut on a rod. *Garnett v. Phoenix Bridge Co.*, 98 Fed. Rep. 192.

2. OR KNOWN TO SERVANT OR DISCOVERABLE BY HIM WHILE IN THE EXERCISE OF ORDINARY CARE.

There was a trench just where a switchman was ordered to couple cars in the night, and there was snow on the ground. The switchman had known of the trench for ten years. Question was for the jury. As his duty took all his attention, the switchman's knowledge of the trench did not preclude recovery. *Plank v. N. Y. C. & H. R. R. Co.*, 60 N. Y. 607, ordering judg't absolute for pl'ff.

See *Gibson v. Erie R. Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 N. Y. 274; 19 Hun, 509; 23 Hun, 490.

The plaintiff's intestate in the defendant's employ, in a good light, fell into a tank of hot syrup and was killed. There were two tanks on each side and a raised gutter across the passage between them. The deceased had been two days in the defendant's employ and five times over the gutter, and had been warned to be careful. Defendant was not liable. *Riceman v. Havemeyer*, 84 N. Y. 647, rev'g judg't for pl'ff.

A switchman and car coupler in a yard drained by a system of ditches

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across the tracks, in existence, when he entered the employment, and with which he was perfectly familiar, was injured thereby. Defendant was not liable. *DeForest v. Jewett*, 88 N. Y. 264; 19 Hun, 509; aff'g 23 id. 490, which granted a new trial to def't.

Citing *Gibson v. The Erie R. Co.*, 63 N. Y. 449, and distinguishing *Plank v. N. Y. C. R. Co.*, 60 id. 607.

An employé stepped on the manhole in the tank of an engine and was hurt. The court should have charged that, if the lining was off and he knew it, and yet stepped on it, he could not recover. *McQuigan v. D., L. & W. R. Co.*, 122 N. Y. 618, rev'g judg't for pl'ff.

Citing *Power v. N. Y., L. E. & C. R. Co.*, 98 N. Y. 274; *Odell v. N. Y. C. & H. R. R. Co.*, 120 id. 324.

Warning was needless where servant had worked long enough at the machine to have gained the necessary knowledge. *O'Hare v. Keeler*, 22 App. Div. 191.

Chicago & A. R. Co. v. Pettigrew, 82 Ill. App. 33; *McArthur Bros. Co. v. Nordstrom*, 87 Ill. App. 554; *Cunningham v. Bath Iron Works*, 92 Me. 501; *Gulf & C. R. Co. v. Whittig*, (Tex. Civ. App.) 35 S. W. Rep. 857; *Carlson v. Sioux Falls Water Co.*, 8 S. D. 47.

Knowledge that there was machinery beneath a dangerous hole defeated recovery, though it was not known how far. *Cmielewski v. Moltenhauer & Co.*, 11 App. Div. 111.

Duty to notify servant of danger did not extend to one whose sight was good, because he was deaf. (The danger being an obvious one). *Melton v. Jackson Lumber Co.*, (Ala.) 31 South. Rep. 848.

Failure to notify plaintiff of the approach of a train (running at prohibited speed) did not permit recovery where he went back upon the track in front of it after having gone off. *East St. Louis C. R. Co. v. Eggman*, 58 Ill. App. 69.

Where the danger is obvious, failure to warn a servant of it cannot be set up as negligence. *Anderburg v. Chicago R. Co.*, 98 Ill. App. 207.

Campbell v. Mullen, 60 Ill. App. 497; *Lanyon Zinc Co. v. Bell*, 64 Kan. 739; *Findlay v. Russell Wheel & F. Co.*, 108 Mich. 286; *Mississippi Logging Co.*, 74 Fed. Rep. 195.

Unfamiliarity of servant is no argument where danger is obvious. *Gaertner v. Schmitt*, 21 App. Div. 403.

Ferguson v. Phœnix Cotton Mills, 106 Tenn. 236.

So as to dangers that are well known to the servant. *Perry v. Old Colony R. Co.*, 164 Mass. 296.

Bence v. New York & C. R. Co., 181 Mass. 221; *Collins v. Laconia Car Co.*, 68 N. H. 196; *Ladonia Cotton Oil Co. v. Shaw*, (Tex. Civ. App.) 65 S. W. Rep. 693.

So as to failure to give notice that repairs are coming, where it is known that they will come. *Perry v. Old Colony R. Co.*, 164 Mass. 296.

Servant cannot complain of failure to give notice that a trap door is open where he knows it is liable to be. *Young v. Miller*, 167 Mass. 224.

Failure to give notice that a beam had been cleaned with soda ash, was not negligence, where the use thereof was common. The place was light and it did not appear to have been necessary to have used the beam. *Thompson v. Norman Paper Co.*, 169 Mass. 416.

Plaintiff's lack of knowledge of the operation of machinery, which she was sent to clean the exterior of, did not excuse her putting her hand inside it, where she could see the top cylinder, which was revolving and making a great deal of noise in doing so. *Robinska v. Mills*, 174 Mass. 432.

So as to warning one 22 years of age as to the danger of getting clothes caught in revolving shaft in plain sight. *Lemoine v. Aldrich*, 177 Mass. 89.

Failure to receive instruction could not be set up by an employé who had worked 40 years in the factory, being at one time foreman, and who had tended the same machine for over 12. *Cushman v. Cushman*, 179 Mass. 601.

Omission to notify experienced brakeman of risks of double deadwoods does not make company liable, if the risk is manifest to any person, and if on being employed he was warned in general terms of the perils of coupling cars of different construction, and against taking risks. *Hathaway v. Michigan &c. R. Co.*, 51 Mich. 253.

Master's duty to give notice of danger did not extend to a matter of daily occurrence in the foundry. *Nowakowski v. Detroit Stove Works*, (Mich.) 89 N. W. Rep. 956.

But warning from other sources than the master operates to defeat plaintiff's action for damages. So where a laborer admitted that he knew of certain dangers from observation, he could not recover from injuries received. *Truntle v. North Star &c. Co.*, 57 Minn. 52.

So as to failure to warn one 24 years of age of the danger of unloading a barrel weighing 400 pounds by means of a skid, 18 inches long and two feet wide, with an inclination of 10 inches—though he was not appraised of the usual way of unloading. *Manley v. Minneapolis Paint Co.*, 76 Minn. 169.

So of a failure to warn one employed to take down old and decayed poles, of one defective in a given particular. *Saxton v. Northwestern Tel. Exch. Co.*, 81 Minn. 314.

Chesapeake &c. R. Co. v. Hennessey, 96 Fed. Rep. 713.

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So of a failure to give notice of the erection of a temporary post near the track of a tram-way which plaintiff was employed to help construct, which struck the crow-bar he was using to brake a moving car with. *Robinson Land & Lumber Co. v. Gage*, (Miss.) 27 South. 998.

Failure to receive instruction as to the existence of holes in cloth fed to a machine could not be set up where the employé was experienced and had ample opportunity to discover that they were likely to occur. *O'Hare v. Cocheco Man. Co.*, 71 N. H. 104.

Danger of getting caught in a narrow space near a cog-wheel, is apparent. *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348.

Boy of twenty needs no warning of an obvious danger. *Dillman v. Hamilton*, 14 Mont. Co. L. Rep. (Pa.) 92.

The danger arising from the proximity of electric wires was known. *Owings v. Moneyrick Oil Co.*, 55 S. C. 483.

Plaintiff could not set up that he has not been warned that the place for work beneath vats was small where he had had experience in working under them. *Baumler v. Narragansett Brewing Co.*, R. I. 430.

Where a servant knowing of the danger of stepping over a revolving shaft does so with an apron on which can be barely cleared of the shaft while on an errand of his own, cannot complain of a failure to warn him of the additional danger of the projecting key of a pulley thereon. *Ander-son v. Berlin Mills Co.*, 88 Fed. Rep. 944.

3. BUT REQUIRED WHERE DANGER NOT INCIDENT TO EMPLOYMENT NOR DISCOVERABLE IN EXERCISE OF ORDINARY CARE.

A foreman of the defendant directed the plaintiff, an employé, to warm a quantity of dynamite, and while so doing he was injured by an explosion. The plaintiff was not employed to perform this service, and the defendant violated a duty by putting him at a perilous service without warning. The plaintiff was justified in assuming the safety of the service, and, as the danger was not apparent to him, he did not assume the risk. *Lefrano v. N. Y. & Mt. Vernon Water Co.*, 55 Hun, 452, aff'd judg't for pl'ff; aff'd, 130 N. Y. 658.

Reasonable notice of dangers known to master but not to servant is required. *Mannion v. Hagan*, 9 App. Div. 98.

That no previous accident had occurred did not dispense with warnings. *Latorre v. Central S. Co.*, 9 App. Div. 145.

Such notice as will enable latter in the exercise of ordinary care to avoid injury. *Felice v. N. Y. & C. R. Co.*, 14 App. Div. 345.

Defect was latent, but master knew that the appliance had not worked

well. Warning was due. *Fowler v. Buffalo Furnace Co.*, 41 App. Div. 84.

Deceased was sent into smoke and steam to fight fire. Foreman knew a stump was liable to fall but failed to communicate the fact. Negligence was proved. *Mallby v. Belden*, 45 App. Div. 384.

Failure to inform one engaged in pushing cars or baskets on an overhead carrier of the danger of their leaving the track if they are pushed backward, is negligence. *Stock v. LeBoutillier*, 19 Misc. 112; aff'g s. c., 18 id. 349.

An employer is bound to inform employé that the particular employment is hazardous, as where plaintiff was shot while tearing down a fence under direction of defendant, and the defendant knew of the likelihood of this happening. *Baxter v. Roberts*, 44 Cal. 178.

By changing a machine so as to make it more dangerous, employer assumes the duty of giving notice of the additional hazard. *Ryan v. Chelsea Paper Man. Co.*, 69 Conn. 454.

That the party instructing plaintiff how to clean and trim electric lamp did not use the cross bar on the pole in doing so is no defense to an injury received because of its dangerous condition, where he was not warned not to do so. *McQuillan v. Willimantic Electric Light Co.*, 70 Conn. 715.

Defendant's superintendent was negligent in stationing another laborer above plaintiff, in a quarry to remove stone without notifying the plaintiff thereof. *Augusta v. Owens*, 111 Ga. 464.

Sudden backing of train.—Laborer unloading a car was injured by train suddenly backing. He had the right to rely on master's warning him. *North Chicago &c. R. Co. v. Johnson*, 114 Ill. 57.

Failure to notify one directed to work within boilers from which the steam was supposed to have been turned off, of the presence of steam in one, was negligence. *Kewanee Boiler Co. v. Erickson*, 181 Ill. 549; aff'g s. c., 78 Ill. App. 35.

Factory owner must give notice of the danger in oiling fans having great suction power. *Swift & Co. v. Fue*, 66 Ill. App. 651.

That a switch is similar to those in operation on other roads is no excuse for failure to give notice of its dangers, where the servant had no reasonable opportunity of observing them. *Indiana &c. R. Co. v. Bundy*, 152 Ind. 590.

Where the danger to one feeding a mangle from unexpected irregularities in its motion was not apparent, master was negligent in failing to give warnings thereof. *United States Laundry Co. v. Schilling*, (Ky.) 56 S. W. Rep. 425.

REQUIRED WHERE DANGER NOT INCIDENT TO EMPLOYMENT.

Master is presumed to know the dangers incident to his service and is bound to give notice of latent dangers. *Stucke v. Orleans R. Co.*, 50 La. Ann. 172.

Employé was injured while working upon a newly invented machine which he had never before seen. He had a right to assume that warnings would be given. *Walsh v. Peet Valve Co.*, 110 Mass. 23.

O'Conner v. Adams, 120 Mass. 427.

Where a servant is not presumed to know of a danger, the master's duty to instruct exists. *Ciriack v. Merchants' &c. Co.*, 146 Mass. 182.

An inexperienced employé is entitled to notice of the defective condition of a machine not open to observation, though it arose through the neglect of a fellow servant. *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214.

Master is not *per se* diligent in failing to notify one engaged to repair a machine of a danger not apparent upon observation and not connected with the operation of the part he is repairing. *Martineau v. National Blank Book Co.*, 166 Mass. 4.

Where the president of a company introduced giant gunpowder, it was negligence to omit making known to its employés the proper manner of using it, although printed instructions were in the hands of the master. *Smith v. Oxford Iron Co.*, 42 N. J. L. 467.

Failure of a conductor to notify a brakeman of the movement of a train which he may reasonably apprehend may endanger the latter, was negligence. *Purcell v. Southern R. Co.*, 119 N. C. 728.

Where strict attention to duty was inconsistent with constant watchfulness, the master was not as matter of law excused from the duty of giving warnings. *Snyder v. Cleveland &c. R. Co.*, 60 Oh. St. 487.

Knowledge of servant that a machine was dangerous does not relieve master of his negligence in failing to give instructions as to its use. *Welsh v. Butz*, 202 Pa. St. 59.

Master must give warnings of latent dangers. *McCray v. Sterling Varnish Co.*, 7 Pa. Super. Ct. 610.

Western U. Teleg. Co. v. McMullen, 58 N. J. L. 155; *Gray v. Commutator Co.*, 85 Minn. 463; *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387.

Foreman knowing of the dangerous character of an embankment negligent in not notifying a servant thereof. *Garrity v. Pennsylvania Casting &c. Co.*, 17 Pa. Super. Ct. 623.

Especially where the servant is inexperienced. *Hightower v. Bamberg Cotton Mills*, 48 S. C. 190.

Danger incident to the use of a peculiarly formed flat car should be pointed out to the brakemen. *M. P. R. Co. v. Callbreath*, 66 Tex. 526.

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Where defendant knows that its track under a bridge was not low enough, it was bound to give warnings of the danger thereof. *Ft. Worth &c. R. Co. v. Kime*, 21 Tex. Civ. App. 271; s. c. aff'd, 54 S. W. Rep. 240.

Absence of rule held no defense to train dispatcher's failing to notify an engineer of a train ordered to run 25 miles an hour, of the whereabouts of another allowed to make but 16, at a time when the latter is three hours late and only 10 minutes ahead of the former. *Houston &c. R. Co. v. Higgins*, 22 Tex. Civ. App. 430.

Duty to give notice of a change in the schedule of a train falls under the duty to provide a safe place to work. *Frost v. Oregon &c. R. Co.*, 69 Fed. Rep. 936.

Where the master knows of a latent defect which increases the ordinary risk incident to his employment, he is negligent in not disclosing it to the servant. *Gowen v. Bush*, 76 Fed. Rep. 349.

Notice to employes that a car of another company is being returned as out of order, is sufficient in the absence of the discovery of latent defects, and extraordinarily dangerous defects. *Atchison &c. R. Co. v. Meyers*, 76 Fed. Rep. 443.

Failure to give warnings in substituting a new kind of switch which was dangerous to those not acquainted with its operation was negligence. *Cincinnati &c. R. Co. v. Gray*, 101 Fed. Rep. 623.

Failure to notify a boiler repairer of the unsafe condition of a running board on which he was directed to stand while making repairs on a locomotive, was negligence. *Ellis v. Northern P. R. Co.*, 103 Fed. Rep. 416.

Where servant had no knowledge of the danger of loading appliances on a ship catching in the projecting rungs of a ladder, it was the master's duty to inform him. *The Anchoria*, 113 Fed. Rep. 982.

Servant has a right to rely upon the master's warning him of dangers of which servant has no knowledge, as where traveling crane ran over plaintiff's hand while he was tending to machinery. *Michael v. Roanoke &c. Works*, (Va.) 19 S. E. Rep. 26.

Master must inform his servant of latent dangers. *Shoemaker v. Bryant Lumber &c. Co.*, (Wash.) 68 Pac. Rep. 380.

4. TO THE IMMATURE AND INEXPERIENCED INSTRUCTION AND WARNING AS TO DANGERS OF EMPLOYMENT COMMENSURATE WITH YOUTH AND INEXPERIENCE, REQUIRED.

A young person should be instructed, respecting dangerous machinery, and if too young to understand, the employer takes the risk. A girl's finger was hurt while feeding collars into a machine for ironing. She had been six weeks in the service and knew the danger. The defendant

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was not liable. *Hickey v. Taaffe*, 105 N. Y. 26, rev'g 32 Hun, 7, and judg't for pl'ff.

From opinion.—"Upon the general proposition as to the use of machinery, there is no doubt that an employé in accepting service with a knowledge of the character and position of the machinery, the dangers of which are apparent, and from which he might be liable to receive injury, assumes the risks incident to the employment, and he cannot call upon the defendant to make alterations to secure greater safety. *Gibson v. Erie R. Co.*, 63 N. Y. 449; *Powers v. N. Y., L. E. & W. R. R. Co.*, 98 id. 274; *Shaw v. Sheldon*, 103 id. 667. * * *

There is no doubt that in putting a person of immature years at work upon machinery which in some respects may be termed dangerous, an employer is bound to give the employé such instructions as will cause him to fully understand and appreciate the difficulties and dangers of his position and the necessity there is for the exercise of care and caution; merely going through the form of giving instructions, even if such form included everything requisite to a proper discharge of his duties by such employé, if understood, would not be sufficient. In placing a person of this description at work upon dangerous machinery, such person must understand, in fact, its dangerous character and be able to appreciate such dangers and the consequences of a want of care, before the master will have discharged his whole duty to such employé. (*Sullivan v. India Man. Co.*, 113 Mass. 396, at 399; *Finnerty v. Prentice*, 75 N. Y. 615, MS. opinion Andrews, J., where such rule is recognized as existing in this state.) * * *

Plaintiff had not, it is true, received any instructions as to its dangers, from the defendant or his agents, as she says, but she had acquired the information in fact from the best of all teachers, that of practical experience. She knew, therefore, all that the instructions of the defendant would have imparted to her. This was enough. Being of an age to appreciate, and having full knowledge of the danger, and at the same time being competent to perform the duty demanded from her, the fact that she was a minor does not alter the general rule of law upon the subject of employés taking upon themselves the risks which are patent and incident to the employment. *De Graff v. N. Y. C. & C. R. R. Co.*, 76 N. Y. 125; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, at 585; *Sullivan v. India Man. Co.*, 113 id. 396-398; *King v. B. & W. R. R. Co.*, 9 Cush. 112."

An unskillful servant should not be charged with dangerous machinery, where running an elevator, without the master qualifying and instructing him.

If, for the purpose of instruction, the master selects another servant in his employ, the latter must be not simply as competent as the master, but absolutely competent; if he is incompetent or negligent while performing the duty of instructor, or if he discontinues his instruction before completion, and in consequence the promoted servant is injured, the master is liable. *Brennan v. Gordon*, 118 N. Y. 489, rev'g 13 Daly, 208, and judg't of nonsuit.

From opinion.—"The principles of law involved are well defined. Those principles are, that a duty devolved upon a master of a servant hitherto in the capacity of a common laborer, before such laborer should be put in charge of

dangerous machinery with which he is not acquainted, to instruct and qualify him for such new duty. (*Connolly v. Poillon*, 41 Barb. 366, 369; *Ryan v. Fowler*, 24 N. Y. 410; *Noyes v. Smith*, 28 Vt. 59; *Railroad Co. v. Fort*, 17 Wall. 553.)

That if the master selects a co-servant in his employment to instruct and qualify the servant for the new and more dangerous service, the master must select a competent instructor or be liable for his incompetency or his negligence while performing the duty of instructor, or for discontinuance of his instruction until it is completed, by which the promoted servant is injured, and if such is the case, the master will be liable for the injury, and it will be no defense that the injury was caused by one servant to his co-servant, for the servant whose negligence caused the injury stands for the master, and the latter is liable in such case the same as if the injury was caused by the personal negligence of the master. (*Mann. v. D. & H. C. Co.*, 91 N. Y. 500; *Wood on Mast. & Serv.*, secs. 349, 350, 444; *Brennan v. Gordon*, 13 Daly, 208, 210, this case on former appeal; *Loughlin v. State of N. Y.*, 105 N. Y. 159, 162-3; *Railroad Co. v. Fort*, 17 Wall. 553.)"

An employé, inexperienced in a particular work, which was dangerous from causes not apparent, but known to his employer, is entitled to have such information as will apprise him of the nature of the work, and the possible risks in its execution. *Gates v. State*, 128 N. Y. 221, aff'g award for plaintiff.

A boy of sixteen years was operating a buzz saw, and was injured after two days' engagement in defendant's mill. He had had experience in other factories and knew the operation of the machine. The defendant was not negligent in failing to give him oral instruction. *Ogley v. Miles*, 139 N. Y. 458, rev'g judg't for pl'ff.

Citing *Buckley v. The Gutta Percha &c. Co.*, 113 N. Y. 540.

The plaintiff, nineteen years of age, in defendant's machine shop about three weeks, was employed to stand in front of, and take off the dressed lumber, and was cautioned against meddling and was given proper instructions to safely perform a special work. The foreman, in charge of the machine, directed him to place a hood in its place about eight inches above the knives, in doing which he was caught by the knives and injured. It was claimed that the defendant omitted to instruct plaintiff as to the use of the machine, but plaintiff had full opportunity to observe the manner of handling and placing the hood on the machine, and the omission of instruction was not negligent, especially as he asked for none, and if he was directed by the foreman to perform a service for which he was not employed, the fault was of a co-servant and not the master. *Crown v. Orr*, 140 N. Y. 450, rev'g judg't for pl'ff.

Condition of floor and danger of slipping or tilting of a stool was obvious to a boy of 16. *Koehler v. Syracuse Specialty Man. Co.*, 12 App. Div. 50.

Master set a girl of 15 to work at dangerous machine. Negligence in

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not warning her was for the jury. *O'Connor v. Barker*, 25 App. Div. 121.

A girl of fifteen in defendant's laundry smoothing wrinkles in the muslin covers of the rollers of the ironing machine, caught her fingers in the rollers. The foreman knew that it was dangerous for any one to put his hand on a moving roller, though he had instructed plaintiff how to take out the wrinkles while the roller was moving at usual speed. There was a tendency for the fingers to stick to the rollers and to be drawn in. *Owens v. Ernst*, 1 Misc. 388, aff'g judg't for pl'ff.

A person, neither a mechanic nor a skilled workman, and who had never worked on an engine of this particular kind, was put to work on an engine and had worked eight or ten days, but received no instructions about running it. While bending over near a large fly wheel rapidly revolving, for the purpose of feeling of the center bearings, his foot slipped on a step eleven inches wide and three feet long, provided for the operator to stand on while oiling the machine and making other necessary examinations, and on which oil was thrown from the crank, and fell and was struck by the fly wheel. Nonsuit erroneous. *Slacer v. Field Engineering Co.*, 4 Misc. 493, rev'g nonsuit.

Foreman was negligent in directing an ordinary laborer to withdraw a blast without knowing of what he was able to do. *Vitto v. Farley*, 15 Misc. 153.

But, see, *Arizona Lumber & T. Co. v. Mooney*, (Ariz.) 42 Pac. Rep. 952.

Defendant liable for failure to give instructions to boy how to use a machine in a gin-house of the danger of which the boy was ignorant. *Fones v. Phillip*, 39 Ark. 17.

It was negligence to set a general carpenter to tightening up the nuts on a refrigerating machine, of the special danger in doing which he has no knowledge. *Ryan v. Los Angeles Ice &c. Co.*, 112 Cal. 244.

Master is not negligent if the danger incident to the employment should be apparent to any youth of plaintiff's age and of average mental capacity. *Adams v. Clymer*, 1 Marv. (Del.) 80.

He may assume that the plaintiff possessed the knowledge, experience and discretion of the average servant of his age and intelligence. *Chielinsky v. Hoopes &c. Co.*, 1 Marv. (Del.) 273.

Where the servant is young and inexperienced, instruction must be such as to enable him to understand. *Strattner v. Wilmington City Electric Co.*, 3 Penn. (Del.) 245.

An inexperienced boy of tender years should be fully warned of all dangers incident to the employment; whether a particular danger is in-

cident to the employment is a question for the jury. *Harris v. Sherbeck*, 151 Ill. 287.

May v. Smith, 92 Ga. 95; *Keller v. Gaskill*, 36 N. E. (Ill.) 303; *Reisert v. Williams*, 51 Mo. App. 13; *Hill v. Gust*, 55 Ind. 45; *St. Louis &c. R. Co. v. Valirius*, 56 Ind. 511; *Downing v. Allen*, 74 Mo. 13; *Combs v. Cordage Co.*, 102 Mass. 572; *Sullivan v. Indiana Man. Co.*, 113 Mass. 396; see, however, *Fones v. Phillips*, 39 Ark. 17; where a master was held not to be bound to disclose patent to minor, discoverable by ordinary exercise of diligence.

Master was negligent in directing a servant to go upon a floor where the latter was ignorant of its defective condition. *Kirk v. Scally*, 79 Ill. App. 67.

Danger of putting one's hand between two sets of rollers to remove a stalk that had been jammed therein, should have been obvious to a boy of 16. *Marsden Co. v. Johnson*, 89 Ill. App. 100.

That the machine was being used improperly was no defense where defendant had failed to give instruction as to its proper use. *Newbury v. Getchel &c. Lumber Co.*, 100 Iowa, 441.

A youth of seventeen is presumed to have sufficient capacity to be sensible of danger; and in the absence of proof to the contrary will not recover for injuries sustained by dangerous machinery, which, however, it was not customary to box. *Sanborn v. A. T. &c. R. Co.*, 35 Kas. 292.

Railroad company must explain to an inexperienced brakeman, the peculiar danger incident to coupling cars with special apparatus. *Louisville &c. R. Co. v. Veach*, (Ky.) 46 S. W. Rep. 493.

Illinois C. R. Co. v. Price, 72 Miss. 862.

Failure to instruct one unskilled in the use of machinery how to unclog a metal discharge tube, was negligence, where one unaccustomed thereto might naturally attempt to do so with the fingers. *Standard Oil Co. v. Eiler*, (Ky.) 61 S. W. Rep. 8.

Failure to instruct one who is called upon to perform the service of another involving danger to which he has not been accustomed, is negligence. *James v. Rapides Lumber Co.*, 50 La. Ann. 717.

Camp v. Hall, 39 Fla. 535; *Waxahachie Cotton Oil Co. v. McLain*, (Tex. Civ. App.) 66 S. W. Rep. 226; *Gulf &c. R. Co. v. Newman*, (Tex. Civ. App.) 64 S. W. Rep. 790; *Texas &c. R. Co. v. Utley*, (Tex. Civ. App.) 66 S. W. Rep. 311.

Ship builder was negligent in failing to warn an inexperienced hand of the danger of the rope he was compelled to use, kinking, which might cause him injury. *Skinner v. McLaughlin*, 94 Md. 524.

Inexperienced workman was injured by an unguarded circular saw. For jury. *Wheeler v. Mason Man. Co.*, 135 Mass. 294.

Guards for dangerous machinery are not needed to protect a boy of twelve years. *Gilbert v. Guild*, 144 Mass. 601.

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A master was not negligent in failing to instruct a boy of seventeen of the danger of putting his fingers between the roll and hot cylinder of a machine, where he had had six months' previous experience. *Crowley v. Pacific Mills*, 148 Mass. 228.

So as to a cog-wheel in the case of a boy of twelve years. *Ciriack v. Merchants' &c. Co.*, 146 Mass. 182.

When dangers are obvious or a child knows of them, the master is not obliged to warn or instruct him. *Coullard v. Tecumseh Mills*, 151 Mass. 85.

As to instructions to children, see *Rolling Mill Co. v. Corrigan*, 46 Oh. St. 283. *Hesse v. National Casket Co.*, 66 N. J. L. 652.

Boy slipping on slippery floors fell into a revolving cylinder. The danger was apparent and the master was not negligent in not warning the boy, nor was he obliged to cover up the machinery. *Frinkham v. Sawyer*, 153 Mass. 485.

Ryan v. Tarbox, 135 Mass. 207; *Glover v. Dwight &c. Co.*, 148 id. 22; *Probert v. Phipps*, 149 id. 258.

Plaintiff could not complain of lack of instructions as to his new position where, though a youth of little over 17, he was of ordinary intelligence, and had opportunity before engaging therein, to become acquainted with the performance thereof. *Bussey v. Newichawanick Co.*, 94 Me. 61.

Directing one to build a fire without giving him instructions, was negligence where it was a dangerous operation, for one not acquainted therewith. *La Fortune v. Jolly*, 167 Mass. 170.

No warning was necessary to a bright boy of seventeen, who knew of the danger of getting his hands in the machinery and the liability of there being holes in the cloth he was feeding to it, which might draw them there. *Shine v. Cocheco Man. Co.*, 173 Mass. 558.

A boy of fourteen and of average intelligence could not complain of a failure to warn him of the obvious danger of getting his fingers caught in the gearing of "Mules" which he had assisted in attending to three times a day for two months. *Silvia v. Sagamore Man. Co.*, 177 Mass. 476.

Instruction to a boy of ordinary mental capacity to use his fingers in pressing down scrap rubber which he was feeding between revolving cylinders, did not permit recovery, when he failed to guard against the obvious danger of getting his fingers caught. *Sullivan v. Simplex Electrical Co.*, 178 Mass. 35.

Ertz v. Pierson, (Mich.) 89 N. W. Rep. 680.

One whose duty it is to push stone into a lime kiln, through ignorance

of his duty, fell in and was burned to death. Master was liable. *Parkhurst v. Johnson*, 50 Mich. 70.

The question of whether defendant was negligent in failing to instruct an inexperienced girl of 14, employed to take paper out of a mangle, farther than to warn her not to get her hands between the rollers, the danger of which was obvious, was for the jury. *Allen v. Jakel*, 115 Mich. 484.

Boy of nineteen caught his fingers in roller of powerful machine, the danger of which was apparent. Master was not liable. *Berger v. R. Co.*, 39 Minn. 78.

Negligence in failing to warn an inexperienced boy of 15 of the danger from a revolving circular saw in the vicinity of which he was set to work, was for the jury. *Barg v. Bousfield*, 65 Minn. 355.

It was for the jury to say whether defendant was not negligent in not giving a boy with little experience notice of the danger of working about a machine having no guards. *Forske v. Commonwealth Lumber Co.*, (Minn.) 90 N. W. Rep. 532.

See, also, *Lafam v. Missisquoi Man. Co.*, (Vt.) 52 Atl. Rep. 526.

Failure to warn an inexperienced employé assisting another in adjusting the knives of a planing machine against slipping into the unguarded knives, was negligence. *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387.

Where the dangers are such as plaintiff from his youth, incapacity, or inexperience, is unable to comprehend, the master is bound to give him warnings thereof. *Norfolk Beet-Sugar Co. v. Hight*, 56 Neb. 162.

Coffee v. Phillips, 21 Misc. 663; *National Malleable Castings Co. v. Luscomb*, 19 Oh. C. C. 673; *Addicks v. Christoph*, 62 N. J. L. 786; *Hayes v. Colchester Mills*, 69 Vt. 1; *McDougall v. Ashland &c. Co.*, 97 Wis. 382.

Where a boy of about 19 and of average intelligence, had been in the business for years, it was not as matter of law beyond his ability to apprehend the danger that cider bottles might explode in being filled. *Omaha Bottling Co. v. Theiler*, 59 Neb. 257.

Warning to another servant seen to use a dangerous method in the work was no defense to failure to warn plaintiff not to use such method. *Lapelle v. International Paper Co.*, 71 N. H. 346.

Where a boy of fourteen, physically weak, was ordered to work and objected, and went reluctantly and without instruction, the master took the risk, in this case, to drive a dump cart, which was a dangerous employment. *Kehler v. Schwenk*, 151 Pa. St. 505.

Following *Rummel v. Dilworth*, 131 Pa. St. 109.

Where the machine is dangerous and is to be operated by a young and

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inexperienced hand, he must be thoroughly instructed. *Welsh v. Butz*, 202 Pa. St. 59.

Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517, s. c., 47 Pac. Rep. 778; *Tedford v. Los Angeles Electric Co.*, 134 Cal. 76; *Lemser v. St. Joseph Furniture Man. Co.*, 70 Mo. App. 209; *Missouri &c. R. Co. v. Evans*, 16 Tex. Civ. App. 68; *Texarkana &c. R. Co. v. Preacher*, (Tex. Civ. App.) 59 S. W. Rep. 593; *Anderson v. Daly Min. Co.*, 15 Utah, 22.

Defendant was not negligent in setting a boy of 18 to work at his own request, in its electric works, winding and testing armatures after four weeks' instruction and three weeks' experience having prior to that for several years, been a messenger in the factory. *Tague v. Westinghouse &c. Co.*, 30 Pitts. L. J. (N. S.) 67.

That an inexperienced switchman does not request a warning, does not excuse the master from giving it. *Galveston &c. R. Co. v. Hughes*, 22 Tex. Civ. App. 134.

Where a boy was taken from his employment into the midst of dangerous machinery to adjust a belt, he had the right to rely on the orders of his superior and was not responsible for the perils, and his father recovered for injuries received. *R. Co. v. Fort*, 84 U. S. 553.

A slight acquaintance with the danger on the part of the servant, does not excuse the master from disclosing the main sources thereof. *New York Biscuit Co. v. Rouss*, 74 Fed. Rep. 608.

Sheetram v. Trexler Stave & Lumber Co., 13 Pa. Super. Ct. 219; *Greenville &c. Co. v. Harkey*, 20 Tex. Civ. App. 225; *Hayes v. Colchester Mills*, 69 Vt. 1.

Qualifying an inexperienced employé for the duties of a new and dangerous employment is one which belongs to the master personally and cannot be delegated. *Louisville & N. R. Co. v. Miller*, 104 Fed. Rep. 124.

Complaint charging defendant with negligence for failing to warn plaintiff of the danger of putting dynamite in an oven held insufficient in failing to allege that she did not know of its dangerous character. *Brainard v. Van Dyke*, 71 Vt. 359.

A servant though inexperienced, cannot complain of a master's failure to give warnings of danger, where he had already received them from other sources. *Richmond &c. Works v. Ford*, 94 Va. 627.

Hettehen v. Chipman, 87 Md. 729.

It was for the jury to say whether a boy of 14 had sufficient intelligence to comprehend without instruction, the danger in case of accident of being caught between bumpers of cars, the brakes of which he was required to hold down. *Boyer v. Northern P. Coal Co.*, (Wash.) 68 Pac. Rep. 348.

PROVIDED MASTER KNEW OR COULD HAVE KNOWN.

5. PROVIDED MASTER KNEW, OR BY EXERCISE OF ORDINARY CARE COULD HAVE KNOWN, OF THE DANGER.

The plaintiff was employed to move a lever, which put in or out of gear certain machinery, and to manage certain plugs on the sides of certain cisterns; in fact the plaintiff did sometimes assist, when the machinery was not in motion, in replacing the driving chain or belt, when the same would come off, thereby stopping the machinery. Plaintiff undertook to replace a key, which had dropped out, and thus relock a wheel to the shaft, with a spike, and to do this crawled over the framework of the machinery, while the shaft was in motion, whereupon, the key being replaced, the wheel at once began to move and did him injury. It was the duty of the plaintiff to report the defect to the office of the machinist in the same building, whose duty it was to make repairs and the act of repair did not pertain to plaintiff's duty.

The court held that the verdict was based upon the principle that the master failed to perform his duty to the plaintiff in not warning him against the possibility of such an accident or instructing him how to avoid it. This imposed upon the defendant a measure of responsibility not warranted by the rules of law. *McCue v. N. S. M. Co.*, 142 N. Y. 106, rev'g judg't for pl'ff.

That no previous accident had occurred did not dispense with warnings. *Latorre v. Central S. Co.*, 9 App. Div. 145.

Master was negligent in directing an employé to put his hand into a pipe, which, by the exercise of ordinary care, he could have known contained potash. *Dunn v. Connell*, 21 Misc. 295; aff'g s. c., 20 id. 727.

Where the master knew of the defect in a wagon wheel which his servant was directed to turn in starting a team, he was negligent in failing to apprise the servant of it. *Spaulding v. O'Brien*, 26 Misc. 184.

Where the danger arose from a process which was not the usual one in the defendant's factory and which it had no knowledge of, it was not liable, especially where the servant, a boy of 19, had equal means of informing himself of the danger. *O'Keefe v. National Folding Box &c. Co.*, 66 Conn. 38.

Warnings to employes engaged to tear a building down, extend only to latent defects therein, which may be known by the employer. *McFarland v. Edmunds Man. Co.*, 97 Ill. App. 629.

Order to throw water on a mass of burning wood and grease knowing that it would likely produce an explosion, was negligence. *Swift & Co. v. Creasey*, 9 Kan. App. 303.

Where the master knows, or should, by the exercise of reasonable care,

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know of a hidden danger, which the servant has no reason to suspect, he is bound to disclose it. *Hysell v. Swift & Co.*, 78 Mo. App. 39.

National Malleable Castings Co. v. Luscombe, 9 Oh. C. C. 680; *Richmond & Co. Works v. Ford*, 94 Va. 627.

Otherwise in such case if the master does not and cannot so know thereof. *Klochinski v. Shores Lumber Co.*, 93 Wis. 417.

Master was not chargeable with failure to give notice that a joist in a floor had been sawed nearly through for a "well-hole," where the party making it had left it momentarily only to get an axe with which to knock it out. *McCann v. Kennedy*, 167 Mass. 23.

Failure to ascertain how long a trench had been dug for the purpose of ascertaining its safety and communicating the fact to the employé before sending him into it, was not negligence. *Hughes v. Malden & Co.*, 168 Mass. 395.

In an unexpected emergency, such as a fire, master is not chargeable with the duty of instructing its servants what to do. *Gilmore v. Mit-tineague Paper Co.*, 169 Mass. 471.

Servant assumes risk of cars with double deadwoods received from another company, and master need not expressly notify servant of risks, when the nature of the business and of the risk is such that the only effective notice he can have is from his own general experience and the visible presence of that from which the danger is to be apprehended. *Michigan Central R. Co. v. Smithson*, 45 Mich. 212.

Defendant was not chargeable with failure of its conductor to ascertain and disclose a hidden danger in a bluff above a track causing a landslide to one whom he had directed to remove a previous landslide, where such was no part of the former's duty, but was part of the latter's. *Slavens v. Northern P. R. Co.*, 97 Fed. Rep. 255.

By undertaking to use dangerous explosives, a master becomes bound to ascertain if he does not know, and disclose the dangers incident to its use. *Bertha Zinc Co. v. Martin*, 93 Va. 791.

Defendant's boss was not negligent in failing to notify a miner of unexpected blasts, where he was sent to work where he had reason to believe there were none that did not have wires projecting from them which would be a sufficient warning. *McMahon v. Ida Min. Co.*, 101 Wis. 102.

O'Neil v. Leary, 164 Mass. 387.

6. SUFFICIENCY OF THE WARNING OR INSTRUCTION.

Defendant was liable for a failure to instruct a conductor left in charge of a car on a grade as to how to operate the brake. *Sullivan v. Metropolitan Street R. Co.*, 53 App. Div. 89; s. c. aff'd, 170 N. Y. 570.

Two boys, one fifteen years old and the other fourteen, were sent by their master to saw logs near a declivity of about thirty-three feet in a hundred. The log was steadied upon a stump by a stick. After a time the boys changed places, the younger one going to the lower side of the stump. The log having been sawed through fell on the lower side of the stump, and one of the pieces fell on the younger boy and killed him. It was properly left to the jury to determine whether the master had discharged his duty to the deceased in the mere direction to the younger boy to work on the upper side of the stump without giving him warning of the danger existing on the lower side. It was not necessarily contributory negligence for the boy to disregard the master's direction. *Skaarup v. Stover*, 56 Hun, 86, rev'g judg't of nonsuit.

Warning at the instant master precipitates earth into a ditch is insufficient. *Raynor v. Trolan*, 22 App. Div. 107.

Plaintiff was told that a mule might stop at any time and go to kicking, and might kill him. It was held that he had been sufficiently warned as to its vicious disposition. *Bessemer Land &c. Co. v. Dubose*, 125 Ala. 442.

That plaintiff heard the tree beginning to fall, did not excuse the foreman's failure to give warning, where it was not in time for him to escape. *Postal Tel. Cable Co. v. Hulsey*, 132 Ala. 444.

Child of eight, but of ordinary intelligence, was frequently warned of the danger from cog-wheels in plain sight, but was not shown how he might get into it. Warning was not *per se* deficient. *Bibb Man. Co. v. Taylor*, 95 Ga. 615.

Master was negligent in not notifying one employed to repair an apparatus, of its danger. *Decatur Cereal Mill Co. v. Boland*, 95 Ill. App. 601.

An explanation by the master to the servant of the risks of his employment was not given. For jury. *Ryan v. Tarbox*, 125 Mass. 207.

Plaintiff was sent into a room to clear away debris from an exploded fly wheel. The nature of the task showed that the place was likely to be dangerous and failure to formally state that no one had inspected the room to see that it was a safe place to work in, was not negligence. *Kanz v. Page*, 168 Mass. 217.

Where the boss had removed clogs in a cotton picking machine in the presence of plaintiff, who was being initiated in the art of handling it, without stopping the beater, which he was able to do successfully by reason of his knowledge of the construction of the machine, instruction was insufficient. *De Costa v. Hargraves Mills*, 170 Mass. 375.

If a boy was too young to understand dangerous character of machinery or appreciate danger of operating it, master would not be relieved by proof of proper instructions, and this was a question for the jury. *Steller v. Hart*, 65 Mich. 644.

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It is not the duty of the master to inform servant of ingredients of paris green, if he is notified of its poisonous character and of the precaution to be used against danger incident to working at vats. Servant was injured by exhalations from vats containing paris green, which he was stirring in the course of manufacture. *Fox v. Peninsula &c. Works*, 84 Mich. 676.

The following cases held that the master was liable for failure to properly instruct servant of the dangerous character of the employment:

Smith v. Oxford Iron Co., 42 N. J. L. 467; *Paulmier v. R. Co.*, 34 id. 151; *Baker v. Alleghany Valley R. Co.*, 95 Pa. St. 211; *Swoboda v. Ward*, 40 Mich. 420; *Strahlendorf v. Rosenthal*, 30 Wis. 674; *Jones v. Mining Co.*, 66 id. 268; *R. Co. v. Watts*, 64 Tex. 568; *R. Co. v. Callbreath*, 66 id. 526; *Baxter v. Roberts*, 44 Cal. 187; *McGowan v. Smelting Co.*, 9 Fed. Rep. 861; *Perry v. Marsh*, 25 Ala. 659; *Coombs v. Cordage Co.*, 102 Mass. 572.

Warnings to youths must be so expressed as to be adequately comprehended. *Addicks v. Christoph*, 62 N. J. L. 786.

Foreman was negligent in sending plaintiff on a hand car without notifying him of the liability of meeting a train, especially around a curve. *Allison v. Southern R. Co.*, 129 N. C. 336.

Southern R. Co. v. Craig, 113 Fed. 76.

Train was directed to await engine No. 54 at a siding. Failure to notify the engineer that he was to meet with engine No. 64 there also, did not permit recovery, where the engineer saw the latter but mistook it for No. 54, and passed it without stopping. *Brown v. Southern R. Co.*, 126 N. C. 458.

Written notice of the lowering of a bridge, without "tell tales" in addition, held insufficient to a servant engaged in duties which required his exclusive attention. *Lake Shore &c. R. Co. v. Baldwin*, 19 Oh. C. C. 338; *Ft. Worth &c. R. Co. v. Kime*, 21 Tex. Civ. App. 271; s. c. aff'd, 54 S. W. Rep. 240.

Where a boy of seventeen was set to cleaning a woolen mule in motion, an occupation dangerous to an adult, the question whether the boy had received proper instructions was for the jury.

If boy obeyed order from fear to disobey, or because he thought foreman knew better, he may recover. *Tagg v. McGeorge*, 155 Pa. St. 368.

Distinguishing *Zurn v. Tetlow*, 134 Pa. St. 213; *Keife v. Thorn*, 24 W. N. Rep. 379. Citing *Chopin v. Badger Paper Co.*, 83 Wis. 192.

A warning merely to look out for himself is insufficient where the employé while engaged on a car cannot reasonably so protect himself. *Houston &c. R. Co. v. Strychaski*, (Tex. Civ. App.) 35 S. W. Rep. 851.

It is necessary to have some one person stationed to give warnings in

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switching cars and in repairing tracks, several opens a way to mistake. *Texas &c. R. Co. v. Eberhardt*, (Tex. Civ. App.) 40 S. W. Rep. 1060; s. c. aff'd, 91 Tex. 321.

See, also, *The Pioneer*, 78 Fed. Rep. 600; *Louisville &c. R. Co. v. Hawkins*, (Ky.) 51 S. W. Rep. 426; *Louisville &c. R. Co. v. Lowe*, (Ky.) 66 S. W. Rep. 736; *Pennsylvania R. Co. v. Mahoney*, 22 Oh. C. C. 469; *Galveston &c. R. Co. v. Quay*, (Tex. Civ. App.) 66 S. W. Rep. 219.

Requirement as to warnings held not complied with where the bell was so cracked that it could not give sound enough to constitute an ordinary warning. *Northern P. R. Co. v. Kröhne*, 86 Fed. Rep. 230.

A whistle of an engine about the yard in an iron mill held not a sufficient warning, where other whistles were constantly being blown within such mill. *Weiss v. Bethlehem Iron Co.*, 88 Fed. Rep. 23.

Statement that a switch intended to act automatically only in an emergency would so act at all times, was negligence. *Thomas v. Cincinnati &c. R. Co.*, 97 Fed. Rep. 245.

Notice to a brakeman to look out for digging between the ties at a certain place was sufficient to put him on his guard as to unblocked frogs. *Hauss v. Lake Erie &c. R. Co.*, 105 Fed. Rep. 733.

Notice that a horse is "high lived" is not sufficient to put one on his guard against vicious lunging and balking. *Wilson v. Sioux Consol. Min. Co.*, 16 Utah, 392.

(c). COMPETENT AND SUFFICIENT EMPLOYÉS.*

1. DUTY TO FURNISH COMPETENT AND SUFFICIENT EMPLOYÉS.

A railroad corporation, having employed skillful and competent persons to supervise and inspect its road-beds and bridges, and having made it their duty to do so, is not liable for an injury to an employé, occasioned by the falling of one of its bridges, where the defect was such as was not apparent, and of which it had no notice. *Warner v. The Erie R. Co.*, 39 N. Y. 468, rev'g judg't for pl'ff.

A master must use *great* care in employing a servant, make inquiries as to character and qualifications, and when proper care has been used and a competent servant has been employed, his competency will be presumed to continue until the master receives notice or knowledge of a change.

It is improper to leave it to jury to determine what particular watchfulness of a servant is required. The declarations of the defendant's

*NOTE.—The doctrine here involved is a modification of the general rule that the employer is not liable to one servant or laborer for an injury resulting from the carelessness of or negligence of another servant or co-laborer. *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 521.

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superintendent that the servant, whose negligence is in question, must stop drinking, and that he had reprimanded him for the same, is a proper evidence of notice to the defendant.* *Chapman v. Erie R. Co.*, 55 N. Y. 579, rev'g judg't for pl'ff.

Lee v. R. Co., 87 Mich. 574.

The master's duty to his servant, so far as reasonable care would accomplish it, was to employ only competent men in the management of its road. A competent man is a reliable man; one who may be relied upon to execute the rules of the master, unless prevented by causes beyond his own control. Hence, incompetency exists not alone in physical or mental attributes, but in the disposition with which a servant performs his duty. If he habitually neglects these duties, he becomes unreliable, and although he may be physically and mentally able to do well all that is required of him, his disposition toward his work and toward the general safety of the work of his employer and to his fellow servants, may determine his competency.

A switchman, whose duty it was to close the switches connecting with the passenger tracks, absented himself from his post and neglected his duty, as he was accustomed to do, to the knowledge of the company, whereby his co-employé on the passenger train was injured. The defendant was liable. *Coppins v. N. Y. C. & H. R. R. Co.*, 122 N. Y. 557, aff'g 48 Hun, 292, and judg't for pl'ff.

When special and dangerous service for safe performance requires servants fitted by habits of carefulness and obedience, the master is liable for employing a servant known to be otherwise, yet knowledge of disobedience must be brought home to him or to one who acts for him. *Sizes v. Syracuse & B. & N. Y. R. Co.*, 7 Lansing, 67, aff'g judg't of nonsuit.

* NOTE—"SEC. 420 INTOXICATION OR OTHER MISCONDUCT OF RAILROAD OR STEAMBOAT EMPLOYÉES.—(1) Any person who, being employed upon any railway as engineer, conductor, baggagemaster, brakeman, switchtender, fireman, bridge-tender, flagman, signal man, or having charge of stations, starting, regulating or running trains upon a railroad, or, being employed as captain, engineer or other officer of a vessel propelled by steam, is intoxicated while engaged in the discharge of any such duties, or,

(2) An engineer, conductor, brakeman, switchtender, or other officer, agent or employé of any railroad corporation, who willfully violates or omits his duty as such officer, agent or employé, by which human life or safety is endangered, the punishment of which is not otherwise prescribed, is guilty of misdemeanor." New York Penal Code, as amended by chap. 692, L. 1892.

"SEC. 39. EMPLOYMENT OF PERSONS ADDICTED TO INTOXICATION BY COMMON CARRIERS.—Any person, association or corporation engaged in the business of conveying passengers and property for hire, who shall employ in the conduct of such business any person who habitually indulges in the intemperate use of intoxicating drinks, after notice that such person has been intoxicated while in the active service of such person, association or corporation, as an engineer, fireman, conductor, switchtender, commander, pilot, mate, foreman, or in other like capacity, so that by his neglect of duty the safety and security of the life, person or property so conveyed might be imperilled, shall be guilty of a misdemeanor. Chap. 401, Laws of 1892, entitled "An act to revise and consolidate the laws regulating the sale of intoxicating liquors."

WHEN DUTY IS DISCHARGED.

Such duty due from the master cannot be delegated by him. *Matthews v. Bull*, (Cal.) 47 Pac. Rep. 773.

Master was liable where he employed or neglected to discharge one whom he knew or reasonably ought to have known, was incompetent. *Chicago &c. R. Co. v. Myers*, 83 Ill. App. 469.

Penn. R. Co. v. Wachter, 60 Md. 395.

Yeomans v. Contra Costa &c. Nav. Co. 44 Cal. 71; *Kansas Pac. R. Co. v. Salmon*, 11 Kas. 83; *Bogard v. Louisville &c. R. Co.*, 100 Ind. 491; *Harper v. Indianapolis &c. R. Co.*, 47 Mo. 567; *New Orleans R. Co. v. Hughes*, 49 Miss. 258; *Voss v. Delaware &c. R. Co.*, 62 N. J. L. 59; *Murphy v. Hughes*, 1 Penn. (Del.) 250; *Ledwidge v. Hathaway*, 170 Mass. 348; *Hintsinger v. Trexler*, 181 Pa. St. 497; *Webster Man. Co. v. Schmidt*, 77 Ill. App. 49; *Cherokee &c. Co. v. Britton*, 3 Kan. App. 292; *San Antonio &c. R. Co. v. Taylor*, (Tex. Civ. App.) 35 S. W. Rep. 855; *Gier v. Los Angeles Consol. Electric R. Co.*, 108 Cal. 129; *Smith v. E. W. Backus Lumber Co.*, 64 Minn. 447; *Chandler v. Atlantic Coast Electric R. Co.*, 61 N. J. L. 380; *Baltimore &c. R. Co. v. Henthorne*, 73 Fed. Rep. 634; *Maitland v. Gilbert Paper Co.*, 97 Wis. 476.

Master is liable for lack of reasonable care in not discovering incompetency at time of employment or thereafter. *Blake v. Maine &c. R. Co.*, 70 Me. 63.

Master may assume one is competent till the opposite appears. Frequent negligence in the use of a machine is not notice thereof, where such use leaves no trace upon the machine. *Walkowski v. Penokee &c. Mines*, 115 Mich. 629.

Foreman must be as competent as tools are safe; *i. e.* reasonably so. *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464.

2. WHEN DUTY IS DISCHARGED.

Defendant employed a competent* and skillful agent, whose duty it was to employ men for a particular department of its service. The agent hired one W. as foreman, who was competent at the time of employment, but subsequently acquired habits of intoxication which rendered him at times incompetent. This was known both to plaintiff and the agent. Evidence was given, however, tending to show that the agent, upon complaint of plaintiff, stated to the latter that if W. did not do better he would have to discharge him. W., while intoxicated, directed two incompetent and unskillful men to erect a scaffold, upon which plaintiff was directed to work. Defendant had furnished sufficient good and proper materials wherewith to build the scaffold, but, from the unskillfulness and incompetency of the men employed in the construction, it was so defectively built that it fell while plaintiff was upon it, and he was injured. The defect was mainly in using improper and insufficient

* NOTE.—When words "competent," and "efficient" are equivalent see *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108.

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materials. The defendant was chargeable with the negligence of its agent in retaining W. in its employ after he had knowledge of his incompetency. It was a question of fact for the jury whether under the circumstances the fact of plaintiff's remaining in defendant's employ with knowledge of the incompetency of W., was contributory negligence upon his part.

It was competent to prove, by the declaration of the agent to plaintiff, knowledge upon the part of the former of the incompetency of W. *Lansing v. New York Central Railroad Co.*, 49 N. Y. 521, aff'g judg't for pl'ff.

Brickner v. N. Y. C. R. Co., 49 N. Y. 672; aff'g 2 *Lansing* 521.

"T.," a fireman of the defendant, was killed by the derailment of his engine, and it was claimed that the man at the switch, in the absence of the regular switchman, was incompetent. Such man, employed about the round house, had done such work before and there was no evidence of incompetency or lack of care of the switchman. *Tinney v. Boston & A. R. Co.*, 52 N. Y. 632, aff'g judg't of nonsuit.

The fact that a brakeman had been hired and did not appear, does not excuse the company from liability for the injury to an employé caused by the absence of the brakeman. The company, in making up and dispatching trains, must supply it with sufficient machinery and employés for the journey. The duty of an agent was to make up and dispatch trains, and hire a station brakeman. He sent out a train with two brakemen, when there should have been three, hence a collision occurred. Defendant was liable. *Flike v. Boston & Albany R. Co.*, 53 N. Y. 549, aff'g judg't for pl'ff.

See *Sprong v. Boston & Albany R. Co.*, 58 N. Y. 56. Same Principle, *Mad. River R. Co. v. Barber*, 5 Ohio St. 541.

If a master retain a servant after notice of his incompetency, he is liable to a co-servant for injury arising therefrom. Evidence of former acts may show incompetency, (123 Ind. 210), but a single unintentional improper act, properly investigated and decided in good faith by the master, will not prove incompetency. *Baulec v. N. Y. & H. R. Co.*, 59 N. Y. 356; aff'g 5 *Lansing*, 436, and judg't of nonsuit.

A single act of negligence will not disqualify servant. *Evansville R. Co. v. Guyton*, 115 Ind. 450; *Baltimore &c. Co. v. Neal*, 65 Md. 438.

Cars being drawn from a switch broke and some ran back and hit a car which a co-employé was repairing and killed him. No claim for insufficiency or incompetency of servants was shown and there was no liability. Perhaps the rule is different as to regular trains.

It did not appear, and was not claimed, that a sufficient number of

men were not employed or that they were not competent. The work of moving cars in the yard was of such a nature that it could not be arranged with exactness and governed by rules, as in the running of regular trains. *Besel v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 171, rev'g 9 Hun, 457, and judg't for pl'ff. See *Keenan v. R. Co.*, 145 N. Y. 190.

See *Muirhead v. Hannibal &c. R. Co.*, 103 Mo. 251.

It is the duty of the defendant to send out with its train sufficient brakemen to man it, and, if an employé be injured on account of the failure of the defendant or one of its employés to make such provision, the defendant would be liable. *Booth v. Boston & A. R. Co.*, 73 N. Y. 38, aff'g judg't for pl'ff; s. c., 67 N. Y. 593.

While the plaintiff was getting on a work train the cars started and went down a grade and he was hurt. Two of the five brakes were set; the brakes, although not the best, were such as were commonly used on dirt cars, and had been inspected and put in order a short time before. The cars were suitable, and two brakemen were in charge. The inference was that not enough brakes were set through the negligence of a co-employé, also that it was not negligence to provide no conductor separate from the engineer. *Henry v. Staten I. R. Co.*, 81 N. Y. 373, rev'g judg't for pl'ff.

A fireman on the defendant's road was killed by a misplaced switch, caused by the negligence of the switchman, who had been a baggageman for seven years and a switchman for more than three years. It was claimed that the switchman was incompetent and had too many duties. The injury was caused by the negligence of a co-employé and the defendant was not liable. *Harvey v. N. Y. C. & H. R. R. Co.*, 88 N. Y. 481, rev'g 19 Hun, 556, and judg't for pl'ff.

In flagging trains, the rule required the use of torpedoes, and a brakeman had not been informed of it. He had made but two trips as a brakeman and flagged one train on the night before, and had done that incorrectly. The question of the defendant's negligence in employing him was for the jury, in an action for the death of a co-employé. *Mann v. President of D. & H. Canal Co.*, 91 N. Y. 495, aff'g judg't for pl'ff.

Johnson, the operator at Petersburg Junction, received orders to hold train No. 1 going east, and he immediately put out a red flag. The flag was maintained until Johnson received orders for train No. 2 going west to meet train No. 1 at Hoosac Falls, a point west of Petersburg Junction, which order was duly delivered to train No. 2. Johnson had never before had orders to hold train No. 1 for No. 6, and after the order respecting train No. 2, he took in the flag. Train No. 1 passed Petersburg Junction and collided with train No. 6, respecting which it had been ordered to be held.

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The operator was seventeen years of age, conversant with defendant's rules, intelligent, and had had more than a year's experience as an operator, and had been for three months in his place, successfully discharging his duties.

Held, that there was not sufficient evidence of his incompetency, nor that the accident necessarily resulted therefrom; and also the running of train No. 1 beyond the speed allowed by the rules of the company may have contributed to the death of the engineer of train No. 1. No recovery was allowed therefor. *Sutherland v. Troy & B. B. R. Co.*, 125 N. Y. 737, rev'g judg't for pl'ff. See report of first trial, 46 Hun, 372.

Defendant's foreman ordered men to dig out ground under a pier, in such a negligent manner, that it fell in and injured a man, stooping at his work in front of it, and who did not see it. The dangerous manner in which the work was done was evidence of foreman's incapacity. Defendant liable. *Eagan v. Tucker*, 18 Hun, 347, rev'g nonsuit.

Hofnagle v. N. Y. C. & H. R. R. R. Co., 5 N. Y. 608; *Corcoran v. Holbrook*, 59 id. 517; *Morrison v. N. Y. C. & H. R. R. R. Co.*, 63 id. 643.

Plaintiff claimed that car repairer was injured by engine running into a car on which he was working. Engine claimed to have been defective and engineer incompetent. Evidence of intoxication on the day before the accident while on duty, was excluded as not pleaded. Error. *Lyons v. N. Y. C. & H. R. Co.*, 39 Hun, 385, aff'g order granting defendant new trial after verdict.

*Plaintiff, engineer, not seeing anything ahead, was oiling his engine, an act required while the train was moving, and so ran into another engine that usually stayed on the switch to let engine No. 1 pass; engine No. 2 was without a headlight, and in charge of a fireman with little or no experience as an engineer, but with five or six months experience as fireman. Negligence and contributory negligence for jury. *Newell v. Ryan*, 40 Hun, 286, rev'g judg't of nonsuit.

The defendant's employé was shoveling snow at a crossing at an early hour of a stormy, windy, blustery morning, and while so engaged was killed by an engine backed upon him by an engineer; there was no light on the tender and no signal was given. It was shown that this engineer had, during the preceding summer, crossed the said street without warnings, and this was known to the dispatcher and superintendent, and this omission was so frequent, that it should have been known to defendant's

* Chap. 692, Laws of 1892, "An act to amend the Penal Code," provides as follows:

Sec. 418. PERSONS UNABLE TO READ NOT TO ACT OR BE EMPLOYED AS ENGINEERS. Any person unable to read the time-table of a railroad and ordinary handwriting, who acts as engineer or runs a locomotive or train on any railroad in this state; or any person who in his own behalf, or in behalf of any other person or corporation, knowingly employs a person so unable to read, to act as engineer or to run any such locomotive, is guilty of a misdemeanor.

officers. The question of the deceased's contributory negligence and of the omission of the defendant to discharge its duty in employing a proper engineer, was correctly submitted to the jury. *Wall v. D., L. & W. R. Co.*, 54 Hun, 454, aff'g judg't for pl'ff, aff'd 125 N. Y. 549.

The captain in charge of a dredging machine, being drunk at the time, so negligently swung a hatchet as to strike a shaft which the plaintiff was turning, and thereby injured the latter. Both were servants of the defendant. The plaintiff had seen the captain drunk three days out of eight of the former's employment, and did not report it to the defendant. The defendant's superintendent was every day at the place of working of the dredge, and this was the only evidence of notice or knowledge on the part of the defendant. The question of the captain's competency and the plaintiff's negligence was for the jury. *Tonneson v. Ross*, 58 Hun, 415, rev'g nonsuit. See dissenting opinion, Pratt, J.

A boy of seventeen, familiar with tracks and switches, was at a single track with sidings and highway crossing, required to report trains, receive and carry out telegraphic instructions, flag the crossing and operate a safety switch, which duties were known to him and easily performed. Upon the approach of a train he was seized with the thought that the switch was set wrong, and impulsively so turned it as to send the train upon the siding, where a collision occurred, injuring an employé. There was no evidence of incompetency on the part of the switchman. *Burke v. Syracuse, Binghamton & N. Y. R. Co.*, 69 Hun, 21, aff'g nonsuit.

A servant employed by defendant as a glass cutter, knowing the weight of glass, which he had handled in boxes, which he had occasionally assisted in moving to and from a factory, was, while supporting three or four boxes which were resting on the edge of one end, overpowered by their weight and injured. There were other employés at work on sidewalk, and still others at the call of the foreman, but plaintiff asked no assistance but undertook with another employé to do the work in the manner stated. *Alberts v. Bache*, 69 Hun, 255, aff'g judg't for nominal damages on plaintiff's appeal.

The competency or incompetency of a servant is determined not alone by physical or mental attributes, but also by the disposition with which he performs his duties. If he habitually neglects those duties he becomes unreliable, and although he may be physically and mentally able to do well all that is required of him, his disposition towards his work and his fellow-servants makes him an incompetent man.

Employer should not only hire competent servants, but also see to it that they remain competent, and for that purpose he must maintain a vigilant watch and superintendence over them.

Master is not liable for the first lapse of duty by reason of their care-

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lessness or negligence, but when such failure of duty becomes habitual or of frequent occurrence, he is chargeable, if he has notice of such conduct on the part of his employés, or if, by a reasonable supervision of those employed in his service, he could have acquired notice or knowledge.

In an action brought by an employé against a corporation for injuries alleged to have resulted from its negligence, it is a proper question of fact to be submitted to the jury whether the accustomed violation of the rules of the corporation, and the habitual neglect of duty on the part of one of its employés had been so frequent and long continued as to satisfy the jury that a careful supervision would have brought the matter to the knowledge of the corporation.

Proof of knowledge by co-employés of such neglect of duty by a fellow-servant, while not evidence of notice to the master, is competent upon the question as to the master's diligence in supervising his employés. *Cameron v. The New York Central & Hudson River R. Co.*, 77 Hun, 519; rev'd 145 N. Y. 400, on question of constructive notice.

The fact that the engineer on a locomotive was near-sighted, and that he had been twice intoxicated prior to a certain accident, does not make his employer liable for injuries sustained by a co-employé, resulting from negligence on the part of the engineer, where neither his near-sightedness nor drinking habits in any way contributed to the accident whereby the injuries in question were sustained, in the absence of proof that the drinking habits of such engineer had rendered him either mentally or physically incompetent to discharge his duties when sober. *Englehardt v. The Delaware, Lackawanna & Western Railroad Co.*, 78 Hun, 588.

O'Connell v. Thompson-Starrett Co., 76 N. Y. Supp. 296; *Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228; *Bonnet v. Galveston & C. R. Co.*, 89 Tex. 72.

Conductor was not incompetent because the route was new where he was familiar with the rules governing the dangers arising. *Cooper v. New York & C. R. Co.*, 25 App. Div. 383.

Master is negligent if the acts complained of are of such frequency as to charge it with notice. *Wood v. New York & C. R. Co.*, 32 App. Div. 606; *Malay v. Mt. Morris & C. Co.*, 41 App. Div. 574.

Bad reputation is not proof that a servant is actually careless or reckless. *Gier v. Los Angeles & C. R. Co.*, 108 Cal. 129.

Failure to question the employé himself was not negligence where the former employer was inquired of. *Gier v. Los Angeles & C. R. Co.*, 108 Cal. 129.

Where an employé's reputation for intemperance was such that it is reasonable to infer that the officers of the defendant company had notice

of it, his negligence is chargeable to the company. *C. & A. R. Co. v. Sullivan*, 63 Ill. 293.

See *Monahan v. Worcester*, 150 Mass. 439; *Chicago &c. R. Co. v. Doyle*, 18 Kas. 58; *Frazier v. Penn. R. Co.*, 38 Pa. St. 104; *Davis v. Detroit &c. R. Co.*, 20 Mich. 105; *Gilman v. E. R. Co.*, 10 Allen 233; *Haskin v. N. Y. C. R. Co.*, 65 Barb. 135; *Stasch v. Cornwall Ore Bk. Co.*, 19 Pa. Super. Ct. 113; Master is chargeable by general reputation, but a fellow servant is not. *Texas & P. R. Co. v. Johnson*, 89 Tex. 519.

Certificate of competency of state board of mine examiners is not conclusive. *Consolidated Coal Co. v. Seinger*, 179 Ill. 370; aff'g s. c., 79 Ill. App. 456.

Hearing not so defective as to prevent inspectors detecting the presence of broken stay bolts held not to make him incompetent. *Chicago &c. R. Co. v. DuBois*, 65 Ill. App. 142.

Master is not liable for his servant's incompetency when he used due care in his selection. *Dysart v. Kansas City &c. R. Co.*, 145 Mo. 83.

Cummings v. Chicago &c. R. Co., 89 Ill. App. 199; s. c., 60 N. E. Rep. 51; *Lewis v. Emery*, 108 Mich. 641.

A master is liable for the negligence of a co-servant employed to help the decedent in "off bearing" lumber, who, being ignorant concerning him, employs him without inquiry. *Indiana Man. Co. v. Millican*, 87 Ind. 87.

Postal Tel. Cable Co. v. Coote, (Tex. Civ. App.) 57 S. W. Rep. 912; *Bell v. Globe Lumber Co.*, 107 La. 725 But, see, *Nutzmann v. Germania Life Ins. Co.*, 78 Minn. 504, where the question was left to the jury.

The jury is not authorized to decide that a person is unfit to be employed as a brakeman on a railroad on account of what they saw or supposed they saw or could read in his face or manner while testifying before them as a witness, and determine from that alone that the company was negligent in employing him. *Corson v. Maine Cent. R. Co.*, 76 Me. 244.

Brakeman was injured by defective ladder on freight car; defendant's inspector, when cars were received, testified that he heard of the accident on the day it occurred; that he had no recollection of having inspected the train or having seen the ladder; and that he did not remember having inspected any particular train before it started. Court could not say as a matter of law that the appearance and conduct of the inspector as a witness, in connection with the other testimony, would not warrant the jury in finding the inspector incompetent. *Keith v. New Haven R. Co.*, 140 Mass. 175.

But it will not be presumed that the appearance and conduct of the party before the jury furnished evidence that the defendant knew or

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ought to have known that he was incompetent. *Peaslee v. Fitchburg R. Co.*, 152 Mass. 155.

Negligence of yard master in a particular instance cannot be shown by proof of incompetency on other occasions; but knowledge by master of such incompetency, or inference of knowledge from their frequency, can be shown to charge him. *Mich. Cent. R. Co. v. Gilbert*, 46 Mich. 176.

See *Huffman v. Chicago &c. R. Co.*, 78 Mo. 50.

Failure of superiors of a locomotive engineer to notice that he is in the habitual use of intoxicating liquors, is negligence. *Hilts v. Chicago &c. R. Co.*, 55 Mich. 437.

Master held to have exercised due care in employing one who was but seventeen years of age to manage a brake which lowered the cage of a mine, where the machinery was simple; and where not only his father had been consulted, but he was instructed and watched in the performance of the work and had performed it successfully for several months. *Wal-kowski v. Penokee &c. Mines*, 115 Mich. 629.

A company who employs a foreman to direct the building of a depot, who is not a practical carpenter and is unfit to superintend the same, is liable for his negligence in not furnishing a substantial staging. *Bun-nell v. St. Paul &c. R. Co.*, 29 Minn. 305.

Retaining in employment a gripman whose recommendations as to competency had been withdrawn, held to present a question as to negligence, for the jury. *Morrow v. St. Paul City R. Co.*, 71 Minn. 326.

Company is liable for negligence of fireman in suddenly starting train and throwing plaintiff, the conductor, upon the track, on proof of negligence in employing the fireman. *Harper v. Indianapolis &c. R. Co.*, 47 Mo. 567.

See *Harper v. Indianapolis &c. R. Co.*, 44 Mo. 489.

Knowledge that one takes an occasional drink is not notice of incompetence. *Culbertson v. Metropolitan Street R. Co.*, 140 Mo. 35.

Incompetence of a roundhouse wiper or fire puller to run an engine did not permit recovery, where he was not authorized to do so, and had never done so before. *Smith v. St. Louis &c. R. Co.*, 151 Mo. 391.

Railroad company held negligent in not having a conductor on a freight train, carrying a passenger coach, instead of compelling the brakeman to risk his life in taking the fares collected to the engineer. *Means v. Carolina Cent. R. Co.*, 126 N. C. 424.

The bare statement by a fellow servant, without proof, that one was incompetent, was not sufficient notice of the fact. *Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228.

Where an employé's acts show care, master is not negligent because he

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turns out to be incompetent. *Bruce v. Penn. Bridge Co.*, 197 Pa. St. 439.

A servant's incompetency was not established, where, during a service of twelve years, mostly in the capacity of engineer, he had given satisfaction, though on one occasion, in another kind of hoist he had failed to reverse the lever. *McKeever v. Homestake Min. Co.*, 10 S. D. 599.

Hiring a boy under twelve years of age, contrary to statute, held negligence *per se*. *Queen v. Dayton Coal & I. Co.*, 95 Tenn. 458.

Knowledge by a conductor of an engineer's incompetency is notice to the company, being the latter's superior. *Railroad Co. v. Wright*, 100 Tenn. 56.

Inexperience merely, is not sufficient evidence of incompetency. *National Fertilizer Co. v. Travis*, 102 Tenn. 16.

Master is not liable merely because of incompetence, where a competent servant would not have done differently. *Galveston &c. R. Co. v. Parrish*, (Tex. Civ. App.) 40 S. W. Rep. 191.

Knowledge of one authorized to temporarily suspend another is chargeable to the company. *Baltimore &c. R. Co. v. Henthorne*, 73 Fed. Rep. 634.

Ship-owner was liable where he failed to use reasonable care to ascertain whether or not his winchman was competent to do the work. *The Anaces*, 93 Fed. Rep. 240; *rev'g s. c.*, 87 id. 565.

In determining competency of a boy of fourteen to act as a doorkeeper in a mine, the jury may consider his age, size, experience, strength, intelligence and the fact that he was kept at his post for thirteen hours a day. *Carlson v. Wilkeson Coal &c. Co.*, 19 Wash. 473.

The question of negligence in failing to provide sufficient men to operate a pile driver was for the jury, upon conflicting evidence as to the number of men engaged. *Gustafson v. Seattle Traction Co.*, (Wash.) 68 Pac. Rep. 721.

Incompetency may be the result of lack of practice as well as inexperience. *Curran v. Stange Co.*, 98 Wis. 598.

(d). RULES AND REGULATIONS.

1. DUTY TO PROVIDE AND ENFORCE RULES TO FACILITATE COMPLEX AND DANGEROUS OPERATIONS.

An operator received by telegraph an order to hold regular train No. 50 for orders; he merely told conductor to hold No. 50 for No. 61; after No. 61 had passed, No. 50 proceeded and collided with No. 337, for which, in fact, it had been held. The order should have been delivered to the conductor and engineer of the train No. 50,

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and there should have been a rule requiring it, as there was not. For jury. *Sheehan v. N. Y. C. & H. R. R. Co.*, 91 N. Y. 332, rev'g order granting new trial on verdict for pl'ff.

Distinguishing *Slater v. Jewett*, 85 N. Y. 61. Same state of facts as last case, *Dana v. N. Y. C. & Co.*, 92 N. Y. 639; rev'g 23 Hun, 473, and judgment of nonsuit.

It is the duty of the master to provide proper and reasonably safe machinery, skillful and careful employes, and rules which, if observed, will give reasonable protection to employes.

"A.," plaintiff's testator, a car repairer in defendant's employ, was under one of its cars, standing on a side track, engaged in making repairs. Another car was carelessly backed against it by other employes, causing his death. In an action to recover damages, it appeared that other railroad companies had adopted a rule, providing for the placing of a blue flag by day, and blue light by night, upon a car under which repairmen were at work, and prohibiting the coupling or moving of a car thus protected until the signal was removed by the repairmen. No similar rule, or rule applicable to such a case, had been adopted by the defendant. Held, that the question of negligence on defendant's part was one of fact for the jury, and that a nonsuit was error.

It was no defense that there was a custom, which had been disregarded, requiring a flag to be displayed on a car undergoing repairs on a side track, so as to protect the workmen. *Abel v. Prest. & Co. D. & H. Canal Co.*, 103 N. Y. 581, rev'g judg't for def't.

See 128 N. Y. 662.

It is the duty of a carrier to make proper and sufficient rules with respect to the loading of cars with lumber. Where there was no such rule and an employe was killed at his post by timbers falling from a passing open car improperly loaded, the defendant was held liable. *Ford v. L. S. & M. S. R. Co.*, 124 N. Y. 493, aff'g judg't for pl'ff.

Distinguishing 117 N. Y. 638; 27 N. Y. S. R. 246.

The failure of a master to adopt rules, as to the precautions to be used by his employes, does not render him liable for the negligence of servants, unless, from the nature of the business, the master, in the exercise of reasonable care, should have foreseen the necessity of such precautions. The plaintiff got down under a car to clear away the ore, which prevented its progress, and told the men in charge of the car in the rear, not to let it down the incline while he was in that position. They did let it down, however, and by the collision the car that he was under was started, and he was hurt. The employes had been instructed to clear away the ore with rakes, and in getting under the car the plaintiff

took the risk upon himself, and the negligence whereby the front car started was that of his co-employés. It did not appear that the master was negligent in not making a rule. *Morgan v. H. R. Ore. & Iron Co.*, 133 N. Y. 666, rev'g judg't for pl'ff.

From opinion.—"The recovery was based entirely on the absence of rules. It was not suggested at the trial, nor is it on this appeal, what particular rule the defendant could have adopted that would have been likely to prevent the accident. No evidence was given that any rule is in use in business of a similar character by other corporations of the same class carrying on like operations, nor was there any evidence by experts or other witnesses to show that any rule was necessary or practicable in such cases. It was left to the jury to say whether or not it was a case for rules, and if so, what particular rule should have been adopted. We know nothing with respect to the views entertained by the jury on these questions, except so far as they are indicated by their verdict for the plaintiff. It is not probable that they concluded that any definite rule should have been promulgated, but were content to hold that as the plaintiff was injured the defendant ought, in some way, to have prevented it, or in case it did not, respond to him in damages. Almost every conceivable injury that a servant receives in the course of his employment may, in this way, be submitted to a jury, and with the same result. The plaintiff was one of several workmen engaged in loading cars with ore, and moving them on a track a few hundred feet in length. They were not moved by engines, but by the strength of the men themselves and sometimes by the use of a horse. There was nothing in the nature of the business that made it necessary for the defendant to make and publish rules. * * * The cases in which the master, by omitting to provide proper rules, subjects himself to the imputation of negligence are thus stated in a work of authority: 'If a master, engaged in a complex business, that requires definite regulations for the safety and protection of his employés, a failure to adopt proper rules, as well as laxity in their enforcement, is negligence *per se*, and the establishment of defective or improper rules is such negligence as renders the master responsible for all injuries resulting therefrom.' Wood's Law of Master and Servant 794, sec. 403.

Within the principle here stated and upon the authority of several recent cases, the court was not warranted in submitting the case to the jury. *Berrigan v. N. Y., L. E. & W. R. Co.*, 131 N. Y. 582; *Corcoran v. D., L. & W. R. Co.*, 126 id. 673; *Larow v. N. Y., L. E. & W. R. Co.*, 61 Hun, 11."

Cars were kicked along tracks leading to repair shops. A rule should have been enforced prohibiting it, so as to protect employés occupied on cars on the track in the shops. *Doing v. New York &c. R. Co.*, 151 N. Y. 579; rev'g s. c., 73 Hun, 270.

A brakeman coupling cars on a switch was killed by an engine sending back its car against those upon which he was. There were no rules applicable to the case, and the court left it to the jury to determine whether it was reasonable to require the defendant to issue a rule forbidding entrance on a switch when another engine and train, or engine and cars, are upon it without signals of notice to the employés. There was no evidence that such rule existed anywhere, nor what would be the

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practical effect of it. The question in such a case is not whether a rule should be provided, but whether in view of its existence or non-existence the train was moved with prudence or negligence. *Larow v. N. Y., L. E. & W. R. Co.*, 61 Hun, 11, rev'g judg't for pl'ff.

Houghkirk v. President &c. D. & H. C. Co., 92 N. Y. 220; *McGrath v. N. Y. C. & H. R. R. Co.*, 63 id. 528; *Grippen v. N. Y. Cent. R. Co.*, 40 id. 41.

A brakeman was injured by an erroneous signal given by his fellow brakeman. The company was not negligent in not having made a rule confining the giving of such signals to some one person connected with the train, and in the absence of such rule the employé takes the risk. *Cole v. R., W. & O. R. Co.*, 72 Hun, 467, aff'g nonsuit.

The charge of negligence on the part of a railroad corporation, in that it did not make and promulgate proper rules for the protection of its employés, is avoided by a proof of a rule and practice, actually in force, which render any other rule apparently unnecessary. *Kudik v. Lehigh Valley R. Co.*, 78 Hun, 492.

Master might have prevented injury from flying chips of iron, by requiring the men to adopt a certain precaution. A rule for its enforcement should have been made. *Smith v. Lidgerwood Man. Co.*, 56 App. Div. 528.

Where a business is so large and complicated as to prevent his personal supervision, the master must provide rules for its government. *Murphy v. Hughes*, 1 Penn. (Del.) 250.

Giordano v. Brandywine Granite Co., (Del.) 52 Atl. Rep. 332; *Consolidated Coal Co. v. Lundalk*, 196 Ill. 594; *Sanner v. Atchison &c. R. Co.*, 17 Tex. Civ. App. 337.

A fireman on locomotive, under orders of engineer, was, when the engine was proceeding backwards driving a train, injured by the collision of the engine with a cow. The court said: "Rules forbidding the operation of trains in this negligent manner should have been obeyed by defendant's employés, and the accident would have been avoided. The negligence of defendant then, in running the train, is traceable to its failure to provide necessary rules for conducting its business with proper safety to its employés." Hence, this charge was held to be proper. "It was the duty of the defendant to use ordinary care and prudence in making and publishing to its employés sufficient and necessary rules for the safe running of its trains, and for the government of its employés, and as a great degree of safety for them, taking into consideration their hazardous employment, as could be procured by ordinary care and prudence, and the more hazardous the employment the greater is the degree of care required by the law." *Cooper v. Central &c. R. Co.*, 44 Iowa, 134.

While foreman of car repairers and a hand were engaged in repairing

a car, and the latter was at work under the car by the order of the foreman, he was injured by the striking of the car by another on the same track. The hand was the subordinate of the foreman, and the latter should have used reasonable care to protect him; it was the duty of the company to make reasonable regulations and provisions to protect him from the dangers to which he was exposed from moving trains and cars. *Lake Shore &c. R. Co. v. Lavalley*, 36 Oh. St. 221.

Failure to provide such regulation as to prevent cars set on a side track running off the main track on an incline, getting back on the latter, was negligence. *Lake Shore &c. R. Co. v. Topliff*, 18 Oh. C. C. 709.

See, also, *Texas &c. R. Co. v. Cumpston*, 15 Tex. Civ. App. 493.

It is the duty of a company to frame and promulgate such rules and schedules for the moving of its trains as would afford reasonable safety to the operatives who were engaged in moving them. This is a direct, positive duty which the company owed to its employes, and for the failure to perform which it would be responsible to any person injured as a consequence thereof, whether such person be a passenger or an employe. * * * This is a personal, positive duty; and, while a corporation is compelled to act through its agents, yet the agents in performing duties of this character stand in the place of and represent the principal. *Lewis v. Siefert*, 116 Pa. St. 647.

Failure to make such rules, etc., as are proper for safety of employes, is negligent. *Crew v. St. Louis &c. R. Co.*, 20 Fed. Rep. 87.

So is a failure to provide a rule requiring danger flags to be exhibited, and prohibiting coupling operations while car repairers are engaged under the cars. *Pool v. Southern Pac. Co.*, 20 Utah, 210.

Not necessary to provide against risks incident to employment:

Presence of rules regulating the use of an elevator would not have helped one who walked into an elevator shaft, without looking to see if the elevator was standing as he left it. *Poindexter v. Benedict Paper Co.*, 84 Mo. App. 352.

The place for the cutting of wires to be taken down was held to be a detail of the work as to which the duty as to adoption of rules therefor did not apply. *Wagner v. Portland*, (Ore.) 67 Pac. Rep. 300.

So as to the method of drilling out the tamping from a hole loaded for a blast. *Johnson v. Portland Stone Co.*, (Ore.) 67 Pac. Rep. 1013; s. c., 68 id. 425.

The requirement for the adoption and enforcement of rules does not extend to the prevention of risks assumed, including the negligence of a fellow servant. *Voss v. Delaware &c. R. Co.*, 62 N. J. L. 59.

Fritz v. Salt Lake & O. Gas &c. Co., 18 Utah, 493.

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Nor to cases where the work is not complex. *Olsen v. North Pac. Lumber Co.*, 100 Fed. Rep. 384.

Or against unusual or extraordinary conditions:

The work of moving cars in a yard was of such a nature that it could not be arranged with exactness and governed by rules, as in the running of regular trains. Cars being drawn by engine broke, and some went back and struck a car which a fellow servant was repairing, and injured him. Master not liable. *Besel v. N. Y. C. R. Co.*, 70 N. Y. 171.

A railroad corporation need only use ordinary care to anticipate and guard against such accidents, and casualties, as may reasonably be foreseen by its managers, exercising such ordinary care; it cannot be assumed that it can, by rule, guard against and prevent every injury to them. The plaintiff's intestate, while coupling cars in the defendant's yard, received an injury from which he subsequently died. *Berrigan v. N. Y., L. E. & W. R. Co.*, 131 N. Y. 582; rev'g judg't for pl'ff.

Rules cannot be required to provide against unexpected and unaccountable accidents. *Whalen v. Michigan C. R. Co.*, 114 Mich. 512.

Or for the performance of every simple service conceivable, especially where the danger was obvious and the plaintiff could easily have guarded against it himself. *Norfolk &c. R. Co. v. Graham*, 96 Va. 430.

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An assistant of the master switched a car upon the track, where another disabled car stood, and it came in contact with the disabled car and injured the plaintiff, a car repairer, who was working thereunder. The rules of the defendant were that the car repairers must protect themselves by a red flag, and the engineer, upon perceiving it, must immediately stop his train. It also provided, by rule, that the employes should exercise the greatest care and watchfulness to prevent injury or damage to persons or property.

The plaintiff knew the regulations regarding the hanging out of a red flag and observed it.

It was held that the defendant had promulgated suitable rules and was not liable; also that the plaintiff's injuries were caused by the neglect of a co-servant. *Corcoran v. D., L. & W. R. Co.*, 126 N. Y. 673, rev'g judg't for pl'ff.

The rule that the employe takes the risk of the business is subject to qualification, that the master is bound to guard its employes against the negligence of co-employes, so far as it can by the enactment of reasonable rules. The repair man, in the defendant's employ, was killed while at

work under a car by the alleged negligence of the defendant to promulgate proper rules for the protection of car repairers, as requiring a danger flag to be kept out. The rules of other companies were received in evidence and the court properly charged that the jury should weigh the evidence in view of the rules adopted by the different companies, but not to find a rule proper or improper because some other company had or had not adopted it. *Abel v. Pres. &c. D. & H. C. Co.*, 128 N. Y. 662, aff'g judg't for pl'ff.

Where the rules properly applied cover the danger, they are sufficient. *Simpson v. Central V. R. Co.*, 5 App. Div. 614.

Defendant had a rule requiring patrolmen on the track in extra foggy weather, but failed to extend it to similar conditions in snowy weather. Not negligence. *Niles v. New York &c. R. Co.*, 14 App. Div. 58.

A rule giving the conductor full charge over a train yields to one binding the engineer to have the train in full control while approaching a "time table station." *Louisville &c. R. Co. v. Mothershed*, 110 Ala. 143.

Switch yard rules, providing the same signals for all engines were insufficient where there were at times two engines or more in vicinity of one another without the means of distinguishing their signals. *Louisville &c. R. Co. v. York*, 128 Ala. 305.

See, also, *Southern R. Co. v. Craig*, 113 Fed. Rep. 76; *Pearl v. Omaha &c. R. Co.*, (Iowa) 88 N. W. Rep. 1078.

Rules held deficient where the only provision for protecting car repairers on a side track, is one stating that "blue is a signal to be used" by them. *Chicago &c. R. Co. v. McGraw*, 22 Colo. 363.

The customary red light in the cupola of a caboose for signaling is properly used without rule therefor. *Denver &c. R. Co. v. Sipes*, (Colo.) 55 Pac. Rep. 1093.

A schedule which does not provide for the emergency of a train being behind time is insufficient. *Sprague v. New York &c. R. Co.*, 68 Conn. 345.

Rules provided for telegraphic information of the meeting places of special trains going in opposite directions but did not provide for such information being given to those going in the same direction. They were held sufficient as such information in the latter case experience had found tended to lessen rather than increase the safety of such trains. *Nolan v. New York &c. R. Co.*, 70 Conn. 159.

A rule is sufficient where it has been in force for some time and has accomplished its purpose. *Rex v. Pullman's Palace Car Co.*, 2 Marv. (Del.) 337.

Sufficiency of rules is for the jury. *Murphy v. Hughes*, 1 Penn. (Del.) 250.

SUFFICIENCY OF RULES.

The presumption is in favor of sufficiency. *Murphy v. Hughes*, 1 Penn. (Del.) 250.

A rule by which an employé forfeits the right to recover for an injury is to be strictly construed against the company. *Western A. R. Co. v. Bussey*, 95 Ga. 584.

Notices and statements designed to relieve employer from its duties and responsibilities to its employés, are not rules promulgated for their protection as required by statute. *Consolidated Coal Co. v. Lundak*, 196 Ill. 594; *Himrod Coal Co. v. Clark*, 197 Ill. 514.

Defendant fulfills its duty, by requiring that an extra train be side tracked at the last station to which it is safe to run, at least five minutes before a scheduled train arrives. *Evansville &c. R. Co. v. Tohill*, 143 Ind. 49; s. c., id. 60.

Provision for notifying regular trains of the position of wild trains held not necessary in view of a provision requiring the latter to be furnished with time tables and to keep out of the way of the former, and prohibiting their occupying the main track within ten minutes of the former. *Terre Haute &c. R. Co. v. Becker*, 146 Ind. 202.

See, also, *Nolan v. New York &c. R. Co.*, 70 Conn. 159.

Rule of the company made it a brakeman's duty to see that cars were safe. There was no right to assume they were safe. *Terre Haute &c. R. Co. v. Pruitt*, (Ind. App.) 57 N. E. Rep. 949.

See, also, *Louisville &c. Co. v. Hiltner*, (Ky.) 56 S. W. Rep. 654; s. c., 60 id. 204.

The law does not require a railroad company to direct the movement of its trains by orders from the train dispatcher alone, nor by a system of signals only; nor does it require the company to adopt any particular form of orders, or any particular system for communicating them; but the company has the right to direct the movements of its trains by train orders alone, or by train orders of any form and signals, or by signals alone, or by time card alone, provided that the means adopted are brought to the knowledge of its employés, and they are reasonably well calculated to secure the safety of the men, if obeyed by them.

A railroad company is not required to change its orders or signals for the movement of its trains, because some other railroad company has adopted a different system of orders or signals; and a railroad company may even have in use a system of orders or signal shown to be less safe than that adopted by another railroad company, without being liable to its employés for the consequences of the use of such orders or signals, if the orders and signals in use are reasonably well calculated to secure the safety of the employés of the company, if obeyed by them.

SUFFICIENCY OF THEIR PROMULGATION.

Whether a railroad company has been guilty of negligence in the use of certain orders and signals for the movement of its trains, cannot be determined by proof that another railroad company has adopted a different order for the operation of its trains. *Hannibal & St. Joseph R. Co. v. Kanaley*, 39 Kas. 2.

A rule requiring a red signal to be displayed at a station after the departure of a train for the length of time given in the time table, between it and the train which should follow, if not for more than ten minutes, but in all cases kept there for five minutes, etc., does not require it to be kept there the full ten minutes where that is the time of the arrival of the next train. *Foss v. Old Colony R. Co.*, 170 Mass. 168.

Engineer failing to comply with a rule requiring him to act on the assumption that one train would be met at a given place, was not allowed to complain of a failure to notify him of the presence of another there. *Whalen v. Michigan C. R. Co.*, 114 Mich. 512.

Such rules must be adopted as will cover such cases as may reasonably be apprehended. Not simply such as experience has shown. *Hill v. Lake Shore &c. R. Co.*, 22 Oh. C. C. 291.

On the other hand it has been held that the failure to provide for warning special or extra trains of the movements of others, was not unreasonable, where the rules had been the result of many years of successful experience. *Little Rock &c. R. Co. v. Barry*, 84 Fed. Rep. 944.

Requiring a track foreman to protect himself against all trains whatsoever without notice of their time, held unreasonable. *Willis v. Atlantic &c. R. Co.*, 122 N. C. 905.

Otherwise as to a requirement that a section foreman shall flag his truck and hand car against all trains, without giving notice of their times where by reason of fogs, curves, etc., a clear track cannot be seen for a safe distance. *Kansas &c. R. Co. v. Dye*, 70 Fed. Rep. 24.

3. SUFFICIENCY OF THEIR PROMULGATION.

The *framing and publishing* of proper rules for the conduct of the business of a railway company is not sufficient. It must also exercise *such supervision* over them and the prosecution of its business, as to *have reason to believe* that it is being conducted in pursuance of such rules. (*Wabash R. Co. v. McDaniels*, 107 U. S. 452; *Chapman v. Erie Ry. Co.*, 55 N. Y. 579; *Baulec v. N. Y. & H. R. R. Co.*, 59 id. 356.) The hiring of capable and competent servants is not sufficient, but a corporation must exercise such an oversight and supervision of them that, if a servant becomes habitually and notoriously unfit, from carelessness or bad habits, to perform his duties, it will discover and guard against it; otherwise

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it will be liable to another servant for injuries caused by the negligent act of the incompetent servant. If such incompetency is continued for such a length of time, that a careful and diligent supervision would have discovered it, the master is chargeable with notice of its existence. *Gilman v. Eastern R. Co.*, 10 Allen, 233; *Hilts v. Chicago &c. R. Co.*, 55 Mich. 437.

An engineer left his engine standing on the main track, while waiting for orders, in violation of the master's rules, and such engineer and other engineers had done so for at least one year. An incoming train ran into the same and the fireman thereof was killed. The complaint was improperly dismissed.

The incoming train, by orders, came in ahead of schedule time at the rate of seven to ten miles per hour. The engineer, on a dark and foggy night, gave the signal one-half mile distant from the yard, and rung his bell continuously and kept a sharp lookout; the stationary engine had no light and was not discovered until the incoming train was sixty or seventy feet away, when it was too late to stop. Held, that neither the engineer nor the fireman were negligent, although the company's rules limited the speed of the incoming train to four miles an hour, yet it was not clear that such want of care contributed to the accident, and the question was for the jury. *Whittaker v. President, of D. & H. C. Co.*, 126 N. Y. 544, aff'g judg't rev'g nonsuit.

Promulgation to an engineer only, who is a subordinate to the foreman, held insufficient. *Daley v. Brown*, 45 App. Div. 428.

When principal is held to have authorized or ratified rules of his superintendent. See *Rogers v. New York &c. Bridge*, 11 App. Div. 141.

A fireman becomes an "engineman" when he has temporary charge of the engine. *Louisville &c. R. Co. v. Morgan*, 114 Ala. 449.

Knowledge of the existence of rules, their purport, and the fact that they are enforced, implies assent to them upon entering into the service. *Diamond State Iron Co. v. Bell*, 2 Marv. (Del.) 303.

Measures to be adopted to give information concerning the location of a train, need not be made to conform to the convenience of employes. *Houston &c. R. Co. v. Stewart*, 92 Tex. 540.

Where there is a custom by which those handling cars are required to notify car repairers, the company need not reduce it to a written rule. *Campbell v. Texas &c. R. Co.*, 16 Tex. Civ. App. 665.

So the fact that there was no rule requiring lookouts on trains backing in the yards, did not prevent employes relying on the custom established by its officers requiring it. *Galveston &c. R. Co. v. Collins*, (Tex. Civ. App.) 57 S. W. Rep. 884.

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So, where the rule was orally promulgated and the servants had actual notice thereof, defendant was not liable for failing to reduce it to writing. *Grady v. Southern R. Co.*, 92 Fed. Rep. 491.

Whalen v. Michigan &c. R. Co., 114 Mich. 512.

To have a rule binding on an employé it must not only be brought to his notice, but must be one which has been actually enforced. *Wright v. Southern P. Co.*, 14 Utah, 383.

Chicago &c. R. Co. v. Oyster, 58 Neb. 1.

It is sufficiently promulgated if the party charged with the performance of a duty has knowledge. *Oliver v. Ohio River R. Co.*, 42 W. Va. 703.

4. EFFECT OF THEIR VIOLATION WITH KNOWLEDGE OF MASTER.

A rule which an employé has agreed in writing to observe is not abrogated unless its violation has been so frequent and long standing as to amount to an acquiescence in its abandonment. *Louisville &c. R. Co. v. Mothershed*, 110 Ala. 143.

Where the performance of the duty is inconsistent with the observance of a rule the latter is waived. *Brown v. Louisville &c. R. Co.*, 111 Ala. 275.

A railroad company is bound to enforce its rules as well as to adopt them. *Nolan v. New York &c. R. Co.*, 70 Conn. 159.

Riding on an engine in violation of duty, not excused by a custom to do. *Chattanooga &c. R. Co. v. Myers*, 112 Ga. 237.

Railroad company is liable for the failure of its trackmen to follow the rules it prescribes for removing rails. *Chicago &c. R. Co. v. Eaton*, 96 Ill. App. 570; s. c. aff'd, 62 N. E. Rep. 784.

A railroad company is negligent in permitting its order forbidding firemen to handle engines, to be violated by its engineers, and retaining them in their employ after notice of their practice of abandoning engines to firemen, which practice led to the injury through a careless and incompetent fireman. *Ohio &c. R. Co. v. Collarn*, 73 Ind. 261.

Railroad held negligent in not securing compliance with its rules requiring that an extra train running over the working limits of a work train, be notified of the presence of the latter. *Louisville &c. R. Co. v. Heck*, 151 Ind. 292.

Knowledge of a rule forbidding the uncoupling of cars while in motion, held no defense where the company had waived the performance thereof. *Fish v. Illinois C. R. Co.*, 96 Iowa, 702.

If in practice a rule is violated with the knowledge of the master, or of those who represent him, it will be regarded as abrogated or modified.

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Alexander v. R. Co., 83 Ky. 590; *North. Pac. R. Co. v. Nickels*, 4 U. S. App. 369; 50 Fed. Rep. 718.

Same principle, *Kansas &c. R. Co. v. Kier*, 41 Kas. 661; *Union Pac. R. Co. v. Springsteen*, 41 id. 724; *Barry v. Hannibal &c. R. Co.*, 98 Mo. 62; *Georgia P. R. Co. v. Davis*, 92 Ala. 300; *Fay v. R. Co.*, 30 Minn. 234; *Sprong v. R. Co.*, 58 N. Y. 56; *Hays v. Bush &c. Co.*, 41 Hun, 407; *Atkyn v. Wabash &c. R. Co.*, 41 Fed. Rep. 193; 4 U. S. App. 369; *Whittaker v. Delaware &c. Co.*, 126 N. Y. 544.

Where, at the time of his employment, a person promised in writing to use a stick then given to him to couple cars, but was told that it was a matter of form merely, and that the use of such sticks had been generally disregarded, he was not precluded from recovering. *Louisville &c. R. Co. v. Foley*, 15 Ky. L. R. 17.

Abandonment of a rule is not shown where its violation is infrequent and unknown. *Louisville &c. R. Co. v. Scanlon*, (Ky.) 60 S. W. Rep. 643.

Konold v. Rio Grande W. Ry. Co., 21 Utah, 379.

A custom to violate rules forbidding the uncoupling of cars while in motion held not to establish an abandonment, where it is not so universal and notorious as to evince a virtual acquiescence therein. *Fluhrer v. Lake Shore &c. R. Co.*, (Mich.) 80 N. W. Rep. 23.

Likewise in the case of making a link and pin coupling with the hand. *Nichols v. Chicago &c. R. Co.*, (Mich.) 84 N. W. Rep. 470.

The mere fact that a rule is violated by an employé at will, does not excuse the disobedience of a servant, where no acquiescence on the part of the employer is shown. *Francis v. Kansas City R. Co.*, 110 Mo. 387.

Sloan v. Georgia &c. R. Co., 86 Ga. 25.

Abrogation of a rule is established, however, where its violation has been so frequent and long standing to the defendant's knowledge as to warrant the conclusion defendant has acquiesced therein. *Cleveland &c. R. Co. v. Ullom*, 20 Oh. C. C. 512.

Wright v. Southern P. Co., 14 Utah, 383; *Konold v. Rio Grande W. Ry. Co.*, 21 Utah, 379.

So, abrogation may be presumed, where the violations are so frequent and notorious that defendant could not help knowing thereof by the exercise of ordinary care. *Texas &c. R. Co. v. Leighty*, (Tex. Civ. App.) 32 S. W. Rep. 799; s. c. aff'd, 88 Tex. 604.

So, railroad was chargeable with notice of such habitual violation, where such fact was within the knowledge of its superintendent. *Galveston &c. R. Co. v. Slinkard*, 17 Tex. Civ. App. 585.

Jury should decide whether defendant had, by permitting frequent

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violations, waived a rule for the guidance of employes. *Cleveland &c. R. Co. v. Baker*, 91 Fed. Rep. 224.

See, also, *Tullis v. Lake Erie &c. R. Co.*, 105 Fed. Rep. 554.

Plaintiff may show that a rule had been disregarded by both employer and employé. *Tullis v. Lake Erie &c. R. Co.*, 105 Fed. Rep. 554.

(e). WHEN APPLIANCES &C. ARE SUFFICIENT, MASTER NOT LIABLE FOR ACTS OF FELLOW SERVANTS.

The defendant's brakeman was killed in a collision caused by the conductor signing the engineer's name to orders and not delivering the orders to him. The system and rules were complete. Held that the operator, conductor and engineer were co-employes of the brakeman, and that the injury was due to their negligence and the defendant was not liable. *Slater v. Jewett*, 85 N. Y. 61, rev'g judg't for pl'ff.

Distinguishing *Fike v. B. & A. R. R. Co.*, 53 N. Y. 549; *Fuller v. Jewett*, 80 id. 46; *Crispin v. Babbitt*, 81 id. 516.

When the master has provided adequate and safe appliances usual in the business, the servant takes the risk of the work and his own and his fellow-servant's negligence.

The plaintiff, while engaged in putting freight on board of one of defendant's steamships at its dock in New York city, by means of a truck which he wheeled from dock to ship over a platform or "skid," was precipitated into the water by the fall of the skid and thereby was injured. It is usual to truck freight over such a platform and the plaintiff had been for some time engaged as a longshoreman in that kind of work and on that very dock. According to the evidence adduced on plaintiff's behalf, it is the duty of the longshoremen when engaged in trucking freight to attend to the fastenings of the "skid." It is only made fast by ropes at the ship's end, the shore end being left loose to allow of its movements with that of the ship. As the tide falls the ship fastenings must be lengthened to conform. The proofs showed the "skid" to be in good order, and the slipping of the shore end was caused by some omission of those engaged at work to attend to its fastenings; or the fall may have been caused by the swell of some moving vessel. *Hudson v. The Ocean S. S. Co. of Savannah*, 110 N. Y. 625, aff'g judg't for def't.

The defendant had provided a safe system for the loading of cars and inspection thereof. By the negligence of a co-employé a car was so defectively loaded with lumber that the brake would not work and a brakeman was injured thereby.

Defendant, having provided a safe car and a system of loading and

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competent men for its inspection, was not liable for injuries resulting to a co-employé, for their neglect of this duty.

Also, held, that the question was not affected by the fact that the car was loaded by the owner of the lumber. *Byrnes v. N. Y., L. E. & W. R. Co.*, 113 N. Y. 251, rev'g judg't for pl'ff.

This case was retried and nonsuit reversed upon the ground that the existence of a rule for inspection was not established. 71 Hun, 209.

The presumption is, that competent and sufficient servants were employed by the defendant, and that proper regulations for the management of its business had been established, and the burden of showing an omission of duty in these respects is upon the plaintiff. One of the defendant's employés was run over by a car started by other cars being shunted up against them. It was alleged as a ground of liability, that there was no brakeman upon the two cars. It was held that a nonsuit should have been granted and that, assuming that there was no brakeman upon the shunted cars, the negligence was that of a co-servant and not of the defendant. *Potter v. N. Y. C. & H. R. R. Co.*, 136 N. Y. 77, rev'g judg't for pl'ff.

Distinguishing *Flike v. B. & A. R. Co.*, 53 N. Y. 549; *Rose v. B. & A. R. Co.*, 58 id. 217.

Overruling *Murphy v. N. Y. C. & H. R. R. Co.*, 118 N. Y. 527.

Where the master furnished sufficient and proper belt fasteners it was the duty of the servant to use the same, and failure to do so was negligence of co-employé. *Harley v. Buffalo Car Co.*, 142 N. Y. 31.

Plaintiff, an experienced longshoreman, was employed by defendant in unloading a steamer. A skid extended from the steamer to the dock; this was placed in position by other longshoremen and tied to a "mouthpiece," so called, on the dock by lanyards, so as to permit the skid and mouthpiece to move back and forth with the movements of the vessel. Plaintiff went up the skid on to the deck with a truck, when the skid and mouthpiece were in apparent position, but on his return with the loaded truck, because insecurely tied together, they had separated five or six inches. The wheels of the truck dropped into the opening, throwing out the load upon plaintiff. Complaint was made of the improper fastening of the skid to the mouthpiece. The court erroneously refused to charge, that "if defendant furnished suitable appliances for securing the mouthpiece to the skid and the injury occurred because the mouthpiece was not properly secured the plaintiff cannot recover." If this work was improperly done it was the negligent act of plaintiff's co-employés; and the question was not affected by the fact that plaintiff was not present

when the skid and mouthpiece were rigged. *McCampbell v. The Cunard Steamship Co.*, 144 N. Y. 552.

Citing *Hogan v. Smith*, 125 N. Y. 774; *Hudson v. Ocean S. Co.*, 110 id. 625; *Cregan v. Marston*, 126 id. 568-571; *Filbert v. D. & H. C. Co.*, 121 id. 207; *Hussey v. Coger*, 112 id. 614. See, also, *Soderman v. Kemp*, 145 N. Y. 427.

If the derrick be a proper one, the master is not liable for neglect of servants to properly fasten guy ropes, whereby one of such servants is injured. *Marvin v. Muller*, 25 Hun, 163, rev'g judg't for pl'ff.

See *Holden v. Fitchburg R. Co.*, 129 Mass. 268.

A switch engine ran on the main track, whither it was going after getting orders, through negligence of engineer. It had no headlight on the end towards the west, but had one on the east end. A train from the west ran into it and the fireman of such train was killed. Plaintiff alleged that the accident was caused by the failure to carry rear light.

On the day preceding the accident the headlight of the locomotive, having been broken in a snow drift, was removed for the purpose of being repaired, and had not been restored. The court charged that if that were true, the plaintiff could recover, although the co-employés, by their negligence, contributed to the injury. Error. *Whittaker v. President of D. & H. C. Co.*, 49 Hun, 400, rev'g judg't for pl'ff.

The defendant was engaged in repairing a railroad, and employed for the control of the men at work a superintendent, a contractor, a general foreman and the plaintiff who had charge of a "gang" of men. A car, known to many of the men to be defective, was put in front of a train, upon which the men were to return from their work, whereby the train was thrown from the track and the plaintiff was injured. There was evidence tending to show the employment of competent men and that the car was not defective when originally furnished. The evidence was conflicting as to whether the workman had ever complained of the car as defective. The court held, as a matter of law, that the plaintiff was a fellow servant with the members of the "gang."

The defendant requested the court to charge that if the jury believed that the defendant had employed competent men or a competent superintendent, and that the latter employed competent men under him; that no complaint relative to the car had ever been made to the superintendent; that the latter would have repaired any defect had any complaint been made to him, and that the workmen used the car, knowing it to be out of repair, then the defendant, if he had no personal knowledge of the matter, was not liable to the plaintiff, which request was refused.

Held, that the refusal was error.

The use of the car under such circumstances would establish negligence on the part of the fellow servants for which the master would not

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be liable. *Reynolds v. Kneeland*, 63 Hun, 283, rev'g judg't for pl'ff.

Where, upon the trial of an action brought against a railroad company, the only evidence that the defendant failed to furnish sufficient and suitable lamps, was the testimony of the plaintiff as to the declaration of the defendant's brakeman to that effect, the burden of proving the contrary is not thereby cast upon the defendant, nor is the legal presumption that competent and sufficient servants were employed by the railroad corporation overcome.

Where a railroad corporation adopts adequate rules governing the conduct of its employes, if an employe is injured by the failure of his co-employe to observe such rules, the injury results from the negligence of his co-employe, for which the employer is not liable. *Drake v. N. Y. C. & H. R. R. Co.*, 80 Hun, 490.

Place was safe when the trap was in proper position, fitting tightly. Master was not held where a servant, after using it, had not properly secured it. *Bateman v. New York & C. R. Co.*, 67 App. Div. 241.

Safe tools being supplied, master is not accountable for their use between the servants. *Stewart v. International Paper Co.*, 96 Me. 30.

A master who used care in selecting his servants, is not liable to one who is cleaning machinery for the negligence of another in starting the same. *Curran v. Manufacturing Co.*, 130 Mass. 374.

See, however, *McDade v. Washington & C. R. Co.*, 5 Mack. (D. C.) 144.

Overloading a tender with coal was not the proximate cause of coal falling off it, where it was dislodged by a fellow servant. *Weisel v. Eastern R. Co.*, 79 Minn. 245.

Safe place refers only to construction and equipment of a place itself, and not the manner in which a fellow servant handles the business. *Wells Fargo & C. Co. v. Page*, (Tex. Civ. App.) 68 S. W. Rep. 528.

Master is not liable for acts of fellow servants, where he has provided competent ones. *Cochran v. Shanhan*, (W. Va.) 41 S. E. Rep. 140.

Okowski v. Pennsylvania & C. Coal Co., (Wis.) 90 N. W. Rep. 429.

When a company had provided a watchman to guard an employe from danger while at work under a car, it was not liable to him for injury resulting from their failure to warn him of an approaching train, which struck such car and injured him. *Leubke v. Chicago & C. R. Co.*, 63 Wis. 91.

From opinion.—"True, no written or published regulation of the company to that effect (requiring trainmen to watch) was shown; neither did any witness in the employ of the company testify that he had been charged by an officer of the company with the duty of watching for the safety of other employes working under cars upon the track; but many such witnesses testified that their duty in that behalf was well understood by them and other employes of the company. It was a sort of common law of the company, obligatory upon its employes, and

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as thoroughly understood by them as though it had been embodied in the printed regulations and read by the officers of the company to them. It thus became a rule or custom of the company as well as an understanding between its employes."

(f). PROXIMATE CAUSE.

An employé was engaged to unload coal cars standing on a trestle some eight feet high. A wagon driven shortly before along plank roadway by the side of the trestle struck a slanting brace and displaced the support on which the plank rested, along the side of which the car was run upon the tracks, and the plaintiff, in alighting from the car, got on the platform in the usual way, and as he stepped on the plank, the outer end of which had been supported by the displaced trestle, it tipped and he fell to the ground, breaking his leg. The judge apparently authorized the jury to find for the plaintiff, if they believed that the platform was improperly constructed and contributed in any degree to his injuries. The defendants were not liable, however, for the consequence resulting from the act whereby the platform was broken down, unless the same was the natural and proper result of the way and manner in which the platform was constructed, and ought to have been foreseen by the defendant, and the charge of the judge was therefore incorrect. *Selleck v. Langdon*, 55 Hun, 19, rev'g judg't for pl'ff.

That the escape of steam from a defective valve would cause one approaching an engine to uncouple it to get his hand caught between the buffers, was not a natural and probable consequence to be anticipated. *Hope v. Fall Brook Coal Co.*, 3 App. Div. 70.

Conley v. American Express Co., 87 Me. 352.

That a third party's act contributed as a proximate cause did not relieve the master. *Larkin v. Washington Mills Co.*, 45 App. Div. 6.

Failure to give warnings did not permit recovery, where injury was due to the negligence of a fellow servant. *O'Brien v. Buffalo Furnace Co.*, 68 App. Div. 451.

The direction by the foreman to do something beyond the scope of a servant's duties, held the proximate cause of injury and not an accident while engaged in its performance. *Daubert v. Western Meat Co.*, 135 Cal. 144.

Plaintiff was ordered to sweep behind a dangerously situated machine while it was in motion. Liability was not effected by the fact that it was started by a fellow servant while she was about it. *O'Connor v. Golden Gate &c. Co.*, 135 Cal. 537.

The defective construction of a bridge and not the derailment of the engine, was the proximate cause of accident, where except for the former

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the latter would not have caused injury. *Dolan v. Sierra R. Co.*, 135 Cal. 435; *Webster v. Monongahela River Consol. Coal &c. Co.*, 201 Pa. St. 278.

Negligent cutting of wire was the proximate cause of a shock, though the fact of its crossing other wires contributed. *Broughel v. Southern New England Tel. Co.*, 72 Conn. 617.

Injuries to servants from the master's negligence are chargeable to the master only when they are the legitimate sequence of his wrongful act; as where a servant is obliged to sleep for several nights on wet and frozen ground and with insufficient covering. *Clifford v. Denver &c. R. Co.*, 9 Colo. 333.

Master not liable, where no act of his contributed. *Creswell v. Wilmington &c. R. Co.*, (Del.) 43 Atl. Rep. 629.

Where it did not contribute to the injury defendant was not liable because its track was in fact defective. *Western &c. R. Co. v. Esslinger*, 95 Ga. 734.

Where insufficiency of assistants was the cause of injury, it was immaterial whether or not foreman was a fellow servant. *Supple v. Agnew*, 191 Ill. 439; rev'g s. c., 80 Ill. App. 437.

It is not necessary that defendant should foresee the particular injury. *Illinois C. R. Co. v. Creighton*, 63 Ill. App. 165.

Master is liable where his negligence was the efficient cause, though acting in connection with a cause for which he was not responsible. *Malott v. Hood*, 99 Ill. App. 360.

That defendant was negligent in piling coal around the edges of a tender did not permit recovery where the piece in question rolled from the center. *Atchison &c. R. Co. v. Croll*, 3 Kan. App. 242.

Weisel v. Eastern R. Co., 79 Minn. 245.

Though there would have been no cause for cleaning out a pipe, except for the defect causing it to clog, master was not necessarily liable where injury may have resulted from the negligent manner of doing the work. *Washington Man. &c. Co. v. Barnett*, (Ky.) 42 S. W. Rep. 1120.

Whether injury was proximately caused by tightening wire rope in a saw mill was a question for the jury. *Bouck v. Jackson Sawmill Co.*, (Ky.) 49 S. W. Rep. 472.

Master was negligent both as to appliances and place for work, but neither effected the injury. No recovery. *Henry v. Brackenridge Lumbar Co.*, 48 La. Ann. 950.

Master had failed to enforce a regulation for the removal of scrap iron, but no accumulation was shown at the time. No recovery. *Cunningham v. Bath Iron Works*, 92 Me. 501.

Order to hold a keg of beer while riding in a dangerous position did not contribute to injury. *Illinois C. R. Co. v. Bishop*, 76 Miss. 758.

Plaintiff was not allowed to complain that defendant had not furnished a safe apparatus, where his fall was due to his feet slipping. *Bessey v. Newichanwanick Co.*, 94 Me. 61.

Not guarding an employé against danger of which he was ignorant and which he was not bound to look for, presented a question for the jury as to the negligence thereof. *Jones v. Pipe Co.*, 15 Oh. C. C. 26.

Failure to give a watchman the customary notice that a train would run through on the wrong track held to be the proximate cause of accident. *Lake Shore &c. R. Co. v. Schultz*, 19 Oh. C. C. 639.

Recovery was not allowed where the failure to send back a flag upon taking a rail out of a track, was not the proximate cause of injury. *Michigan C. R. Co. v. Shea*, 8 Oh. C. D. 325.

Except for a defective brake a collision due to careless switching could have been avoided. The defect held proximate cause of death from the collision. *Houston &c. R. Co. v. Smith*, (Tex. Civ. App.) 51 S. W. Rep. 506.

Defective door fastening which prevented securing door in time to prevent escape of horse, held not the proximate cause of injury from kick of horse. *Smith v. Texas &c. R. Co.*, (Tex. Civ. App.) 58 S. W. Rep. 151.

Recovery allowed, where the failure to brake or block a car on a siding to prevent its being blown on the main track contributed to the accident. *Galveston &c. R. Co. v. Lynch*, 22 Tex. Civ. App. 336; *Galveston &c. R. Co. v. Johnson*, (Tex. Civ. App.) 58 S. W. Rep. 622.

Failure of subcontractor to post warning held not proximate cause of injury to employé of contractor from falling through uncompleted flooring. *St. Louis &c. Fire Proofing Co. v. Dawson*, (Tex. Civ. App.) 59 S. W. Rep. 847.

In attempting to regain his balance plaintiff caught his foot on a projecting bolt. The leaving of such bolt in an exposed condition was the proximate cause of his fall. *International &c. R. Co. v. Bayne*, (Tex. Civ. App.) 67 S. W. Rep. 443.

Where derailment was caused by a horse on the track, negligent speed could not be set up. *Bowes v. Hopkins*, 84 Fed. Rep. 767.

Failure to give notice of a special train held not the proximate cause of collision with a stalled regular that could have been prevented by giving the warning of stoppage provided by rules. *Little Rock &c. R. Co. v. Barry*, 84 Fed. Rep. 944.

See, also, *International &c. R. Co. v. Culpepper*, 18 Tex. Civ. App. 182.

The placing of a keg on loosely and carelessly piled hatch covers was the proximate cause of injury from fall of keg caused by stepping on covers. *The Joseph B. Thomas*, 86 Fed. Rep. 658.

That a person would fall if a wrench should break while being used

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was not reasonably to be anticipated. *Garnett v. Phoenix Bridge Co.*, 98 Fed. Rep. 192.

Engine could not have been stopped in time to avoid accident in any event. Leak of steam so as to obscure vision was immaterial. *Hunt v. Kane*, 100 Fed. Rep. 256.

A defective appliance held the proximate cause of injury from beam loosened thereby and pushed by one, to save himself, upon another. *Mexican C. R. Co. v. Murray*, 102 Fed. Rep. 264.

Defective condition of couplings held proximate cause of injury to brakeman directed to couple by hand after an attempt to couple with a stick failed. *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108.

Negligence and not fog caused collision, where notwithstanding, the train could have been run with safety. *Southern P. Co. v. Schoer*, 114 Fed. Rep. 466.

Question of whether a process for fumigating malt was so dangerous as to require warnings as to its effects, held to be for the jury. *Deisenrieter v. Kraus Merkel Malting Co.*, 92 Wis. 164.

As to when master's failure to notify servant of a defect did not contribute to the injury so as to permit recovery.

See *Boelter v. Ross Lumber Co.*, 103 Wis. 324.

That a platform was too narrow did not justify recovery, where it was not the cause of injury. *Youngbluth v. Stephens*, 104 Wis. 343.

V. Assumption of Risk by Servant.*

(a). SERVANT ASSUMES RISK BY CONTINUING IN EMPLOYMENT WITH KNOWLEDGE OF IT.†

The plaintiff, an employé of the defendant, for the purpose of coupling and assisting in the removal of crippled cars to the cripple-switch, was

* NOTE.—In dealing with the doctrine of Assumption of Risk, it is evident that the mere use of the word "assume" forms no criterion for the classification of cases. Thus it is said not only that a servant "assumes a risk by continuing in employment with knowledge of it," but also that he "assumes risks incident to his employment" and "assumes risks from negligence of fellow servant" and "assumes risks readily discoverable while in the exercise of ordinary care in his employment." In these cases the servant cannot recover, because, in the first instance, the master's liability for breach of duty has been waived by the servant's choosing to ignore it; in the second and third, there is no breach of duty whatever on the part of the master and hence no liability; in the fourth, the master's liability for breach of duty is checked by the servant's contributory negligence. In the last three instances the servant "assumes" the risk only in the sense that he assumes everything for which he cannot recover; the use of the word assume is not technical but simply a convenient escape from the circumlocution "cannot recover for." The first instance is the technical use of the word assume as applied to the doctrine of assumption of risk. That doctrine is distinguished by the element of actual knowledge of the risk to be encountered. To assume it, it is necessary to know it and exercise, in encountering it, a choice, a volition. "*Volenti non fit injuria*," the maxim usually applied, is an accurate statement of the rule. Cases of which the first instance is an example are gathered here; the second, under the heading "Risks Incident to Employment;" the third, "Fellow Servant;" and the fourth, "Contributory Negligence."

† NOTE.—As to when servant, though unaware of the danger, is barred from recovery by his contributory negligence in failing to discover it. See "Contributory Negligence," *post*, p. 1681.

injured by a defective draw head in making such removal. The defect might easily have been seen and the plaintiff had no right to assume that the couplings were perfect, but was bound to assume that the couplings might be disabled. He took the risk of his employment and was chargeable with negligence. The neglect to support the defective draw head, according to the rule and custom of the business, was, if not the plaintiff's negligence, at least the negligence of an employé. *Arnold v. Prest. &c. D. & H. Co.*, 125 N. Y. 15, aff'g judg't of nonsuit.

Citing *McCosker v. L. I. R. Co.*, 84 N. Y. 79; distinguishing *Goodrich v. N. Y. Cent. R. Co.*, 116 id. 398.

A servant assumes not only the risk incident to his employment, but obvious dangers, and so, if he voluntarily enters into or continues in the service, having knowledge or means of knowing the dangers involved, he assumes the risk. *Crown v. Orr*, 140 N. Y. 450, rev'g judg't for pl'ff. See *Kennedy v. Man. R. Co.*, 145 N. Y. 288.

From opinion.—"The law imposes upon him the duty of self-protection and always assumes that this instinct, so deeply rooted in human nature, will guard him against all risks and dangers incident to the employment or arising in the course of the business of which he has knowledge or the means of knowledge. If he voluntarily enters into or continues in the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk and to waive any claim for damages against the master in case of personal injury to him. *Thompson on Neg.* p. 1008; *Haskin v. N. Y. C. & H. R. R. Co.*, 65 Barb. 129; aff'd 56 N. Y. 608; *Jones v. Roach*, 9 J. & S. 248.

This principle applies to the plaintiff, though he was not at the time of full age. Like any other servant he took upon himself the ordinary risks of the service, and all dangers from the use of machinery which were known to him, or obvious to persons of ordinary intelligence. *DeGraff v. N. Y. C. & H. R. R. Co.*, 76 N. Y. 125; *King v. B. & W. R. Co.*, 9 Cush. 112.

He is bound to take notice of the ordinary operation of familiar laws and to govern himself accordingly, and if he fails to do so the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person so using them, and if he neglects to do so he cannot charge the consequences upon the master."

Voluntary continuance in employment after knowledge of the danger constitutes an assumption of risk thereof. *Huda v. American Glucose Co.*, 154 N. Y. 474; aff'g s. c., 12 App. Div. 624.

See, also, *Benda v. Keil*, 31 Misc. Rep. 812; *Pioneer Construction Co. v. Howell*, 189 Ill. 123; aff'g s. c., 90 Ill. App. 122.

Louisville &c. R. Co. v. Kemper, 147 Ind. 561; *Pennsylvania Co. v. Witte*, 15 Ind. App. 583; *Louisville & R. Co. v. Quinn*, 14 Ind. App. 554; *Conley v. American Ex. Co.*, 87 Me. 352; *Pennsylvania Co. v. McCurdy*, 66 Oh. St. 118; *Gann v. Nashville &c. R. Co.*, 101 Tenn. 380; *Massie v. Peel Splint Coal Co.*, 41 W. Va. 620; *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42. Without objection or complaint. *Cantancarito v. Siegel-Cooper Co.*, 23 Misc. 664; *Thomas v. Bel-*

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lamy, 126 Ala. 253; Helbig v. Slaughter, 95 Ill. App. 623; Chicago &c. R. Co. v. Merriman, id. 628; Johnson v. Devoe Snuff Co., 62 N. J. L. 417; Fletcher v. Louisville &c. R. Co., 102 Tenn. 1; Erdman v. Illinois Steel Co., 95 Wis. 6; Gropp v. Carnegie Steel Co., 4 Pa. Super. Ct. 621; Yerkes v. Northern P. Co., 112 Wis. 184; Greenleaf v. Dubuque R. Co., 33 Iowa, 52; Lumley v. Caswell, 47 Iowa, 159; and without promise or reason to expect that it will be made less dangerous. Atchison &c. R. Co. v. Schroeder, 47 Kas. 315; Nugent v. Kaufman Mill, 131 Mo. 241; Cunningham v. Bath Iron Works, 92 Me. 501; Corbett v. Smith, 101 Tenn. 368; Fick v. Jackson, 3 Pa. Super. Ct. 378; Oliver v. Ohio River R. Co., 42 W. Va. 703.

Where the condition is as well known to the employé as to the employer. *Hawk v. Standard Oil Co.*, 38 App. Div. 621.

Baltimore &c. R. Co. v. Spaulding, 21 Ind. App. 323; Allard v. Hildreth, 173 Mass. 26; Regan v. Palo, 62 N. J. L. 30; Cincinnati &c. R. Co. v. Hedges, 15 Oh. C. C. 254.

A master is not answerable to a servant for an injury from an unsafe implement which, upon the failure of the master to provide a better, the servant substitutes without the knowledge or authority of the master. *Oellerich v. Hayes*, 8 Misc. 211.

To one engaging in service with knowledge of an unsafe place or appliance, the master is under no obligation to alter or amend the condition of the place or appliance.

By entering upon the employment with such knowledge, the servant himself assumes the hazards of the dangerous place or appliance.

If by due diligence the servant may ascertain the danger, but chooses rather to forbear the exercise of that care, such opportunity of knowledge is the legal equivalent of actual knowledge.

Where plaintiff prevaricates as to a fact fatal to his case, and his own witnesses testify to that fact, the general term should set aside a verdict in his favor as against the weight of evidence. *McDugan v. N. Y. C. & H. R. R. Co.*, 10 Misc. 336.

Where servant is free to adopt his own and a safe method of doing work, and he voluntarily chooses a perilous and more convenient method, he assumes the risk thereof. *St. Louis &c. R. Co. v. Brennan*, 20 Ill. App. 555.

Where servant enters a hazardous employment with knowledge of the hazard, and of the master's negligence in providing safe appliances, and continues therein without objection and without the master's promise to remove the hazard, he cannot recover for injury resulting therefrom. *Chicago &c. R. Co. v. Merckes*, 36 Ill. App. 195.

Citing Camp Point Man. Co. v. Ballou, 71 Ill. 418; St. Louis &c. R. Co. v. Britz, 72 id. 256; Simmons v. Chicago R. Co., 110 id. 340; Penn. Co. v. Lynch, 90 id. 333. And see, also, Chicago &c. R. Co. v. Monroe, 85 id. 25; Clark v. Chicago

R. Co. 92 id. 43; *Naylor v. Lower Vein Coal Co.*, 55 Iowa, 671; *Hughes v. Winona &c. R. Co.*, 27 Minn. 137; *Stafford v. Chicago &c. R. Co.*, 114 Ill. 244; *C. & E. I. R. Co. v. Geary*, 110 id. 383; *C. & N. W. R. Co. v. Donahue*, 75 id. 106; *Lake Shore &c. R. Co. v. Roy*, 5 Ill. App. 82; *Hatt v. Nay*, 144 Mass. 186; *Coombs v. New Bedford Cordage Co.*, 102 id. 572, 585; *Reed v. Stockmeyer*, 74 Fed. Rep. 186.

Rule as to safe machinery, etc., held not to apply where the servant expressly agrees to use of a certain boat and engineer. *Lebkeucher v. Bolanson*, 69 Ill. App. 297.

An assumption of the risk by a servant will exonerate the master from liability, although the servant was free from negligence. *Louisville R. Co. v. Orr*, 84 Ind. 50.

If servant knows the general bad condition of appliances, he takes the risk.

When person enters employment of railroad company, the master is not obliged to examine him as to his experience and fitness, *unless he be a child*, and the servant assumes the risk of perils incident to the employment, and must exercise care proportioned to the danger of employment, and will be presumed to have knowledge of what is open and obvious. *O'Neal v. R. Co.*, 132 Ind. 110.

Cincinnati &c. R. Co. v. McMullen, 117 Ind. 439; *Louisville &c. R. Co. v. Bucks*, 116 id. 566; *Louisville &c. R. Co. v. Corps*, 124 id. 427; *Vincennes &c. R. Co. v. White*, 124 id. 376.

Servant does not, by simply remaining in the employ of the master with knowledge of defects in machinery, assume the risk; such result obtains only when he remains without objection or protest against consequences of defects. *Greenleaf v. Dubuque R. Co.*, 33 Iowa, 52.

Citing *Kroy v. Chicago &c. R. Co.*, 32 Iowa, 357.

Where an engineer has the same means of knowledge of the defects in the engine as his employer, if he remain in the service without protest, he cannot recover for explosion thereof. *Lumley v. Caswell*, 47 Iowa, 159.

Servant having charge of or use of implements or appliances in the performance of his work, must use such care as to their condition as will save him from personal injury, and proper watchfulness to preserve such appliances in a condition which will render them safe and fit for the purpose for which they are designated; and, if repairs are required, he must either make them himself, or report the condition to the master or the proper person to make repairs. *Stroble v. R. Co.*, 70 Iowa, 558.

Citing *Lumley v. Caswell*, 47 Iowa, 159; *Baker v. Allegheny &c. Co.*, 95 Penn. St. 211; *Ballou v. Chicago &c. R. Co.*, 54 Wis. 257; *Mad River &c. R. Co. v. Barber*, 5 Oh. St. 541; *Toledo &c. R. Co. v. Eddy*, 72 Ill. 138; *Chicago &c. R. Co. v. Bragonier*, 119 id. 51.

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Servant who was employed to handle damaged cars was allowed to recover for injury from defect, known by foreman but unknown to him, which caused the car to tilt and throw him when he mounted it pursuant to the foreman's orders. *Southern R. Co. v. Hart*, (Ky.) 64 S. W. Rep. 650.

If servant knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions. *Leary v. Boston &c. R. Co.*, 139 Mass. 580.

Citing *Sullivan v. India Man. Co.*, 113 Mass. 396; *Coombs v. New Bedford Cordage Co.*, 102 id. 572; *Ladd v. New Bedford R. Co.*, 119 id. 412; *Osborne v. Morgan*, 130 id. 102; *Taylor v. Carew Man. Co.*, 140 id. 150; *Linch v. Sagamore Man. Co.*, 143 id. 206; and distinguishing *O'Connor v. Adams*, 120 Mass. 427; *Railroad v. Fort*, 17 Wall. 553; *Lalor v. Chicago &c. R. Co.*, 52 Ill. 401, in which cases the servant was put to service of peculiar dangers of which he had no knowledge or experience, without warning or instruction, and discussing *Jones v. Lake Shore &c. R. Co.*, 49 Mich. 573; *Chicago &c. Co. v. Bayfield*, 37 id. 205, where a person was injured by work to which he was wrongly assigned.

Risk was assumed in returning to the machine because servant could not find the boss he wanted to fix it. *Dobbins v. Lang*, 181 Mass. 397.

Plaintiff, after three days' operation of saw, was told on the morning of his injury that he could work or lay off. He worked—and no recovery was allowed. *Prentiss v. Kent. &c. R. Co.*, 63 Mich. 478.

Servant assumes not only risk of employment, but also those risks caused by the master's negligent manner of conducting the business, if he know them and they are obvious to one of ordinary understanding. *Hughes v. Winona &c. R. Co.*, 27 Minn. 137.

Fleming v. St. Paul &c. R. Co., 27 Minn. 111; *Sherman v. Chicago &c. Co.*, 34 id. 259.

Plaintiff cannot recover where he was aware of every fact material to his safety. *Evans v. Meredith &c. L. Co.*, 69 N. H. 664.

Dangers which arise or become known during the service are assumed as well as those existing at its inception. *Dillenberger v. Weingartner*, 64 N. J. L. 292.

Contra, see *Pittsburg &c. R. Co. v. Sackworth*, 10 Oh. C. C. 583.

Whether it is negligence to continue work with a knowledge of defects, is for the jury. *Parker v. South Carolina &c. R. Co.*, 48 S. C. 364.

Though the appliance is one which an ordinary man might rely on, where the defects are within the actual knowledge of the servant, he assumes the risk thereof. *Missouri &c. R. Co. v. Wood*, (Tex. Civ. App.) 35 S. W. Rep. 879.

Under conflict of evidence as to knowledge of defect, it is for the jury

to say whether risk is assumed. *Ft. Worth &c. R. Co. v. Gary*, (Tex. Civ. App.) 68 S. W. Rep. 200.

Where servant knows of defect, without giving notice thereof, he assumes the risk, and he is presumed to know of open and obvious defects. *Davidson v. So. Pac. R. Co.*, 44 Fed. Rep. 476.

St. Louis &c. R. Co. v. Higgins, 33 Ark. 458; *Pennsylvania &c. R. Co. v. Long*, 94 Ind. 250; *Crandall v. New York &c. R. Co.*, 19 R. I. 594.

"The court below ignored wholly the doctrine of assumption of risk, and refused the instructions requested in that behalf, erroneously supposing that absolute knowledge of the defect which existed during the entire time of his service, could not, under any circumstances, amount to an assumption of risk, but merely cast upon him greater care in the use, or in avoiding danger from the defective appliance. This is manifest error, for which we think the judgment must be reversed. The doctrine of assumption of risk is not to be confounded with the doctrine of contributory negligence; for, where the former doctrine is applicable, the servant may exercise the greatest care, and yet be precluded from recovery for an injury in the performance of his service, because the risk was assumed." *Miner v. Railroad Co.*, 153 Mass. 398; *Pierce v. Clavin*, 82 Fed. Rep. 550.

Continuance for two weeks after knowledge of the increase of danger constituted an assumption of risk. *Fritz v. Salt Lake &c. Light Co.*, 18 Utah, 493.

Willfully encountering dangers excuses the employer. *Reese v. Wheeling &c. R. Co.*, 42 W. Va. 333.

Servant assumes risk by continuing in employment with knowledge of risk from violation of statutory requirement. *Powell v. Ashland Iron &c. Co.*, 98 Wis. 35.

Railroads:

Locomotives and Cars.—The handle of the walking beam of a hand car broke, and the men used a crowbar in its place. In working it rapidly to get away from a train the lever broke and an employé was killed. Such employé assumed the risk. *Powers v. N. Y., L. E. & W. R. Co.*, 98 N. Y. 274, rev'g 32 Hun, 415, and aff'g nonsuit.

Distinguishing *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521.

An employé knowing of a defective man-hole in a tank of an engine stepped on it; he could not recover if he had knowledge of the defect. *McQuigan v. D., L. & W. R. Co.*, 122 N. Y. 618.

Motorman continued on car with knowledge that its brake was defective. *Windover v. Troy C. R. Co.*, 4 App. Div. 202.

Winkler v. St. Louis Basket & B. Co., 137 Mo. 394.

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Using a car known to be defective after attempting to remedy it. Risk assumed. *Howey v. Lake Shore &c. R. Co.*, 13 Misc. 641.

Using a locomotive with a defective boiler months after learning thereof. Risk assumed. *Bridges v. Tennessee Coal &c. R. Co.*, 109 Ala. 287.

So, where train is run with knowledge of defective appliances and train crew. *Cresswell v. Wilmington &c. R. Co.*, 2 Penn. (Del.) 210.

Company was not liable to a servant injured in coupling cars with double buffers, because a higher degree of care is required in coupling them; if servants know that care is required and continue in the service, they take the risk. Servant was injured by foreign cars and claimed to have had no previous experience with such cars, but was a brakeman of experience, and master might presume that he knew that such cars were in daily use. *Indianapolis &c. R. Co. v. Flanigan*, 77 Ill. 369.

An employ  was injured by the breaking of a common car door used as a platform in removing freight. Held, that he could not recover, because having known of the use of such platform he had never objected to it or made any suggestion that others should be substituted. *Penn. R. Co. v. Lynch*, 90 Ill. 333.

Where servant ran an engine for two years and knew of defect from which the accident came and did not advise master, he took the risk. *Litchfield &c. R. Co. v. Romine*, 39 Ill. App. 642.

See, also, *Smalls v. Southern R. Co.*, 115 Ga. 137; *Hunt v. Kane*, 100 Fed. Rep. 256.

Continued use of an engine without hand holds. *Wabash &c. R. Co. v. Kastner*, 80 Ill. App. 572.

Shackelton v. Manistee &c R. Co., 107 Mich. 16.

Knowledge that the draw bars were not the kind ordinarily used. *Box v. Chicago &c. R. Co.*, 107 Iowa, 660.

Secord v. Chicago &c. R. Co., 107 Mich. 540; *Brooks v. Northern R. Co.*, 47 Fed. Rep. 687.

Using a hand car with knowledge that the lever of it is worm eaten and defective, imposes assumption of risk. *McGhee v. Bell*, (Ky.) 39 S. W. Rep. 823.

If servant knows that he will be required to make use of improper and dangerous implements, and continues in service, he takes the risk. Company is not liable for servant injured while coupling an old mail car lower than others, where he knew the danger. *Fort Wayne R. Co. v. Gildersleeve*, 33 Mich. 133.

System of inspection was defective, to knowledge of servant, in failing to test strength of brake rods on foreign cars. *Leazotte v. Boston &c. R. Co.*, 70 N. H. 5.

Where servant has knowledge of the defects, or mismatching of cars (as of bumpers of cars), or by the exercise of ordinary care would have known it, and continues in master's employ without objecting to or protesting against the use of such cars, he is presumed to assume the risk. *Muldowney v. Ill. Cent. R. Co.*, 39 Iowa, 615, 620.

Citing *Kroy v. C. R. I. & Co.*, 32 Iowa, 357; *Priestly v. Fowler*, 3 M. & W. 1; *Seymour v. Maddox*, 5 Eng. L. & Eq. 260; *Dynen v. Leach*, 40 id. 491; *Griffiths v. Gidlow*, 3 H. & N. 648; *Potts v. Plunkett* (2 B. Ireland), 7 Am. L. R. (O. S.) 562; *Welkinson v. Fairrie*, 1 H. & C. 633; *Hadden v. Smithville Man. Co.*, 29 Conn. 548; *Buzzell v. Man. Co.*, 48 Me. 121; *Moss v. Johnson*, 22 Ill. 642; *Frazier v. Penn R. Co.*, 38 Pa. St. 104; *Loonan v. Brockway*, 3 Robertson, 74; *Fifield v. Northern R. R. Co.*, 42 N. H. 240; *Coombs v. Cordage Co.*, 102 Mass. 585; *Hugh v. R. Co.*, 6 La. Ann. 495; *McGlynn v. Brodie*, 31 Cal. 376.

Where master failed to furnish cars that coupled readily, yet when the injured person, on cars failing to couple, instead of stepping out of danger, kept on trying to couple while the cars were moving and caught his foot in a frog, master was not liable. *Williams v. Central R. Co.*, 43 Iowa, 396.

Electric cars were without fenders and guards. *Chandler v. Atlantic & C. R. Co.*, 61 N. J. L. 380.

Notice of defect will defeat plaintiff's recovery, as where section master used a dump car although he knew it to be defective. *Pleasants v. R. Co.*, 95 N. C. 195.

Engineer knew step of an engine was dangerously high, yet he attempted to board the engine in motion, in the night, incumbered with two lanterns, although he had the right to have the engine stopped; master was not liable. *N. Y. & C. R. Co. v. Lyons*, 119 Pa. St. 324.

If employé knew of defective couplings, no recovery is allowed. *H. & T. C. R. R. Co. v. Myers*, 55 Tex. 110.

Burns v. Chicago & C. R. Co., 69 Iowa, 450; *Texas & C. R. Co. v. Bradford*, 66 Tex. 732; see *Chicago & C. R. Co. v. Smith*, 18 Bradw. (Ill.) 119; *Texas & C. R. Co. v. McAtee*, 61 Tex. 695; *Chicago & C. R. Co. v. Bragonier*, 119 Ill. 51; *Thompson v. Missouri P. R. Co.*, 51 Neb. 527; *McDonald v. Norfolk & C. R. Co.*, 95 Va. 98; *Southern R. Co. v. Winton*, (Tex. Civ. App.) 66 S. W. Rep. 477.

Otherwise, where, learning of a defective brake, a section hand has himself transferred to another car. *International & C. R. Co. v. Williams*, (Tex. Civ. App.) 34 S. W. Rep. 161.

Attempt to couple cars, though a projecting timber rail is seen on one of them. *Ely v. San Antonio & C. R. Co.*, 15 Tex. Civ. App. 511.

Nash v. Chicago & C. R. Co., 95 Wis. 327.

Servant had often removed rails from moving trains and knew the danger. Assumed the risk. *Webb v. Gulf & C. R. Co.*, (Tex. Civ. App.) 65 S. W. Rep. 684.

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Sharpness of curve in track caused draw bars of cars to slip past each other, when cars were brought together. Servant assumed the risk. *Tuttle v. Detroit R. Co.*, 122 U. S. 195.

Roadbed.—Where a switchman and car repairer fell into a ditch in existence when he entered the service, and with which he was familiar, defendant was not liable. *DeForest v. Jewett*, 88 N. Y. 264; 19 Hun, 509, *aff'd* 23 Hun, 490.

When it is the duty of an employé of a railroad corporation to ride over the road of the corporation, the duty of providing a suitable and sufficient track and maintaining same devolves upon the master, with the qualification that, when the road has become dilapidated and out of repair and is in the process of reconstruction, the risk is assumed by the servant. *Buck v. R. Co.*, 98 N. Y. 211.

Karr v. N. R. Con. Co., 48 Hun, 266; *Texas M. R. Co. v. Taylor*, (Tex. Civ. App.) 44 S. W. Rep. 892.

Knowledge that small quantities of shale fall from an overhanging bluff, did not charge engineer with knowledge that sufficient might be found on the track to cause derailment. *True v. Lehigh Valley R. Co.*, 22 App. Div. 588.

No recovery allowed for fall from switch platform of elevated structure known to be unguarded. *Nugent v. Brooklyn Union &c. R. Co.*, 64 App. Div. 351.

Brewer v. Tennessee Coal &c. R. Co., 97 Tenn. 615.

Where a brakeman is not required to ascertain the condition of a bridge, he does not assume the risk of its defectiveness. *Dolan v. Sierra R. Co.*, 135 Cal. 435.

See, also, *Maydole v. Denver &c. R. Co.*, (Col. App.) 62 Pac. Rep. 964.

Though a brakeman may have assumed the risks incident to a defective track, he did not *per se* assume the additional risk of the car's running over it at excessive speed. *Lawhorn v. Millen &c. R. Co.*, 97 Ga. 742.

If defect exist on railroad known to company, but impossible of immediate correction, and in consequence road was unsafe but not impassable, and employé in ignorance be allowed to attempt to pass upon the road to his injury, the company would be liable; but otherwise if the servant have knowledge. *Indianapolis &c. R. Co. v. Love*, 10 Ind. 554.

No recovery for injury from sag in the track due to its unfinished condition known to servant. *Baltimore &c. R. Co. v. Welsch*, 17 Ind. App. 505.

Ignorance of defective condition must be pleaded. *Chicago &c. R. Co. v. Lee*, 17 Ind. App. 215.

No recovery for injury from hole known to exist in a turntable. *Cowles v. Chicago &c. R. Co.*, 102 Iowa, 507.

Section hand was not allowed to recover for injury caused by the stumbling of the foreman, while assisting him in carrying a heavy tie, where the rough condition of the ground was known. *Lee v. Chesapeake &c. R. Co.*, (Ky.) 38 S. W. Rep. 509.

Coupling cars on a track known to be dangerous by reason of the worn condition of the rails. Risk assumed. *Arnold v. Louisville &c. R. Co.*, (Ky.) 58 S. W. Rep. 370.

See, also, *Missouri &c. R. Co. v. Wood*, (Tex. Civ. App.) 35 S. W. Rep. 879.

Complaint alleging injuries from falling into an unguarded ash pit in switch yard without alleging ignorance of the danger, held demurrable. *Williams v. Louisville &c. R. Co.*, (Ky.) 64 S. W. Rep. 738.

No recovery for injury from standing on the bumper of a moving car while managing the trolley pole with knowledge that the track was uneven at the point in question. *McCauley v. Springfield Street R. Co.*, 169 Mass. 301.

Plaintiff used a defective elevated tramway after promise to repair and was injured by the spreading of the rails. He was allowed to recover. *Prophet v. Kemper*, (Mo. App.) 68 S. W. Rep. 956.

See, also, *Boyd v. Blumenthal* (Del.), 52 Atl. Rep. 330.

No recovery for injury from collision with stock on track known to be unfenced. *Quill v. Houston &c. R. Co.*, 93 Tex. 616.

Continuation in service for three years with knowledge that culverts upon the road are without coverings, imposed assumption of risk. *West v. Southern P. Co.*, 85 Fed. Rep. 392.

Switches and guardrails.—The defendant's servant, for some years in its employ, knowing that the frog of the switch was not blocked, did not recover for injury caused by catching his foot therein. *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y. 550, rev'g judg't for pl'ff.

Citing *DeForest v. Jewett*, 88 N. Y. 264.

See, also, *Rice v. New York &c. R. Co.*, 55 App. Div. 339.

Defendant's brakeman, between moving cars to disconnect them, caught his foot between the guard rail and hand rail. The defendant was not negligent from failure to block the guard rail, as employé assumed the risk. *Kern v. De Castro &c. Co.*, 125 N. Y. 50.

Davidson v. Connell, 132 N. Y. 228; *Appel v. Buffalo &c. R. Co.*, 111 id. 550.

Plaintiff, defendant's switch brakeman, caught his foot between the guard-rail and main-rail of defendant's track, where another railway crossed it. The jury should have been charged, that, if he knew, that

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blocks were not placed between guard and main rails, when he entered the service, and if he had continued in service without such knowledge, he assumed the risk. *Haas v. Buffalo & P. R. Co.*, 40 Hun, 145, rev'g judg't for pl'ff.

Switches were known to be without lamps. *Illinois C. R. Co. v. Swisher*, 61 Ill. App. 611.

Frog at switch was dangerous; had been so since servant was employed; same as on roads usually. Plaintiff, with full opportunity to acquire knowledge of condition did not do so, and company was not liable. *Lake Shore &c. R. Co. v. McCormick*, 74 Ind. 440.

Servant knowing that the rails were not blocked, took the risk. *Rush v. Mo. &c. R. Co.*, 36 Kas. 129.

Foreman knew that frog was not blocked and was unsafe; he took risk. *Wilson v. Winona &c. R. Co.*, 37 Minn. 326; see 101 N. Y. 520.

Obstructions near the track.—A conductor, long in the defendant's employ and familiar with the projecting roof of a station, was struck by it and killed. He assumed the risk and was negligent, as he had unnecessarily climbed onto the roof of the car. *Gibson v. Erie R. Co.*, 63 N. Y. 449, rev'g 5 Hun, 31, and judg't for pl'ff.

Employé contracting for dangerous duty assumes risks from obvious causes, as where a brakeman with knowledge of height of bridge entered and continued in the employment. No liability. *Owen v. N. Y. C. R. Co.*, 1 Lansing, 108, aff'g order denying new trial to pl'ff.

From opinion.—"He knew, as well as his employer, the perils of the business, at least as respects the bridge in question, and the law will imply that he assumed the risk of personal injury. *Sherman v. Rochester and Syracuse R. Co.*, 17 N. Y. 153; and cases there cited; *Faulkner v. The Erie R. Co.*, 49 Barb. 324. Citations might be multiplied to any extent, but it is unnecessary. The decision in the case of *Warner v. The Erie R. Co.*, (49 id. 558), has been overruled by the court of appeals. s. c., 39 N. Y. 468. The rule is well settled."

Employé contracting for hazardous duties takes the risks incident to them, and if of sufficient age to understand the duties and dangerous employment, it is immaterial that he is a minor. *King v. The Boston & W. R. Co.*, 9 Cush. 112; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 585; Whart. sec. 216.

Plaintiff was a brakeman and leaned out of caboose to see if train had parted and was hit by target of switch. *Evans v. L. S. & M. S. R. Co.*, 12 Hun, 289, aff'g nonsuit.

No recovery for injury from a post, known to be dangerously near the track. *Austin v. Boston &c. R. Co.*, 164 Mass. 282.

Where the conductor of a street car knows of the presence of trees close

to the track, he assumes the risk. *Hall v. Wakefield &c. R. Co.*, 178 Mass. 98.

Experienced brakeman swept from side ladder of freight car by pillar of bridge. No recovery. *Bell v. New York &c. R. Co.*, 168 Mass. 443.

See, also, *Chicago &c. R. Co. v. McGinnis*, 49 Neb. 649.

If servant has knowledge of machinery or structure from which he may apprehend danger, servant takes the risk. Servant was injured by contact with roof or awning projecting towards a side track on which servant was moving freight cars. *Clark v. Railroad Co.*, 28 Minn. 128.

Dillon v. Union Pacific R. Co., 3 Dillon, 319; *Hayden v. Smithville Man. Co.*, 29 Conn. 548; *Ill. Cent. R. Co. v. Welch*, 52 Ill. 183; *Devitt v. Pacific R. Co.*, 50 Mo. 302.

Operation.—A trackman, satisfied that a divided train had entirely passed, stepped back on the track after the forward part of it had gone by and was injured by the remaining part. Such divisions at this point were not unusual and were not unknown to plaintiff. No liability. *Haley v. N. Y. C. R. Co.*, 7 Hun, 84.

A signal man on elevated railway, to avoid a coming train, attempted to step from the track to the other girder, and was struck by the train; he fell and was killed. It was customary for workmen to do this to avoid trains. He took the risk. No liability. *Kennedy v. M. R. Co.*, 33 Hun, 457, aff'g judg't of dismissal.

From opinion.—"In the performance of the service required from the intestate, and which he voluntarily undertook to render, he was subject to the risk of encountering accidents by trains approaching the place required to be occupied by him to give the signals which he was employed to communicate. That was plainly to be observed and seen by himself, as well as all others whose attention might be directed to the situation. His employment required him to make use of the instrumentalities as they had been located in that vicinity; it was all clearly and evidently before his eyes and within his comprehension, and he must have understood that in the discharge of his duties he subjected himself to the risk of just such an accident as was encountered by him. And as that was clearly indicated by the situation and the circumstances under which he was obliged to act, that was one of the risks incident to his employment. This general subject was considered in *Gibson v. Erie Railway Company*, 63 N. Y. 449, where it was held that 'accepting service with a knowledge of the character and position of the structures from which the employé might be liable to receive injury, he could not call upon the defendant to make alterations to secure greater safety, or in case of injury from risks which were apparent, he could not call upon his employer for indemnity.' *Id.* 452. This legal principle is directly applicable to this case, and was sufficient to justify the disposition which was made of it at the circuit. It was further considered in *DeForest v. Jewett*, 88 N. Y. 264, and *Kain v. Smith*, 89 id. 375, and approved on each occasion by the court."

A track repairer walking to tool house in the night time on the tracks,

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carrying a lantern, was killed by a slowly moving coal car on the switch track. As usual there was no light and no warning was given, with which practice deceased was familiar. He took the risk. *Crowe v. N. Y. C. R. Co.*, 70 Hun, 37.

The servant of a railroad company who continues in such employment, rendering services therein without objection or complaint, assumes the ordinary risks incident to the service, but the company cannot rely upon such assumption of risks on the part of the employé, unless it takes reasonable precautions to insure his safety while in the performance of his duty.

It is a duty which a railroad company owes to its employé, to inspect the cars and ascertain their fitness for service, and its duty is measured by the danger to be apprehended and avoided. Such an employé owes a duty of like care and prudence to himself and to his employer.

The fact that the company is neglectful of its duty does not warrant the employé in rushing into a palpably dangerous position.

Working with and among the cars of a steam railroad is necessarily a dangerous employment and demands on the part of an employé thus engaged active vigilance to avoid danger to the same degree at least as is demanded of a traveler along a highway approaching a railroad crossing. *Albert v. N. Y. C. & H. R. R. Co.*, 80 Hun, 152.

Voluntarily starting a train without a conductor prevented fireman from recovering for injury due to lack of one. *Pointon v. St. Louis & C. R. Co.*, 90 Ill. App. 623.

No recovery for injury from known danger outside of duty. *Cleveland & C. R. Co. v. Carr*, 95 Ill. App. 576.

Conductor knowing the turntable was out of repair was not allowed to recover for a strain in trying to turn it. *Roberts v. Indianapolis Street R. Co.*, 158 Ind. 634.

If employé knows of the custom of making a flying switch, and without objection participates, he waives master's negligence. *Youll v. Sioux City R. Co.*, 66 Iowa, 346.

No recovery for injury from slipping and catching upon spikes in sleepers known to contain them. *O'Neil v. Keys*, 168 Mass. 517.

Railroad employé remains at work in a yard which he knows is unusually congested with traffic, at his risk. *Bence v. New York & C. R. Co.*, 181 Mass. 221.

Experienced brakeman ordered to attach a load of lumber which projected forward and compelled him to stoop in making a coupling, was thereby delayed a little and his fingers caught in coupling link. He took the risk. *Day v. Toledo & C. R. Co.*, 42 Mich. 523.

Brakeman undertook to couple cars, with a lantern containing improper oil, which he has used for several months, without objection. No recovery. *Huffman v. Michigan C. R. Co.*, 109 Mich. 251.

It was for the jury to say whether a brakeman relied on a bridge guard to warn him or whether he voluntarily took a risk. *Hardy v. Boston &c. R. Co.*, 68 N. H. 523.

Servant knew of a low bridge, continued in the service, and was injured by forgetting it. Master was not liable. *Brossman v. Railroad Co.*, 113 Pa. St. 490.

Citing *Pittsburg &c. R. Co. v. Sentmeyer*, 11 Norris, 280.

Whether a conductor assumed the risk of danger of defect in a road bed, by proceeding, though under protest, with extra cars without extra brakeman, held to be a question for the jury. *Mew v. Charleston &c. R. Co.*, 55 S. C. 90.

Continuation in service after learning of the incompetency of an extra freight conductor, constituted an assumption of risk. *Texas &c. R. Co. v. Johnson*, (Tex. Civ. App.) 34 S. W. Rep. 186.

Continuance with knowledge that adequate rules had not been provided constituted an assumption. *Gulf &c. R. Co. v. Williams*, (Tex. Civ. App.) 39 S. W. Rep. 967.

Little Rock &c. R. Co. v. Barry, 84 Fed. Rep. 944.

Conductor failed to signal for reduction of speed of train being backed down grade faster than rules permitted. He did not assume risk as matter of law. *International &c. R. Co. v. Vinson*, (Tex. Civ. App.) 66 S. W. Rep. 800.

Foreman of a track gang continued in service with the knowledge of the habitual failure to give crossing signals. He assumed the risk. *McPeck v. Central Vt. R. Co.*, 79 Fed. Rep. 590.

So, where the servant went upon a hand-car knowing a fast train was about due on the track. *Wright v. Southern R. Co.*, 80 Fed. Rep. 260.

One who is aware of the failure to provide an ash pit and the danger incident to its absence, assumes the risk. *Seldomridge v. Chesapeake &c. R. Co.*, 46 W. Va. 596.

Brakeman killed by being crowded between caboose and a foreign freight car, while coupling, by reason of unequal height of coupling irons. Master was not liable as the danger was obvious. *Kelly v. Abbot*, 63 Wis. 307.

See *Dewey v. R. Co.*, 197 Mich. 329.

Muldowney v. Ill. Cent. R. Co., 39 Iowa, 615, 620, and cases there cited; *Ballou v. Chicago &c. R. Co.*, 54 W. 257.

In an action for the death of a servant in railroad yard by switch engine, which it was alleged was running at unlawful speed, evidence that

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it was the custom in the yard to run at unlawful speed, was admissible to show that servant took the risk. *Abbot v. McCadden*, 81 Wis. 563.

Bengston v. Chicago R. Co., 47 Minn. 486.

Employé ran a hand-car in a fog and with such a noise as to prevent the discovery of the approach of a train, which it was known might be encountered. *Hinz v. Chicago &c. R. Co.*, 93 Wis. 16.

Factories, mills and machine shops:

A skilled workman slipped and his leg got into an uncovered coupling of the rolls of a rolling mill. The danger was palpable and the deceased assumed it. Evidence of the superintendent that the deceased told him that he did not want the rolls covered was competent on question of the deceased assuming the risk. *Shaw v. Sheldon*, 103 N. Y. 667, rev'g judg't for pl'ff.

An employé with knowledge of the machinery takes the risk. *Hickey v. Taaffe*, 105 N. Y. 26, rev'g 32 Hun, 7, and judg't for pl'ff.

The plate stuck to a die in a machine used to stamp it for roofing and the plaintiff used his fingers to remove it and the defective upper die caught his fingers. The plaintiff had been warned and reproved for this and knew of the defect. The defendant was not liable. *Cullen v. National S. M. R. Co.*, 114 N. Y. 45, reversing 46 Hun, 562, and judg't for pl'ff.

The plaintiff, who was acquainted with the construction of sugar bins, and the orifices for drawing off the sugar, was injured by a sudden subsidence of the sugar, which he was shoveling. No defect in construction was shown; the subsidence sometimes happened. No liability. *Bohn v. Havemeyer*, 114 N. Y. 296; affirming 46 Hun, 557, and judg't for def't.

McGovern v. Cent. Vt. R. Co., 123 N. Y. 280.

An employé was hurt in an elevator, through a defect in the winding of a chain, of which the master had no notice, and of which the employé had means of knowledge equal to that of the master. The master was not liable. *Hart v. Naumburg*, 123 N. Y. 641, reversing 50 Hun, 392, and judg't for pl'ff.

Where the master furnished torches and the servant failed to use them, he was precluded from claiming that the master had not furnished a safe place to work by reason of the insufficient light.

Plaintiff was engaged in the night time wheeling a load upon a wheelbarrow up an elevated platform leading to defendant's boiler house, he fell therefrom and was injured; the platform was but two feet wide, was not lighted and had no guards upon the sides; plaintiff had used the platform for two weeks, wheeling his barrow up and down it, and for

one week in the night time; he did not ask to have it made wider, or complain of its manner of construction. If the platform was dangerous for use on account of its being too narrow; plaintiff knowing its condition voluntarily took the risk, and could not sustain a recovery on the ground that this defect caused the injury.

A defect in a plank that had escaped notice of others was not sufficient evidence of negligence. *Kaare v. The Troy Steel & Iron Co.*, 139 N. Y. 389, rev'g judg't for pl'ff.

Plaintiff seized a cog-wheel to stop machine used for punching, as there was no brake to stop it. As the danger was patent and dangerous, the plaintiff was guilty of contributory negligence in doing it; nor was defendant liable. *White v. Sharp*, 27 Hun, 94, granting new trial after verdict for pl'ff; s. c. aff'd, 97 N. Y. 460.

Plaintiff was stacking ice; claimed his ice hook, because it was dull, parted from the ice and let him fall off the ice. It was an ordinary defect of an ordinary instrument; he could see it as well as the master. He claimed that there should have been a barrier around the ice to keep slipping men on. He took the risk. *Thorn v. N. Y. Ice Co.*, 46 Hun, 497, aff'g order of nonsuit.

An emery wheel burst injuring defendant's employé. Defective construction for jury; but as the defect was internal the plaintiff was not charged with notice of it, and the finding of the jury that the plaintiff did not know that the wheel was out of balance was conclusive that he did not take the risk of it. *Murtagh v. N. Y. &c. R. Co.*, 49 Hun, 456.

A laborer and a superintendent of a distillery of crude oil went into a still to repair it, and were killed by an explosion of gas, which had entered in the absence of a stop-cock, and which was ignited by a candle carried by them. The laborer had the right to expect, that his master would furnish him with a safe place in which to perform his work. The laborer was ordered in by White, a mechanic, and had worked before in repairing stills. It was an absolute certainty, that gas from other stills in use would return back into the empty still, in the process of repair, in the absence of a stop-cock. The plaintiff was not guilty of contributory negligence as he did not take the risk of the employment. *Nichols v. Brush & Denslow Man. Co.*, 53 Hun, 137, aff'g judg't for pl'ff; s. c. aff'd, 117 N. Y. 646.

The plaintiff had been in the employ of the defendant for about eight years and had the opportunity of seeing how the floor on which he was working was constructed. While engaged, with others, in carrying a pile of large heavy sheets of iron the floor gave way and he was injured.

The court improperly declined to charge that "if the plaintiff was capable and had the right and opportunity of knowing thereof before

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the accident and of judging of the probability of danger there, having continued in its employ, he could not recover." *Ryan v. Porter Man. Co.*, 57 Hun, 253, rev'g judg't for pl'ff.

Plaintiff, two years in defendant's employ, was using circular saw of ordinary construction. There was no hood, as was the case in some mills, but at the point where the plaintiff's hand was injured there was always a space. The rope broke and allowed the saw to come against plaintiff's hand. The rope was apparently not defective. The master was not liable and the servant took the risk. *French v. Aulls*, 72 Hun, 442.

Although parties may waive statutory provisions enacted for their benefit, and may even make laws for themselves which the courts are bound to administer, provided there is no question of public policy involved, yet, when there is a statutory enactment that certain safeguards shall be provided for the security of employes in a factory, and the failure to provide such safeguards is criminal, the employé, by continuing to work, knowing that the machinery is not guarded as prescribed by statute, does not waive the provisions of the statute, nor does he assume such obvious risks as are incident to the use of the machinery without the required safeguards. (Brown, P. J., dissenting.) *Simpson v. N. Y. Rubber Co.*, 80 Hun, 415.

Servant continued with full knowledge of the change wrought by the substitution of soft for hard wood plates in which a saw ran. No recovery. *Freeman v. Dennison Man. Co.*, 40 App. Div. 99.

Although an explosion was not caused by the fault of the injured servant, yet, if he was aware that the boiler was defective, he cannot recover, whatever care he took to prevent the explosion or avoid the effects thereof. *Morris v. Gleason*, 1 Ill. App. 510.

Servant worked three months with a saw, and knew its construction and operation, before he was injured by a block thrown from the saw. He took the risk. *United States &c. Co. v. Chadwick*, 35 Ill. App. 474.

Violation of ordinance as to guarding machinery did not permit recovery where plaintiff knew thereof. *Swift & Co. v. Fue*, 66 Ill. App. 651.

Risk was assumed where the servant sold the derrick to the master and knew of the defect therein. *Wolf v. Big Creek Stone Co.*, 148 Ind. 317.

Plaintiff knew that oil, on which he might slip, had been spilled about an open vat of boiling oil and made no complaint in respect thereto. No recovery. *Hattaway v. Atlanta Steel &c. Co.*, 155 Ind. 507.

See, also, *Lake Shore &c. R. Co. v. Whidden*, 23 Oh. C. C. 85.

Boy of eighteen, for two months in master's employ, to hand up wood to be sawed, was directed to operate a saw as he had done ten or fifteen

times; the saw had two teeth broken and was dull to plaintiff's knowledge; he assumed the risk. *Michael v. Stanley*, 75 Md. 464.

Where plaintiff was familiar with the effect of the fall of a weight for the purpose of breaking iron castings, he could not complain of master's failure to provide a guard to arrest the flying pieces. *Wood v. Heiges*, 83 Md. 257.

So, where plaintiff was fully aware of the danger from molten lead splashing, but continuing to subject himself thereto. *Farrell v. Tatham*, 36 App. Div. 319.

So, where plaintiff was struck by chips from a planer he had noticed flew in every direction. *McAuliffe v. Gale*, 180 Mass. 361.

Smith v. Wilmington &c. R. Co., 129 N. C. 173, (struck by chips from steel beam); *Grabowski v. Pennsylvania Steel Co.*, 2 Dauph. Co. Rep. 118 (by splinter from steel casting).

But an ordinary laborer, employed to clean machinery, soaked in chemicals, with a steam jet, without warning of danger involved in contact with the chemicals, was held not to have assumed the risk. *Texas &c. R. Co. v. Gardner*, (Tex. Civ. App.) 69 S. W. Rep. 217.

Where an employé had been employed for years, knew of the dangers of inhaling poisonous gases while repairing leaks in a sulphuric acid tank and prepared himself for protection against it before entering, he assumed risk. *State v. Lazaretto Guano Co.*, 90 Md. 177.

Employé was ordered by foreman to go up a ladder, standing against a belt box, and was injured by his clothing catching on visible shaft while he was nailing a board. He was working within scope of his authority and took risk. *Russell v. Tillotson*, 140 Mass. 201.

Fireman injured by bursting of pipe, not defective, caused by his letting on steam when there was water in the pipes, of which danger he had knowledge. He assumed the risk. *Linch v. Sagamore &c. Co.*, 143 Mass. 206.

Servant notified master of defective pipe coupling that had been disconnected but was told to replace it. He resumed his work. No recovery was allowed for his death from explosion of the coupling. *Mackey v. Newberry Furnace Co.*, 119 Mich. 552.

So, where servant knew of the danger of explosion of bottles of ale which he was handling, two having exploded. *Lehman v. Van Nostrand*, 165 Mass. 233.

So, where servant who had used a guard to the machine for three years and he had as much opportunity as the master to determine whether it rendered its operation safer or more dangerous. *Quigley v. Plant Co.*, 165 Mass. 368.

So, where plaintiff by long use had been familiar with the length and

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position of the running board from which he fell in leaning forward to clean a coupling. *French v. Columbia Spinning Co.*, 169 Mass. 531.

Servant continued in service for several years with knowledge of the liability of a board coming in contact with an unguarded circular saw. *Tenantry v. Boston Man. Co.*, 170 Mass. 323.

Servant knew of the absence of a guard rail to a vat of vitriol in the floor of a factory which is somewhat obscured by the dimness of the light. *Carrigan v. Washburn &c. Man. Co.*, 170 Mass. 79.

Servant fully understood the danger incident to the absence of a guard to a machine and made no objection. *O'Connor v. Whittall*, 169 Mass. 563.

No recovery for injury from crossbelts known to be unguarded. *Kennedy v. Hingham Cordage Co.*, 168 Mass. 278.

Plaintiff not allowed to recover for fall in dark after lights went out on stopping of machinery at usual time. *Donovan v. American Linen Co.*, 180 Mass. 127.

Plaintiff, knowing a belt shipper was defective and liable to prematurely start the machinery, continued to use it. No recovery. *Silvia v. Wampanoag Mills*, 177 Mass. 194.

Servant familiar with a custom of standing metal bars against a wall assumed the risk of their fall. *Langley v. Wheelock* 181 Mass. 474.

Servant had his attention specifically called to the danger of set screw in revolving shaft. He assumed the risk. *Middaugh v. Mitchell*, 120 Mich. 581.

Continuance with knowledge that a guard to a defective appliance was insufficient, constituted an assumption of risk. *Lally v. Crookston Lumbar Co.*, 82 Minn. 407.

Servant who was familiar with the machinery and knew that it did not have the usual guard, assumed the risk in continuing work with it. *Blom v. Yellowstone Park Association*, 86 Minn. 237.

It was for the jury to say whether plaintiff assumed the risk of washing windows of a factory from the outside after five months' employment at eyeletting shoes. *Zeigler v. C. Gotzian &c. Co.*, 86 Minn. 290.

Where an employé undertakes to raise by hand a heavy frame, he cannot complain of a failure to furnish him with the customary rigger and derrick. *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557.

A woman of thirty-two familiar with the danger of closing a window behind a revolving fan assumed the risk in doing so. *Dillenger v. Weingartner*, 64 N. J. L. 292.

An experienced engineer went upon a platform, known to be defective, without guardrails and insufficiently lighted, to oil machinery in

motion. He assumed the risk. *French v. First Ave. R. Co.*, 24 Wash. 83.

See, also, *Ladonia Cotton Oil Co. v. Shaw*, (Tex. Civ. App.) 65 S. W. Rep. 693; *American Dredging Co. v. Walls*, 84 Fed. Rep. 428.

The risk of an uncovered saw projecting over its frame, and partly across a narrow passage way along which a servant in a mill is obliged to go in the performance of his duties, being apparent, is assumed by servant remaining in service. *Stephenson v. Duncan*, 73 Wis. 404.

Servant cannot complain of dangers of machinery which he is familiar with by reason of having constructed it. *Ausley v. American Tobacco Co.*, 130 N. C. 34.

Plaintiff knew of the danger of being run over by rolling logs on a skidway. He assumed the risk in going thereon. *Gulf &c. R. Co. v. Hernandez*, (Tex Civ. App.) 45 S. W. Rep. 197.

Foreman knowing derrick was not safely secured ordered plaintiff to use it. Plaintiff was not allowed to recover. *Kelly v. Juttes &c. Co.*, 104 Fed. Rep. 955.

Employé was negligent, where, knowing that a ring supporting a load carried by a crane was too large to fit the hook of the crane, he kept on at his task. *White v. Newport News Shipbuilding &c. Co.*, 95 Va. 355.

Mines and excavations.—The fact that a servant continues the work, after knowledge of defendant's negligence in blasting rocks is for the jury, and is not *per se* negligent. *McMahon v. Port Henry Iron Co.*, 24 Hun, 48, rev'g nonsuit.

Citing *Hawley v. N. C. R. W. Co.*, 24 Sup. C. N. Y. 115; *Hough v. Railway Co.*, 100 U. S. 213.

Where foreman of defendant directed the employé, not hired for the purpose, to warm some dynamite, and he was killed by the explosion thereof, he did not take the risk. *Lofrano v. N. Y. &c. Co.*, 54 Hun, 452, aff'g judg't for pl'ff; aff'd, 130 N. Y. 658.

Miner knew that the platform was incomplete and that it was unsafe to use it in that condition. *Sharpsteen v. Livonia &c. Co.*, 3 App. Div. 144.

See, also, *Curley v. Hoff*, 62 N. J. L. 758.

An experienced miner assumed the risk, where he knew more about the danger incident to the sinking of a shaft than his employer and believed that it could be timbered safely. *Stiles v. Richie*, 8 Colo. App. 393.

Plaintiff did not recover where the danger from explosion in excavating a trench was as well known to him as to his employer. *Staldter v. Huntington*, 153 Ind. 354.

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Continuation at work in a mine with knowledge that the roof was dangerous and without any promise of repair was an assumption of the risk. *Breckinridge &c. Syndicate v. Murphy*, (Ky.) 38 S. W. Rep. 700.

Andrews v. Tamarack Min. Co., 114 Mich. 375.

Miner communicated his suspicion of the unsafe condition of a mine roof but was persuaded by the superintendent that it was safe. He did not assume the risk. *Harder &c. Min. Co. v. Schmidt*, 104 Fed. Rep. 282.

Faulkner v. Mammoth Min. Co., 23 Utah, 437.

A miner notified the boss of a loose piece of slate in the roof of the mine; he was directed to prop it up, but failed to do it. No recovery. *Russel Creek Coal Co. v. Wells*, 96 Va. 416.

Vicious mule in charge of another knocked down defective mine props and injured plaintiff. That he knew the mule to be unruly did not impose upon him assumption of risk of such an injury. *Western Coal &c. Co. v. Ingraham*, 70 Fed. Rep. 219.

Where a quarryman knew of the presence of seams of clay, which were liable to cause the rock to separate along them, he assumed the risk. *Mielke v. Chicago &c. R. Co.*, 103 Wis. 1.

Building Operations.—Servant of a company installing an elevator used a scaffold which he knew others had constructed for their own use. *Whallon v. Sprague &c. Co.*, 1 App. Div. 264.

Carpenter started work on a ladder knowing that another was liable to pass in or out of the space beneath with a wagon. *Byrnes v. Brooklyn &c. R. Co.*, 36 App. Div. 355.

Defendant's employé, a carpenter, while framing the roof of a building in the course of erection, stepped upon a tie beam, which gave way, and he fell and was killed. The beam broke on account of a knot. The plaintiff had assisted in hoisting up the tie beam which broke. *Griffiths v. N. J. & N. Y. R. Co.*, 5 Misc. 320, aff'g nonsuit, citing *Butterworth v. Clarkson*, 3 id. 338.

Plaintiff's son, in defendant's employ, while at work on an unfinished building taking an oil can to an upper floor by a ladder, was struck by something falling through the hatch. He had been fully warned of the dangers of such lurking around the hatchway and knew that men on that floor were "sweeping out," and he appreciated the risk. There was no evidence as to how the substance which struck plaintiff's son came to fall, and no proof that it was due to the negligence of the defendant. *Evans v. Vogt & Brothers Man. Co.*, 5 Misc. 330, rev'g judg't for pl'ff.

Servant, without objection, used, in a derrick, ropes he knew to be defective. *Gun v. Willingham*, 111 Ga. 427.

Servant knew wedges used in construction of track were apt to slip out of place. *Bedford Bell R. Co. v. Brown*, 142 Ind. 659.

Servant chose to continue work in the vicinity of danger from falling bricks, rather than quit the job. *Harff v. Green*, 168 Mo. 308.

Servant worked on trestle 8 feet high and 5 inches broad without objection. He assumed risk of a fall. *Garnett v. Phoenix Bridge Co.*, 98 Fed. Rep. 192.

Servant worked on a scaffold he knew to be defective. He assumed the risk. *Nuss v. Rafsnyder*, 178 Pa. St. 397.

Though sound appliances had been known to break when overstrained, servant did not assume danger from break of a defective one. *Mexican C. R. Co. v. Murray*, 102 Fed. Rep. 264.

Buildings and Grounds.—Where a servant was killed by the fall of a post on a building near by, with which he had no actual connection or knowledge, he did not assume the risk respecting the same. *Mickee v. Wood &c. Co.*, 70 Hun, 436.

Risk of defects in an elevator discovered by operator were assumed. *Watson v. Duncan*, 47 App. Div. 640.

Risk from absence of rails about an elevator opening was assumed. *Burns v. Nichols Chemical Co.*, 65 App. Div. 424.

Servant assumed the risk of riding in an elevator he knew was only intended for the conveyance of materials. *Ingram v. Fosburgh*, 73 App. Div. 129.

Servant sweeping off a roof knew that it contained a temporary skylight constructed of ordinary window glass. *Garety v. King*, 9 App. Div. 443.

Plaintiff, while in the employ of defendants as a painter, was directed by defendant's foreman to pass over a plank which the latter had placed in position for the purpose of removing a scaffold. The plank was defective and unable to sustain plaintiff's weight, causing the injuries sued for. Held, that the danger which plaintiff encountered was not an ascertainable one that could have been avoided by the exercise of reasonable care by defendants, but was incident to the employment. *Butterworth v. Clarkson and another*, 3 Misc. 338, aff'g nonsuit.

After a fire the defendant employed the other defendants to remove the debris, and a chute was erected to carry the refuse matter to the street. The bricks sent down the chute would, when they struck the bottom, scatter and hop about ten feet. The plaintiff, who was employed to shovel the material which came down into the street, observed this but continued to work on until he was struck by one of the bricks; there was no improper construction of the chute, and the plaintiff assumed

SERVANT ASSUMES RISK BY CONTINUING IN EMPLOYMENT.

the risk. *Fannessey v. Western Union Tel. Co. and others*, 6 Misc. 322, aff'g nonsuit.

No recovery for injury from fall of pile of lumber while pushing a car along side of it in a lumber yard where servant was employed to work. *Brinkley &c. Man. Co. v. Lewis*, 68 Ark. 316.

No recovery for fall from roof known to be unfenced. *Kinnare v. Chicago*, 70 Ill. App. 106; s. c. aff'd, 171 Ill. 332.

So, where servant continued to work about a horse in a stall after noticing the dangerous condition of its flooring. *Ames v. Quigley*, 75 Ill. App. 446.

Servant cannot complain of the steepness of stairs which he had used for six months. *Mann v. Moore*, (Ky.) 68 S. W. Rep. 402.

So, where servant continued to work in the unwholesome atmosphere of the place without mentioning it to his superior. *Maitland v. C. &c. R. Co.*, 3 Oh. Leg. News, 289.

Whether servant assumed the risk of a rotten plank way, where he called the manager's attention to it and he promised to repair it, was for the jury. *Powers v. Standard Oil Co.*, 53 S. C. 358.

Electrical Appliances.—Where the lineman knew the effect of cutting a guy wire to a decayed pole as well as his foreman, he assumed the risk of cutting it at the latter's orders. *Tanner v. New York &c. R. Co.*, 180 Mass. 572.

Lineman complained of high current in a wire to the foreman who tested it and assured him it was safe. Servant also tested it and continued his work. He assumed the risk. *Eperson v. Postal Teleg. &c. Co.*, (Mo.) 50 S. W. Rep. 795.

So, where he knew of the danger of the lamp becoming charged by contact with other wires. *Carr v. Manchester Electric Co.*, 70 N. H. 308.

Servant working near wires known to be heavily charged assumed the risk of contact. *Newnom v. Southwestern Teleg. &c. Co.*, (Tex. Civ. App.) 47 S. W. Rep. 669.

Miscellaneous Instances.—If a person knowingly engages in a dangerous occupation he takes the risk of it.

The plaintiff's intestate was smothered by foul gases in a boiler where he worked through the closing of the ventilator which had been closed by his order. The deceased was negligent. *Curran v. Warren Chemical & Man. Co.*, 36 N. Y. 153, aff'g order granting new trial to def't.

Where a laborer was ordered into a still to repair it and was killed by

the explosion of gas which had entered in the absence of a stop-cock and was ignited by a candle carried by him, he did not assume the risk, although it was absolutely certain that gas from other stills in use would turn back into the empty still in the absence of a stop-cock. *Nichols v. Brush &c. Co.*, 53 Hun, 137, aff'g judg't for pl'ff.

Coachman told his master it was unsafe to drive horses without blinders, but drove them so, when ordered. No recovery. *Wooster v. Bliss*, 90 Hun, 79.

Knowledge of unruliness of team charges servant riding to and from work with the risk. *Bowles v. Indiana &c. R. Co.*, 27 Ind. App. 672.

Plaintiff was injured by a bale of cotton falling on him by reason of its slipping out of the hook which he was using, on account of same being too straight. Plaintiff took the risk. *Recka v. Ocean Steamship Co.*, 3 Misc. 526, rev'g judg't for pl'ff.

Use for 11 months by an experienced teamster of a wagon without a seat and lines too short, constituted an assumption of risk. *Limberg v. Glenwood Lumber Co.*, 127 Cal. 598.

If an employé knows that another employé is habitually negligent, or materials are defective, and he continues work without objection, and without being induced by his master to believe that change will be made, he assumes the risk. *Kroy v. Chicago &c. R. Co.*, 32 Iowa, 357.

Knowledge of insufficient or incompetent co-servant constituted an assumption of risk. *Swift & Co. v. Rutkowski*, 167 Ill. 156; rev'g s. c., 67 Ill. App. 209; *Davis v. Detroit &c. R. Co.*, 20 Mich. 105.

Binder v. C. P. &c. R. Co., 16 Oh. C. C. 262; *Lake Shore &c. R. Co. v. Litz*, 7 Oh. Dec. 282; *Johnson v. Portland Stone Co.*, 40 Or. 436; *Lantry Sons v. Lowrie*, (Tex. Civ. App.) 58 S. W. Rep. 837; *Slavens v. Northern P. R. Co.*, 97 Fed. Rep. 255.

Co-employé, with knowledge of plaintiff, filled foreman's place in his absence. Master not liable on ground of furnishing incompetent servants. *Daniels v. Covington &c. Build. Co.*, (Ky.) 66 S. W. Rep. 187.

Bridge and walk over which servant was obliged to pass was defective, whereby he was injured. Declaration did not allege that defect was unknown to plaintiff, and that but for want of proper care it would have been known to master, and declaration was bad. *Buzzell v. Laconia &c. Co.*, 48 Me. 113.

Where plaintiff slept aboard a vessel knowing there was no watchman, he took the risk. *Lang v. Williams T. Line*, 119 Mich. 80.

Known risk from customary violation of a rule was assumed. *Reberk v. Horne &c. Co.*, 85 Minn. 326.

No recovery where plaintiff's fingers were frozen while handling ice-coated bales in extreme weather. *Yazoo City Co. v. Smith*, 78 Miss. 140.

TO CHARGE WITH ASSUMPTION HE MUST KNOW AND APPRECIATE THE DANGER.

Continuation with a railroad which fails to furnish platform or warehouse accommodations at the station is an assumption of risk from such sources. *Chaddick v. Lindsay*, 5 Okla. 616.

Knowledge of occasional breach of master's duty in setting to work servants in need of sleep did not impose assumption of risk on a particular occasion. *St. Louis &c. R. Co. v. Kelton*, (Tex. Civ. App.) 66 S. W. Rev. 887.

The doctrine of assumption of risk does not apply to seamen. *Lafourche Packet Co. v. Henderson*, 94 Fed. Rep. 871.

Where plaintiff started to work behind piles which were being drawn up to a car upon skids without chocks to prevent their rolling back in case of accident, he assumed the risk. *Hunt v. Kile*, 98 Fed. Rep. 49.

(b). BUT TO CHARGE HIM WITH ASSUMPTION, HE MUST NOT ONLY KNOW THE CONDITIONS BUT APPRECIATE THE DANGER.

The fact that machinery is dangerous does not make the master liable to a minor injured while operating it, if the minor appreciates the danger.

A boy slipped, and to save himself threw out his hand and it caught in the cogs. No liability. *Buckley v. G. P. & R. M. Co.*, 113 N. Y. 540; rev'g 41 Hun, 450, and judg't for pl'ff.

Risk is assumed to the extent that knowledge is full. *Horrigan v. New York &c. R. Co.*, 7 App. Div. 377.

Willfulness is not essential to liability to one working in a dangerous place. *St. Louis &c. R. Co. v. Eggmann*, 161 Ill. 155; aff'g s. c., 60 Ill. App. 291.

Full knowledge of the violation of statutory duty to furnish guards to dangerous machine held no defence. *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479.

Though defects be known, servant is chargeable with an assumption of risk only where such risk is understood and appreciated. *Burgess v. Davis Sulphur Ore Co.*, 165 Mass. 71.

Nofsinger v. Goldman, 122 Cal. 609; *Illinois C. R. Co. v. Johnson*, 95 Ill. App. 54; *Chicago &c. R. Co. v. Kinnare*, 76 id. 394; *Stomne v. Hanford Produce Co.*, 108 Iowa, 137; *Gaulden v. Kansas City &c. R. Co.*, 106 La. 409; *Stiller v. Bohn Man. Co.*, 80 Minn. 1; *Fickett v. Lisbon Falls Fibre Co.*, 91 Me. 268; *Frye v. Bath Gas Co.*, 94 id. 17; *Snedden v. Libera*, 65 Minn. 337.

Servant must not only have worked on, knowing the danger, but have voluntarily assumed the risk thereof. *Lloyd v. Hanes*, 126 N. C. 359.

Servant knowing of danger in feeding a mangle, assumed the risk. *Day v. Achron*, (R. I.) 50 Atl. Rep. 654.

Cases where knew of a defect but did not realize that danger would come of it.

Clicking of machine did not charge servant with risk where he did not know that it meant danger. *Fox v. La Compte*, 2 App. Div. 61.

Knowledge of the defective condition of a derrick, did not charge a servant with assumption of risk of breaking after all weight had been removed from it. *Julian v. Stony Creek &c. Co.*, 71 Conn. 632.

Inexperienced railroad employé did not assume the risk, though he knew of the existence of a defect, unless he also knew there was danger in continuing to use it. *Pitts v. Florida &c. R. Co.*, 98 Ga. 655.

Fireman did not as matter of law assume the risk of a defective engine, where engineer gave no heed to apparent irregularities when his attention was called to them. *Brownfield v. Chicago &c. R. Co.*, 107 Iowa, 254.

An employé in a quarry whose duty it was to remove broken stone and who was unfamiliar with the use of dynamite was not negligent *per se* in not going to a safe distance while a hole, which had not exploded and to which he had called attention was being unloaded with an iron spoon. *Grimaldi v. Lane*, 177 Mass. 565.

Defendant told a boy of sixteen that if he got his fingers between two small, slowly-revolving, horizontal cylinders, with a knife just back of them for skiving leather, on which he was working, all in plain sight, he would get hurt; but the boy said he did not know that it would draw in his whole hand. Master was not liable. *Pratt v. Prouty*, 153 Mass. 333.

Citing *Coombs v. New Bedford &c. Co.*, 102 Mass. 572; *Sullivan v. India Man Co.*, 113 id. 396; *Rock v. Indian Orchard Mills*, 142 id. 522; *Ciriack v. Merchant' Woolen Co.*, 146 id. 182; 151 id. 152; *Coullard v. Tecumseh Mills*, 151 id. 85.

It is not enough that the servant knew or ought to have known the actual character and condition of the defective instrumentalities furnished for his use. He also must have understood or by the exercise of ordinary observation ought to have understood the risks to which he is exposed by their use. (*Clark v. St. Paul Co.*, 28 Minn. 128.) In some cases, as in the *double dead wood* cases, the risk is obvious on inspection. (*Michigan R. Co. v. Smithson*, 45 Mich. 212; *Hathaway v. Mich. Cent. R. Co.*, 51 id. 253; *Toledo &c. R. Co. v. Block*, 88 Ill. 112.) *Russell v. Railroad Co.*, 32 Minn. 230.

Mere knowledge of the defect is not sufficient, unless it does or should carry to servant's mind the danger from which he suffered. Servant may assume that the master will do his duty, and therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he ordinarily will be justified in obeying orders,

TO CHARGE WITH ASSUMPTION HE MUST KNOW AND APPRECIATE THE DANGER. subject to the qualifications that he must not rashly or deliberately expose himself to unnecessary and unreasonable risks which he knows and appreciates; it is one thing to be aware of *defects*, and another to know and appreciate the *risks* resulting therefrom. *Cook v. Railroad Co.*, 34 Minn. 45.

Knowledge of the manner in which a trench was braced did not charge one with an assumption of risk, where he did not know that any danger would arise therefrom. *Donahoe v. Kansas City*, 136 Mo. 657.

Knowledge that a grindstone is run at an excessive rate of speed does not charge one with an assumption of risk, where he did not know of the danger and relied upon the foreman's experience. *Helfenstein v. Medart*, 136 Mo. 595.

Knowledge of defects in a hand car did not charge one, an inexperienced hand, with an assumption of risk of its jumping the track. *Compton v. Omaha &c. R. Co.*, 82 Mo. App. 175.

Plaintiff, knowing that a hand car was defective but ignorant of the specific defect and believing, as the foreman assured him, that it could be safely used with care, did not assume the risk. *Weldon v. Omaha &c. R. Co.*, 93 Mo. App. 668.

So, where servant knew that a defect in a conveyor produced one effect but not another, he did not assume risk from the latter. *Shoemaker v. Bryant Lumber &c. Co.*, 27 Wash. 647.

Boy, fourteen, oiled gearing in motion, and caught his hand in cog-wheels plainly visible. The court thought that he might be too young and inexperienced to appreciate the risk. It was claimed by the defendant that he had no right and was not ordered to wipe the gearings, but sweep up the floor, &c. He had been employed but a short time. For jury whether he apprehended the danger. *Wilson v. Paper Co.*, 75 Wis. 579.

Cases in which knowledge of danger was not inconsistent with assumption of safety

Carpenter unfamiliar with the construction of piling on which he built his scaffolds was not charged with the risk of their sufficiency. *Pursley v. Edgemoor &c. Works*, 56 App. Div. 71.

That the employment is dangerous does not make it negligent to pursue it, where it is not so dangerous as to deter an ordinarily prudent man from engaging in it at all. *Southern R. Co. v. Guyton*, 122 Ala. 231.

Ashland Coal &c. R. Co. v. Wallace, 101 Ky. 626; *Harriman v. Kansas City Star Co.*, 81 Mo. App. 124.

Where servant was injured by defective machinery in a saw mill, it

was held that the servant only took the risk of such defects in machinery as he ought reasonably to have foreseen might endanger his safety. *Sanborn v. Madera &c. Co.*, 70 Cal. 261.

Citing *Sweeny v. Central Pacific Co.*, 57 Cal. 15; *Russell v. Minneapolis*, 32 Minn. 233; *Coop v. St. Paul*, 32 Alb. L. J. 319; *Mayes v. Chicago &c. R. Co.*, 14 N. W. R. 340; *Lawless v. Conn. R. Co.*, 136 Mass. 51.

Knowledge that an appliance is defective does not make its use negligence in the absence of knowledge that such defect makes its use dangerous. *Chicago &c. R. Co. v. Knapp*, 176 Ill. 127; aff'g s. c., 74 Ill. App. 148.

Chicago &c. R. Co. v. Merriam, 86 Ill. App. 454; *Batchelor v. Union Stock Yard &c. Co.*, 88 id. 395.

Continuing in service with the knowledge of another servant's incompetency. *Webster Man. Co. v. Schmidt*, 77 Ill. App. 49.

Knowledge that a brake to an elevator is out of order is not knowledge that it is dangerous. *Union Show-Case Co. v. Blindauer*, 175 Ill. 325.

Knowledge that a circular saw was ordinarily operated by two men, is not necessarily notice of danger in operating it without a helper. *Colson v. Craver*, 80 Ill. App. 99.

Though presumed to have a general knowledge of the danger involved in oiling machinery in motion, a boy of 14 was not charged, as matter of law, with the full appreciation of the real danger in obeying an order to oil defective machinery in motion. *Avery & Son v. Meek*, (Ky.) 45 S. W. 355.

Although it be negligence on the part of the master to leave dangerous machinery uncovered, yet the servant is not necessarily guilty of negligence because he works in the vicinity of it, knowing the condition; the measure of the duty of the two in that regard is not the same. *Nels Wuotilla v. Duluth R. Co.*, 37 Minn. 153.

Larson v. Railroad Co., 43 Minn. 423.

See *Sweet v. Railroad Co.*, 87 Mich. 559; *ante*, p. 1540; *Dorsey v. Construction Co.*, 42 Wis. 196.

Knowledge that a plank on a runway scaffold was not nailed did not make it negligent *per se* to use it. *Doyle v. Missouri &c. Trust Co.*, 140 Mo. 1.

Where danger is obvious, knowledge of the defects is knowledge of the danger. *Benham v. Taylor*, 66 Mo. App. 308.

Knowledge that an appliance is defective did not make it negligent to use it, where it might reasonably have been supposed that, with the exercise of care and caution, it would be safe to do so. *Bullmaster v. St. Joseph*, 70 Mo. App. 60.

A claw bar was battered and cracked at the edges, was not such an

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obvious defect as made it negligent *per se* to use it. *Booth v. Kansas City &c. Air Line*, 76 Mo. App. 516.

Servant was not negligent in going under a defective car to uncouple it, where the defect was not so glaring as to deter a reasonably prudent man from doing it. *Horney v. Missouri P. R. Co.*, 80 Mo. App. 667.

So knowledge that a mine entry is defective and somewhat dangerous does not charge one with an assumption of risk where it may reasonably be supposed to be safe in the exercise of ordinary care. *Smith v. Little Pittsburg Coal Co.*, 75 Mo. App. 177.

Doctrine of assumption of risk held not to apply to employé continuing in employment of railroad company violating statute by neglecting to supply self couplers. *Greenlee v. Southern R. Co.*, 122 N. C. 977; s. c., 41 L. R. A. 399.

It is only where a machine is so grossly or clearly defective that the employé must know of the extra risk that he can be deemed to have assumed it. *Lloyd v. Hanes*, 126 N. C. 359.

Track walker was not charged with knowledge of danger from rubber on a brake shoe. *Galveston &c. R. Co. v. Parrish*, (Tex. Civ. App.) 40 S. W. Rep. 191.

Knowledge by a switchman that frogs were unblocked was not an assumption of risk, where he did not know of the danger. *Galveston &c. R. Co. v. Hughes*, 22 Tex. Civ. App. 134.

Knowledge by a switchman that a switch engine was operated without a fireman did not *per se* charge one with an assumption of risk where it was not such as to cause one of ordinary prudence to apprehend danger. *Wright v. Southern P. Co.*, 14 Utah, 383.

Continuance in service after learning of defects in machinery does not charge one with an assumption of risk where they are not obviously dangerous to one of ordinary prudence. *Mangum v. Bullion &c. Co.*, 15 Utah, 534.

Galveston &c. R. Co. v. Smith (Tex. Civ. App.), 57 S. W. Rep. 999.

1. EFFECT OF ASSURANCE OF SAFETY BY MASTER.

Defendant having attended a case of small pox at home, employed the plaintiff to whitewash the house, representing that since the death of the patient, the house had been thoroughly disinfected and was entirely safe. Plaintiff contracted the disease, hence the action. Held, if the plaintiff did not act inexcusably, and the defendant, as master, had not used due care towards the plaintiff, his servant, the latter could recover. *Span v. Ely*, 8 Hun, 255, rev'g judg't of nonsuit.

From opinion.—“In *Cesar v. Karutz*, 60 N. Y. 229, the defendant leased

apartments to the plaintiff which were infected with small-pox, of which fact the former had notice but did not notify the plaintiff, and the latter contracted the disease. The defendant was held to liability. See, also, *Jeffrey v. Bigelow*, 13 Wend. 518; *B. & A. R. Co. v. Shanley*, 107 Mass. 568; *Barne v. Burnstenbinder*, 64 Barb. 212; *Thomas v. Winchester*, 6 N. Y. 397; *Vandenburgh v. Truax*, 4 Denio, 464. In the cases here cited, as well as in the case under consideration, the rule of liability is made to stand upon the principle of right and fair dealing between man and man, whatever may be their relation to each other.

In this case the plaintiff was informed, before his employment by the defendant, that a person had sickened and died in the house of the small-pox. Did knowledge of this fact change the case so as to relieve the defendant of liability? The decision in *Patterson v. Wallace*, in the House of Lords, 28 Eng. Law & Eq. 48, answers this question in the negative, or rather holds, that with such knowledge, accompanied by assurances that there was no danger to be apprehended, it became a question for the jury whether due care and caution had been exercised."

Intestate supplied bricks to building elevator to carry them aloft. The elevator descended into a well-hole, which was designed ultimately to contain the stairway. Some bricks fell and the men in the well sang out, "to be careful;" these men were going to lay boards partly across to protect them, when the employer stopped it, and said there was no need of it—that it was all secure above. A man above, contrary to instructions concerning taking bricks from a moving elevator, dropped some and killed the intestate who was fourteen feet away from where the covering of boards was contemplated, so they would not have protected him. The assurance of the master could be relied on and defendant was liable. *Daley v. Schaaf*, 28 Hun, 314, aff'g judg't for pl'ff.

The defendant's superintendent directed plaintiff to get out from a pile some brick with which to load a car, and the latter called the former's attention to the shaky condition of the brick and the superintendent said, "all right, I will attend to that," but he did not. The pile of brick cracked and the covering of boards thereon slid off and injured plaintiff. The superintendent was not an incompetent foreman, nor were the brick badly piled or unskillfully covered. Defendant not liable. *Riley v. O'Brien*, 53 Hun, 147, affirming nonsuit.

Following *Loughlin v. State*, 105 N. Y. 159.

Chambermaid called attention to cracks in the ceiling, but was assured of its safety. She was not negligent in continuing to use it. *Siedentop v. Buse*, 21 App. Div. 592.

See, also, *Anderson v. Steinreich*, 32 Misc. 680.

Foreman's attention was called to the insufficiency of light; but he ordered plaintiff to go to work. Master liable. *Illinois Steel Co. v. Schymanowski*, 59 Ill. App. 32.

Servant notified master of defects and was requested to do the best

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he could till repairs could be made. Risk not assumed. *Westville Coal Co. v. Wood*, 96 Ill. App. 616.

Risk was not assumed where servant was assured that a certain stone would not fall. *Walter v. Fisher*, 96 Ill. App. 590.

Knowledge of a defect did not impose assumption of risk in the face of an assurance of safety. *Stomne v. Hanford Produce Co.*, 108 Iowa, 137.

But, where master does not promise to repair, risk is assumed. *Nealand v. Lynn &c. R. Co.*, 173 Mass. 42.

Employé may defer to the opinions of those who, from their position, are bound to have special knowledge as to whether a particular place is safe or not. *Lake Superior &c. R. Co. v. Erickson*, 39 Mich. 492.

Long v. Illinois C. R. Co., (Ky.) 68 S. W. Rep. 1095; *Giordano v. Brandywine Granite Co.*, (Del.) 52 Atl. Rep. 332; *McKee v. Tourlelotte*, 167 Mass. 69.

Assurance of safety by master does not relieve servant of an assumption when he knows better. *Rohrabacher v. Woodward*, (Mich.) 82 N. W. Rep. 797.

See, also, *Pintorelli v. Hortons*, 22 R. I. 374; *Perschke v. Hencken*, 44 N. Y. Supp. 265; *Hannigan v. Smith*, 28 App. Div. 176.

Where the superintendent, upon his attention being called to a defect, does some work upon the machine and pronounces it all right, the servant is not negligent in resuming its operation. *Sopherstein v. Bertels*, 178 Pa. St. 401.

If the master throw the servant off his guard, the latter cannot be charged with contributory negligence. *Fowler v. B. & O. R. Co.*, 18 W. Va. 579.

Penn. R. Co. v. Ogier, 35 Pa. St. 60; *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521.

The rule does not apply to common implements from which injury could not be expected, although defective. *Corcoran v. Mil. Gaslight Co.*, 81 Wis. 193.

Towen v. Horley, 56 Fed. Rep. 974.

(c). SERVANT RELIEVED FROM ASSUMPTION BY RELIANCE FOR REASONABLE TIME ON MASTER'S PROMISE TO REMOVE DANGER.

Where the servant has full and equal knowledge with the master that the fellow servant is incompetent, and he remains in the service, this may constitute contributory negligence; but if it appears that the master has promised to amend the defect, or other like inducement to remain has been held out to the servant, the mere fact of his continuing in the employment does not of itself, as matter of law, exonerate the master

from liability, but the question of contributory negligence is one of fact for the jury. *Allen, J.*, dissenting.

The offending servant, after employment, acquired habits of intoxication, rendering him incompetent, and this was known both to the injured servant and the master, but there was evidence that the master stated he would discharge the offending servant if he did not do better; but such servant, while intoxicated, directed two incompetent persons to erect a scaffold, from which the injury arose. It was a question for the jury whether the plaintiff's remaining precluded his recovery. *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521, aff'g judg't for pl'ff.

Servant must see that promised repairs have been made before resuming work. *Schultz v. Rohe*, 149 N. Y. 132; rev'g s. c., 8 Misc. 683; aff'g s. c., 4 id. 384.

Ice formed on the roof of defendant's building and fell on a lower roof, crushing the same in and injuring an employé. Eight months before ice had in the same manner fallen and injured the same employé, whereupon a new roof, inadequate to the strain, as defendant knew, was put on. Defendant was negligent. The employé had a right to rely upon the defendant's superior knowledge and information. *Gaul v. Rochester Paper Co.*, 72 Hun, 485, aff'g judg't for pl'ff; s. c. aff'd, 145 N. Y. 603.

A conductor of a train stepped off the rear thereof, while passing through a tunnel, under the impression that it was not the last car, and recovered damages against the master for neglect in leaving the passageway in the railing of the rear platform unguarded by a rope or chain, which he claimed the master had promised to place there. The question of contributory negligence was for the jury. *Fiero v. N. Y. C. & H. R. R. Co.*, 71 Hun, 213, aff'd 143 N. Y. 674.

Appearances justified servant in believing repairs had been made. *Larkin v. Washington Mills Co.*, 45 App. Div. 6.

Ritt v. True Tag Paint Co., (Tenn.) 69 S. W. Rep. 324.

Servant assumed the risk in going to work at the machine again before time appointed for repair. *Rice v. Eureka Paper Co.*, 70 App. Div. 336.

Servant assumes risk when he knows a promised repair has not been made. *Szotak v. Berwind-White, Coal Min. Co.*, 36 Misc. 98.

Carleton Min. &c. Co. v. Ryan, (Colo.) 68 Pac. Rep. 279.

Servant may continue in employment in reliance upon a promise to repair and the assumption of risk is suspended meanwhile. *Chicago Bridge &c. Co. v. Hayes*, 91 Ill. App. 26.

See, also, *Ridges v. Chicago*, 72 Ill. App. 142; *Illinois C. R. Co. v. Weiland*, 67 id. 332; *Pardridge v. Gilbride*, 98 id. 134; *Poirier v. Carroll*, 35 La. Ann. 699; *Texas &c. R. Co. v. Whitmore*, 58 Tex. 276; *Houston &c. R. Co. v. Meyers*, 55 id.

HOW SERVANT RELIEVED FROM ASSUMPTION.

110; *Lyttle v. Railroad Co.*, 84 Mich. 239; *Manufacturing Co. v. Morrissey*, 40 Oh. St. 148; *Holmes v. Worthington*, 2 Foster & F. 533; *Clark v. Holmes*, 7 Hurl. & Nor. 937; *Hough v. R. Co.*, 100 U. S. 213; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Patterson v. P. & C. R. Co.*, 76 Pa. St. 389; *Conrad v. Vulcan Iron Works*, 62 Mo. 35; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Greenleaf v. Illinois Cent. R. Co.*, 29 Iowa, 14; *Kroy v. Chicago &c. R. Co.*, 32 id. 357; *Green v. Minneapolis &c. R. Co.*, 31 Minn. 248; *Parody v. Chicago &c. R. Co.*, 15 Fed. Rep. 205; *Le Clair v. First Division &c. R. Co.*, 29 Minn. 9; *Brabbitts v. Chicago &c. R. Co.*, 38 Wis. 289; *Maitland v. Gilbert Paper Co.*, 97 Wis. 476; *Anderson v. H. C. Ackley Co.*, 47 Minn. 128; *International &c. R. Co. v. Williams*, (Tex. Civ. App.) 34 S. W. Rep. 161; *McClusky v. Garfield &c. Coal Co.*, 180 Mass. 115.

For a reasonable length of time. *Huber v. Jackson &c. Co.*, 1 Marv. (Del.) 374; *Ray v. Diamond State Steel Co.*, 2 Penn. (Del.) 525; *Swift & Co. v. Madden*, 165 Ill. 41; aff'g s. c., 63 Ill. App. 341; *Sendzikowski v. McCormick Harvesting Co.*, 58 id. 418; *East Chicago Iron &c. Co. v. Williams*, 17 Ind. App. 573; *Brown v. Levy*, (Ky.) 55 S. W. Rep. 1079; *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484; *Hillje v. Hettich* (Tex. Civ. App.) 67 S. W. Rep. 90; rev'g s. c., 65 id. 491; *Lehigh Valley Coal Co. v. Warrek*, 84 Fed. Rep. 866; *Jensen v. Hudson Sawmill Co.*, 98 Wis. 73.

And provided continuance would be ordinarily prudent. *Illinois C. R. Co. v. North*, 97 Ill. App. 124; *Gray v. Red Lake Falls Lumber Co.*, 85 Minn. 24; *Webster v. Monongahela River Coal &c. Co.*, 201 Pa. St. 278; *Yerkes v. Northern P. R. Co.*, 112 Wis. 184.

The rule applies, though the defect was in original construction. *Swift v. O'Neill*, 187 Ill. 337; aff'g s. c., 88 Ill. App. 162.

But not to a defect not contemplated in the promise to repair. *Tesmer v. Boehm*, 58 Ill. App. 609.

It applies to latent defects. *Connolly v. St. Joseph &c. Co.*, 166 Mo. 447.

See, also, *Minnier v. Sedalia &c. R. Co.*, 167 Mo. 99.

But is not limited to latent defects. *McFarlan Carriage Co. v. Potter*, 153 Ind. 107; aff'g s. c., 21 Ind. App. 692.

It does not apply to promises in regard to the negligence of a fellow servant. *Vogt v. Honstain*, 81 Minn. 174.

When servant knew of defect in hand car for months, and used it, master was not liable. A waiver of master's negligence places the case in the same position as though no negligence on the part of the master was shown.

Where servant has equal knowledge with the master of the defect, he cannot recover unless it be shown that he notified the master and was induced to remain by promise of a remedy. It is the duty of the servant to call the master's attention to the defect.

If master promises to remedy the defect, servant, if induced thereby to remain, can recover *while the promise is running*, if he remain with

reasonable expectation that repairs will be made. *Burlington &c. R. Co. v. Liehe*, 17 Colo. 280.

Citing *Colorado &c. R. Co. v. Ogden*, 3 Colo. 499; *Wells v. Coe*, 9 id. 159; *Beach on Cont. Neg.*, sec. 8; 2 *Thomp. on Neg.*, p. 1148; *L. &c. Co. v. Orr*, 84 Ind. 50.

Where there was no complaint of defects nor reliance on a promise to repair, the assumption of risk still remained. *Bodwell v. Nashua Man. Co.*, 70 N. H. 390.

Promise to repair one of two defects did not operate as a suspension of the risk as to the other. *Engel v. Standard Lighting Co.*, 12 Oh. C. C. 489.

While the promise to repair suspends the assumption of risk, it does not relieve the servant of the duty to use care proportioned to the increased danger. *Brown Oil Can Co. v. Green*, 22 Oh. C. C. 518.

The assumption is revived by continuance of work after failure to fulfill promise. *Trotter v. Furniture Co.*, 101 Tenn. 257.

See, also, *Illinois Steel Co. v. Mann*, 170 Ill. 200; *Hillje v. Hettich (Tex.)*, 67 S. W. Rep. 90; *rev'g s. c.*, 65 id. 491.

Simple protest by employé against the use of defective machinery will not charge employer with liability in the absence of a promise on his part to repair the same. *Galveston &c. R. Co. v. Drew*, 59 Tex. 10.

Indianapolis &c. R. Co. v. Watson, 114 Ind. 20; *Patterson v. R. Co.*, 76 Pa. St. 389.

Servant may presume that repair has been made where the defect was a latent one, and he is not bound to inspect, where there are no circumstances raising a suspicion that it has not been. *Missouri &c. R. Co. v. Nordell*, 20 Tex. Civ. App. 362.

Where the promise to repair was not to discharge master's duty of protection but to forward his business, it did not effect the assumption of risk. *Industrial Lumber Co. v. Johnson*, 22 Tex. Civ. App. 596.

Promise to repair may not be relied on where experience had taught servant that it was not made *bona fide*. *Houston v. Owen*, (Tex. Civ. App.) 67 S. W. Rep. 788.

Servant having a right to abandon a dangerous service may refrain for a reasonable time, relying on assurance of master that the danger will be removed, but if he continue in the service for a longer time than is reasonable to allow for the performance of the promise, he will be deemed to have waived the objection and assumed the risk. *Stephenson v. Duncan*, 73 Wis. 404.

A teamster was justified in relying on his master's promise to repair before he returned with another load. *Nelson v. Shaw*, 102 Wis. 274.

1. UNLESS DANGER IS SUCH THAT ORDINARY PRUDENCE WOULD REFUSE TO RISK IT.

Where foreman, hiring plaintiff, agreed to advise him of the coming of trains, while removing snow from the track, and did not, the master was not liable. *Bradley v. N. Y. C. R. Co.*, 62 N. Y. 99.

Servant had been promised a long spout oil can but continued to use the short one in the meantime. He assumed the risk. *Spencer v. Worthington*, 44 App. Div. 496.

Whether servant was negligent in continuing to work on defective flooring master had promised to repair was for the jury. *Illinois Street Co. v. Mann*, 197 Ill. 186; aff'g s. c., 100 Ill. App. 367.

An employé who continues in the service of his employer after notice of a defect augmenting the danger, assumes the risk as increased by the defect, notwithstanding he may object or complain, unless the master expressly or impliedly promises to remedy the defect.

Where a light, as the employé knows, is essential to the safe performance of his work as a watchman in a railroad freight yard, in the absence of a promise to furnish the light, on which promise the employé relies, the employer is not liable for an injury resulting from an attempted performance of the service without it, although it is the master's duty to provide the light, and although the servant had previously complained of the danger and demanded that the light be provided.

Where an employé knows that the danger is great and immediate, such as a reasonably prudent man would not assume, he cannot recover for an injury, even though he remained in the employer's service in reliance upon the latter's promise to remedy the defects which produced the danger. *Indianapolis &c. R. Co. v. Watson*, 114 Ind. 20.

From opinion.—"There are authorities holding that, where the employé objects to the safety of the appliances furnished him, the employer is liable if the employé is injured while in the employer's service, and within a reasonable time after urging the objection. *Union Man. Co. v. Morrissey*, 22 Am. L. Reg. 574; *Thorpe v. Mo. Pacific R. W. Co.*, 89 Mo. 650 (58 Am. R. 120); 2 Thompson Negligence, 1009.

A careful examination of the other authorities relied on by appellee's counsel has satisfied us that they do not decide all that it is asserted that they do.

In *Holmes v. Clarke*, 6 Hurl. & N. 349, the master neglected to fence a dangerous place, as an act of parliament required him to do, and a servant was awarded a recovery for injuries caused by this negligence. Leaving out of consideration the element introduced by the positive legislation, although it is by no means clear that the act of parliament did not exert an important influence, yet we conclude that the case does not sustain the appellee's position. *Wabash &c. R. W. Co. v. Locke*, 112 Ind. 404.

This conclusion we rest upon these words of the opinion in the case cited by counsel: 'Where machinery is required by an act of parliament to be protected, so as to guard against danger to persons working it, if the servant enters into

the employment when the machinery is in a state of safety, and continues in the service after it has become dangerous in consequence of the protection being delayed or withdrawn, but complains of the want of protection, and the master promises to restore it, and fails to do so, we think he is guilty of negligence, and that if any accident occurs to the servant, he is responsible.' The promise of the master formed, it is obvious, an important factor in the case, and exerted a controlling influence on the judgment of the court.

There are some expressions in *Green v. Minneapolis &c. R. W. Co.*, 31 Minn. 248, that seem to support the appellee's contention, but the ultimate decision is against him. It was there said: 'If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant and not his own, when notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use under a promise thereafter to repair it.' At another place, the court, in speaking of the general rule, asserts that the master is liable when the servant gives notice of the defects and the master 'thereupon promises that they shall be remedied.'

The utmost that can be deduced from the case under immediate mention is, that the servant may continue in the service a reasonable time after the promise to make the machinery or appliances safe, and that if he is injured within that time, he may maintain an action.

The cases of *Kroy v. Chicago &c. R. R. Co.*, 32 Iowa, 357; *Greenleaf v. Dubuque, &c. R. R. Co.*, 33 id. 52; *Muldowney v. Illinois Central R. R. Co.*, 39 id. 615; *Lumley v. Caswell*, 47 id. 159, and *Way v. Illinois Central R. R. Co.*, 40 id. 341, do not, as we understand them, go further than to hold that the master is not liable where the servant continues in his service with notice of its danger, unless he has induced the servant to do so by an express or implied promise. In *Way v. Illinois Central R. R. Co.*, *supra*, it was held error to refuse an instruction containing this clause: 'If a brakeman on a railroad knows that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risks of such defects.' This, we think, implies that there must be a promise either in express words or arising by fair implication from the conduct of the master. Going back to the case of *Kroy v. Chicago &c. R. R. Co.*, *supra*, we find that the principle upon which the subsequent decisions rest, for they are all built upon that case, it was there said: 'Another important modification of the liability of a master for an injury to an employé, which is sustained by an almost unbroken current of authority in this country and in England is, that if a servant knows that a fellow servant is habitually negligent, or that the materials with which he works are defective, and continues his work without objecting, and without being induced by his master to believe that a change will be made, he is deemed to have assumed the risks of such defects. This ruling certainly does not sustain the appellee's contention that if an objection and protest are made the master becomes liable. The case of *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, cannot be regarded as in point upon this question, nor can the case of *Indiana Car Co. v. Parker*, 10 Ind. 181, for both of these cases simply affirm the general rule, that it is the duty of the master to provide his servants with a safe working place, and with safe machinery and appliances.

In *Patterson v. Pittsburg &c. R. R. Co.*, 76 Pa. St. 389, there was an express promise on the part of the master, and that fact gives a controlling force to the decision there made. We are referred to Dr. Wharton's statement that 'In this

UNLESS DANGER IS SUCH THAT ORDINARY PRUDENCE WOULD REFUSE TO RISK IT. country the exception has been still further extended, and we have gone so far as to hold that a servant does not, by remaining in his master's employ, with knowledge of defects in machinery he is obliged to use, assume the risks attendant on the use of such machinery, if he has notified the employer of such defects, or protested against them in such a way as to induce a confidence that they will be remedied.' Wharton Neg. (1st ed.), sec. 221.

If it were conceded that this is a correct statement of the law, still, it would not supply a premise for the conclusion that an objection or protest exempts the servant from the general rule that he assumes the risk, for it is implied that something must be done by the master to induce the belief that the defect will be remedied, and it is difficult to conceive what other thing than a promise, express or implied, can be regarded as sufficient to induce such a belief. We find on examining the later edition of Dr. Wharton's book, that he adds to what is copied from the earlier edition by counsel, these words: 'Such confidence being based on the master's engagements, either express or implied,' and modifies the statement in other respects. Wharton Neg. (2d ed.), sec. 220.

This author is, indeed, inclined to condemn the exception to the general rule, even as he states it, for he says: 'The only ground on which the exception before us can be justified is, that in the ordinary course of events the employé, supposing the employer has righted matters, goes on with his work without noticing the continuance of the defect. But the reasoning does not apply, as we have seen, to cases where the employé sees that the defect had not been remedied, and intelligently and deliberately continues to expose himself to it.' Wharton Neg. (2d ed.), sec. 220.

The rule which we regard as sound in principle and supported by authority may be thus expressed: The employé who continues in the service of his employer after notice of a defect augmenting the danger of the service, assumes the risk as increased by the defect, unless the master expressly or impliedly promises to remedy the defect. The promise of the master is the basis of the exception. If the promise be absent the exception cannot exist. In support of our conclusion we refer to these authorities: *Russell v. Tillotson*, 140 Mass. 201; *Linch v. Sagamore Man. Co.*, 143 id. 206; *Hatt v. Nay*, 144 id. 186; *Buzzell v. Luconia Man. Co.*, 48 Me. 113 (77 Am. Dec. 212, 218, and authorities, n); *Galveston &c. R. Co. v. Drew*, 59 Tex. 10 (46 Am. R. 261); *Webber v. Piper*, 38 Hun, 353 (33 Alb. L. J. 64); *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Wood's Master & Servant*, 21; *Beach Cont. Neg.* 372.

The rule absolving the servant from the assumption of risks is an exception to the general rule, for the general rule is that the servant does assume all the ordinary risks of the service he enters. There must, therefore, be some ground for the exception, and the only solid ground that can be found is the inducement held out by the agreement of the master. If this be not so, then an employé at his first entrance into the service might object and protest, and successfully claim that he was exempt from the perils of the service. Or, if our theory be not sound, a mere complaint or objection might, in effect, overturn the general rule, and this would result in confusion and uncertainty. We can see no way to hold that the servant is exempt from the known risks of his service where there is no express or implied contract on the part of the master, without completely nullifying the general rule. The servant is at liberty to quit the service, and if he remains after knowledge of its danger, he assumes the risks, even though he may object or complain, unless he is induced to continue by a promise of the master to remove

remove the cause that augments the danger, since, if this be not true, it must be true that any objection or complaint made at any time will absolve him from the risk, and this conclusion cannot be sustained. As the exception concedes and tries the general rule, it cannot be allowed to destroy it, for if it were allowed to do this, it would cease to be an exception. *Sweeney v. Berlin &c. Co.*, 101 N. Y. 520. * * *

We do not depart from the rule that an employer is bound to use ordinary care to provide a safe working place and safe appliances for his employ  s, but we do hold that the rule cannot apply to such a case as this. The rule itself we regard as firmly settled. *Indiana Car Co. v. Parker*, *supra*; *Krueger v. Louisville &c. R. W. Co.*, 111 Ind. 51; *Pennsylvania Co. v. Whitcomb*, id. 212.

It is the application of the rule as made by the appellee, and not the principle it asserts, that we deny. The rule asserts that the machinery and appliances must be kept safe as against those who do not know of their unsafe condition, but does not apply to those who know of their unsafe condition, and still continue in the service without being induced to do so by the employer's promise.

The employ   has a right, until he acquires knowledge of danger, or by reasonable care might acquire such knowledge, to act upon the assumption that his employer will use ordinary care to provide safe appliances; but when he becomes fully informed of the danger, he can no longer act upon this assumption. Knowledge on his part puts an end to his right to assume that the master has done his duty. It is manifest that one who knows that a duty has not been performed cannot reasonably assert that he acted upon the assumption that it had been performed. The case, therefore, falls within the rule that the employ   assumes the risks of all the dangers of which he had knowledge. *Pennsylvania Co. v. Whitcomb*, *supra*; *Indiana &c. R. W. Co. v. Dailey*, 110 Ind. 75; *Lake Shore &c. R. W. Co. v. Stupak*, 108 id. 1; *Umbach v. Lake Shore &c. R. Co.*, 83 id. 191.

Where there is a promise to repair which induces the employ   to continue in the service, then, doubtless, he may, for a reasonable length of time, rely on the promise and continue in the service, unless the danger of continuance, without a removal of the cause of it, is so great that a reasonably prudent man would not assume it. *Hough v. Railway Co.*, 100 U. S. 213; *Loonam v. Brockway*, 3 Rob. (N. Y.) 74; *Illinois Central R. R. Co. v. Jewell*, 46 Ill. 99; *Crichton v. Keir*, 1 C. Sess. Cas. (3d series), 407.

Some of the cases go further and assert that the promise of the employer exonerates the employ   entirely, even though the continuance of the service is known to him to be constantly and immediately dangerous. *Ft. Wayne &c. R. R. Co. v. Gildersleeve*, 33 Mich. 133. We are not inclined to adopt this view. Our opinion is that if the service cannot be continued without constant and immediate danger, and the danger and its character are fully known to the employ  , he assumes the risk if he continues in the service. It is a fundamental principle in this branch of jurisprudence, that one who voluntarily incurs a known and immediate danger is guilty of contributory negligence, and we are unable to perceive why a promise should relieve a party injured through his own contributory fault. If the danger is not great and constant, then such a promise may well be deemed to relieve him; but where it is great and immediate, and is of such a nature that a prudent man would not voluntarily incur it, a promise does not nullify or excuse the contributory negligence. Even if there be a promise by the employer, the employ   must not subject himself to a great and evident danger, since this he cannot do without participating in the employer's fault. The community have an interest in such questions, and that interest requires that all per-

UNLESS DANGER IS SUCH THAT ORDINARY PRUDENCE WOULD REFUSE TO RISK IT. sons should use ordinary care to protect themselves from known and certain danger. A man who brings about his own death or serious bodily injury, sins against the public weal. All must use ordinary care to avoid known and imminent danger, although it is not the assumption of every risk that violates this rule. When the line of danger, direct and certain, is reached, there the citizen must stop, and he cannot pass it, even upon the faith of another's promise, if to pass it requires a hazard that no prudent man would incur. Proceeding upon a somewhat different line of reasoning, other courts have reached the same conclusion as that to which we are led. *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; *Crichton v. Keir*, *supra*; *Couch v. Steel*, 3 E. & B. 402. The general principle which rules here is strongly illustrated by the cases which hold that a passenger cannot recover for an injury received while acting in obedience to the directions of the conductor in whose charge he is, where obedience leads to a known danger which a prudent man would not voluntarily incur. *Lake Shore &c. R. R. Co. v. Pinchin*, 112 Ind 592; *Cincinnati &c. R. R. Co. Carper*, *id.* 26. If the rule prevails in such cases, much stronger is the reason why it should prevail in a case like this, where ordinary care is required of employer and employé alike, while in the class of cases referred to, the highest degree of practicable care is required of the carrier, and only ordinary care exacted of the passenger.

It is probably true that the promise of the employer when relied on by the employé, will rebut a presumption of contributory negligence in cases where the danger is not great and immediate, but this presumption yields whenever it appears that the employé voluntarily incurs a known and immediate danger of so grave a character that it would deter a reasonably prudent man from incurring it."

Master promised to repair a defect which caused an overheated bearing. Servant in charge of machinery, while attempting to cool bearing negligently caught his finger in cogs. No liability. *Gorman v. Des Moines Brick Man. Co.*, 99 Iowa, 257.

It is for the jury to say whether it is the exercise of ordinary care to continue work after promise to repair. *Taylor v. Star Coal Co.*, 110 Iowa, 40.

See, also, *Harris v. Hewitt*, 64 Minn. 54; *Curran v. Stange Co.*, 98 Wis 598.

If servant give notice of defect in machinery and master promises to repair, servant may recover for injuries, at least, when master asks him to continue and *injury occurs before time within which remedy was promised*, and defect was not of such a kind as would preclude a man of ordinary prudence from using it longer. *Greene v. Minneapolis &c. R. Co.*, 31 Minn. 248.

Holmes v. Clarke, 6 Hurl. & N. 249; *Hough v. R. Co.*, 100 U. S. 213; *Patterson v. Pittsburg &c. R. Co.*, 76 Pa. St. 389; *Laning v. N. Y. C. R. Co.*, 49 N. Y. 521; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Holmes v. Worthington*, 2 Foster & F. 533; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Greenleaf v. Ill. C. R. Co.*, 29 Iowa, 14; *Cooley on Torts*, 559; *Shearman & Redfield on Neg*, sec. 96; *Thompson on Neg* 1009, 1010; *Woods' Master & Servant*, sec. 378.

WHAT CONSTITUTES REASONABLE TIME.

The following extract is a contribution to the subject:

Hough v. Railway Co., 100 U. S. 213 (224, 225).

From opinion.—"If the engineer, after discovering or recognizing the defective condition of the cow-catcher or pilot, had continued to use the engine, without giving notice thereof to the proper officers of the company, he would undoubtedly have been guilty of such contributory negligence as to bar a recovery, so far as such defect was found to have been the efficient cause of the death. He would be held, in that case, to have himself risked the dangers which might result from the use of the engine in such defective condition. But 'there can be no doubt that, where a master has expressly promised to repair a defect, the servant can recover for an injury thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and, as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept.' *Shearman & Redf. Negligence*, sec. 96; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Patterson v. P. & C. R. W. Co.*, 76 Pa. St. 389; *Le Clair v. The First Division of the St. Paul & Pacific Railroad Co.*, 20 Minn. 9; *Brabbits v. R. W. Co.*, 38 Mo. 289. 'If the servant,' says Mr. Cooley, in his work on Torts, 559, 'having a right to abandon the service because it is dangerous, refrains from doing so in consequence of assurances that the danger shall be removed, the duty to remove the danger is manifest and imperative, and the master is not in the exercise of ordinary care unless or until he makes his assurances good. Moreover, the assurances remove all ground for the argument that the servant, by continuing the employment, engages to assume the risks.'

And such seems to be the rule recognized in the English courts. *Holmes v. Worthington*, 2 Fos. & Fin. 533; *Holmes v. Clarke*, 6 H. & N. 937; *Clarke v. Holmes*, 7 id. 937. We may add, that it was for the jury to say whether the defect in the cow-catcher or pilot was such that none but a reckless engineer, utterly careless of his safety, would have used the engine without it being removed. If, under all the circumstances, and in view of the promises to remedy the defect, the engineer was not wanting due care in continuing to use the engine, then the company will not be excused for the omission to supply proper machinery, upon the ground of contributory negligence. That the engineer knew of the alleged defect was not, under the circumstances, and as matter of law, absolutely conclusive of want of due care on his part. *Ford v. Fitchburg Railroad Co.*, 110 Mass. 261; *Laning v. N. Y. C. Railroad Co.*, 49 N. Y. 521."

Plaintiff was promised a safe ladder, but continued in employment and was injured by ladder slipping from want of spikes to make it secure. No liability. *Corcoran v. Milwaukee R. Co.*, 81 Wis. 191.

Goltz v. M. & C. R. Co., 79 Wis. 136; *Hoth v. Peters*, 55 id. 405; *Peschel v. C. & C. R. Co.*, 62 id. 338.

Plaintiff continued to use a cracked circular iron saw after promise to repair. He assumed the risk. *Erdman v. Illinois Steel Co.*, 95 Wis. 6.

2. WHAT CONSTITUTES REASONABLE TIME.

Two or three days was not an unreasonable length of time to wait for the master to fulfill his promise to repair the track of an iron truck in a mill. *Ray v. Diamond State Steel Co.*, 2 Penn. (Del.) 525.

CHARACTER OF PROMISE.

Promise to fix an engine "that night," repeated on two successive days construed to mean as soon as possible, without absolute limitation of time. *Illinois C. R. Co. v. Creighton*, 63 Ill. App. 165.

The test as to the reasonableness of time refers not to the time required to make repairs, but to the reliance on the fulfillment of the promise. *Illinois Steel Co. v. Mann*, 67 Ill. App. 66.

The suspension of risk begins as soon as the promise to repair is made. *McFarlan Carriage Co. v. Potter*, 153 Ind. 107; aff'g s. c., 21 Ind. App. 692.

Where servant continued for six days with reasonable cause to believe that promise to repair would be fulfilled he did not assume the risk simply because the repair could reasonably have been made in less time. *Daugherty v. Midland Steel Co.*, 23 Ind. App. 78.

What is reasonable time is a question for the jury. *Atchison & C. R. Co. v. Lannigan*, 56 Kan. 109.

See, also, *Smith v. Backus Lumber Co.*, 64 Minn. 447.

An experienced machinist worked with machine for a long time with knowledge of defect and when he finally explained it to the foreman was told that it would be fixed in due course. Held error not to direct for defendant. *Hayball v. Detroit & C. R. Co.*, 114 Mich. 135.

Two weeks held not unreasonable as matter of law, though previous promise had been broken. *Meyer v. Gundlach-Nelson Man. Co.*, 67 Mo. App. 389.

Suspension continues so long as servant has reasonable ground to expect that the promise will be fulfilled. *Texas & C. R. Co. v. Bingle*, 91 Tex. 287.

Promise to repair in a short time, covered an injury within twenty minutes. *Virginia & C. Wheel Co. v. Chalkley*, 98 Va. 62.

Engineer failed for two hours to fulfill his promise to the fireman to provide the necessary shield to a glass lubricator indicator and the train started without it. Fireman held to have assumed the risk. *Albrecht v. Chicago & C. R. Co.*, 108 Wis. 530.

3. CHARACTER OF THE PROMISE.

It is unnecessary in order to rely on a promise that a time for performance should be fixed; specified time not necessary; a reasonable time will be presumed. *Swift & Co. v. Madden*, 165 Ill. 41; aff'g s. c., 63 Ill. App. 341.

It need not be to repair immediately. *McCormick Harvesting Mach. Co. v. Sendzikowski*, 72 Ill. App. 402.

Promise to repair machinery as soon as "present order" is run out,

WHO MUST GIVE IT.

did not warrant waiting for such a length of time. *Standard Oil Co. v. Helmick*, 148 Ind. 457.

Servant complained of rusty condition of rope, and remarked, "Why not get a new one." Master replied "That might do," but assured him the rope was safe, and had been guaranteed for five years and used but one. Held not a promise to supply new rope. A promise to renew, unlike a promise to repair, does not suspend assumption of risk. *Purcell Mill & Co. v. Kirkland*, (Ind. Terr.) 47 S. W. Rep. 311.

Servant held not entitled to rely on a promise to do what there was no duty to do. *Branstrator v. Keokuk & C. R. Co.*, 108 Iowa, 377.

A servant cannot rely upon a foreman's opinion that a defect does not exist. *Engel v. Standard Lighting Co.*, 12 Oh. C. C. 489.

An indefinite promise to repair a defect not inducing continuance in employment, did not suspend assumption of risk. *Brewer v. Tennessee Coal & C. Co.*, 97 Tenn. 615.

A promise to supply an additional appliance, like a promise to repair an existing defect suspends assumption of risk. *Homestake Min. Co. v. Fullerton*, 69 Fed. Rep. 923.

4. WHO MUST GIVE IT.

Servant was not justified in relying on promise of foreman not charged with keeping machinery in order. *Thomas v. Bellamy*, 126 Ala. 253.

Promise by foreman in charge of work of the department, held binding on master. *Ray v. Diamond State Steel Co.*, 2 Penn. (Del.) 525.

Promise of engineer that new floors would be laid in the engine room did not bind master. *Nealand v. Lynn & B. R. Co.*, 173 Mass. 42.

Servant, working in place known to him to be unsafe, cannot relieve himself from assumption of risk by showing promise to make place safe by one other than his master, unless such person had authority to have done whatever was necessary to be done to make the place safe. *Ehmcke v. Porter*, 45 Minn. 338.

Superintendent of department may make promise to repair. Where track was dangerous and conductor had reported same to superintendent, who had promised to repair it and requested servant to continue, evidence to such effect was admissible. *Patterson v. Pittsburg R. Co.*, 76 Pa. St. 389.

Promise to box a shaft coupling with a projecting screw was within the scope of the authority of a mine foreman; a failure of the servant to box it himself did not impose on him an assumption of the risk. *Homestake Mine Co. v. Fullerton*, 69 Fed. Rep. 923.

From opinion.—"One instruction asked by the defendant requested the court to declare in substance that it was the duty of the plaintiff himself to have boxed

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the coupling if he considered it dangerous, and if he could have boxed it in connection with the discharge of his other duties, and that by failing to do so assumed the risk of getting hurt. No error was committed in refusing this request. The work of boxing the coupling pertained to the carpenter department. The foreman Wreweek recognized that fact when the danger was pointed out to him, by promising to send the carpenters to cover it. The plaintiff, we think, was under no obligation to turn aside from his ordinary duties and construct the box to cover the coupling especially after the foreman's attention was called to the alleged defect and he had promised to send the carpenters to cover it; and he cannot be said to have assumed the risk of injury because he failed to do it. The danger complained of could not be remedied by merely driving a nail or inserting a screw to remedy tool or appliance more secure, but it involved the selection of materials and expenditure of some labor and skill to wholly obviate the danger."

Servant held not to have assumed the risk from obvious dangers while relying for a reasonable time on promise of superintendent of a corporation to repair, though he had no actual authority to make the promise. *Barney Dumping &c. Co. v. Clark*, 112 Fed. Rep. 921; aff'g s. c., 109 id. 255.

See, also, *Dells Lumber Co. v. Erickson*, 80 Fed. Rep. 257.

(d). BUT NOT RELIEVED WHERE HE CHOOSES TO REMAIN IN THE FACE OF DANGER.

When the servant knows that implements are of a certain kind and condition, he takes the risk; a master may, under such circumstances, discharge a servant who refuses to use such machinery, and a threat to do so is no coercion. *Sweeney v. Berlin & J. E. Co.*, 101 N. Y. 520, rev'g judg't for pl'ff.

From opinion.—"The general rule is that the servant accepts the service, subject to the risks incidental to it, and where the machinery and implements of the employer's business are at that time of a certain kind or condition, and the servant knows it, he can make no claim upon the master to furnish other or different safeguards. *DeForest v. Jewett*, 88 N. Y. 264, where a car-coupler stepped into a sluice in defendant's yard and was run over; *Hayden v. Smithville Man. Co.*, 29 Conn. 548, where an employé in a mill received an injury to his hand by being caught in the gearing of a spring frame. In *Gibson v. Erie Railway Co.*, 63 N. Y. 449, the last case is cited with approval, and the rule applied where an employé was killed by a projecting roof. Under such circumstances, the servant is regarded as voluntarily taking the risks resulting from the use of the machinery, unless, as is said, the master by urging on the servant, or coercing him into danger, or in some other way, directly contributes to the injury, or assumes the risk. *Kain v. Smith*, 89 N. Y. 375, and *Hawley v. Northern Central Railway Co.*, 82 id. 370, cited by respondent, went upon that ground, and although in one the tool was defective, and in the other, the road-bed out of repair, negligence was not imputed to the servant."

A seaman on one of the defendant's vessels was commanded to operate

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a winch the operation of which was known to him to be dangerous on account of defects, but he obeyed the order because he knew that disobedience would result in punishment, and he was injured. It was held by a divided court that the plaintiff had to choose between present punishment with a possible hope of remote justification, and a customary obedience to orders with the hope that by care he would escape injury, and that although he made a mistake in judgment under such difficult conditions the law did not adjudge it to be negligence *per se* and the refusal of the jury to do so was not error. *Eldridge v. Atlas S. S. Co.*, 134 N. Y. 187; affirming 58 Hun, 96, and judg't for pl'ff.

S. C., 55 Hun, 309.

It is the duty of employer not to expose servant to perils not within those commonly known to be incidental to the service he is to perform. If servant discovers that service from any cause has become more hazardous than anticipated, he must quit the service or assume the extra risk. *Missouri F. Co. v. Abend*, 107 Ill. 44.

Where a servant has the alternative of continuing to work with the unsafe appliance, or leaving, he cannot complain, when he chooses the former. *Lamson v. American Axe &c. Co.*, 177 Mass. 144.

Fear of being discharged is no defense to assumption of risk from a continuance of work in face of a known danger. *Orr v. Southern Bell Tel. &c. Co.*, 130 N. C. 627.

VI. Risks Incidental to Employment.

(a). MASTER IS NOT LIABLE FOR INJURY FROM RISKS INCIDENTAL TO EMPLOYMENT.

An employé in the service of a railroad corporation, assumes the risks and dangers incident to the business in which he is engaged, and while the company is bound to furnish suitable and safe machinery and appliances for his use, having done so, it is not liable for an injury resulting from their breaking or failure, unless it is shown that the corporation has been guilty of negligence in regard thereto.

The fact that the employé is a minor does not, if he is of age sufficient and is competent for the service in which he is employed, affect the duty or liability of the corporation in this particular; the risks are an element of the employment, and the employé cannot claim, on account of infancy, to be relieved from the consequence of such risks. *De Graff v. N. Y. Central &c. R. Co.*, 76 N. Y. 125, rev'g judg't for pl'ff.

A servant who enters into an employment which is hazardous assumes the usual risks of the service, and those which are apparent to ordinary

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observation. If he accepts service with knowledge of the character and position of machinery, appliances and place where he is to do his work, he takes the risk of such perils as are incident to their use in their present condition and are apparent, and cannot call upon the master to make alterations to secure greater safety. (*Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *De Forest v. Jewett*, 88 id. 264; *Powers v. N. Y., L. E. & W. R. Co.*, 98 id. 274; *Sweeney v. Berlin & Jones Envelope Co.*, 101 id. 520; *Anthony v. Leeret*, 8 N. Y. St. Rep. 542; *Hickey v. Taafe*, 105 N. Y. 26; *Williams v. D., L. & W. R. Co.*, 116 id. 628; *Davidson v. Cornell*, 132 id. 228.) *Spencer v. N. Y. C. R. Co.*, 67 Hun, 196.

The deceased, for several years employed as a track repairer, returning to the tool house on the tracks, in the night time bearing a lantern, was struck and killed by a slowly moving coal car on a switch track, which at that moment he attempted to cross. As usual, there was no light and no warning was given, with which practice the deceased was familiar. It did not appear that he looked to see if the car was approaching before attempting to cross the particular track upon which it was. A nonsuit on the ground of lack of proof of defendant's negligence and of freedom from contributory negligence was proper. This was a risk of the employment. *Crowe v. N. Y. C. & C. R. Co.*, 70 Hun, 37, aff'g nonsuit.

Telephone lineman assumes risk incident to use of the dangerous implements or unsafe places of his position. *McGorty v. Southern & C. Teleph. Co.*, 69 Conn. 635.

Linton Coal & C. Co. v. Persons, 15 Ind. App. 69.

And he is bound to take notice of the operation of the usual physical laws involved. *Worlds v. Georgia R. Co.*, 99 Ga. 283.

Swanson v. Great Northern R. Co., 68 Minn. 184; *Noble v. Jones*, 103 Ga. 584.

Servants assume such patent risks as are ordinarily incident to the business and such latent ones as are known to them. *Chielinsky v. Hoopes & C. Co.*, 1 Marv. (Del.) 273.

Illinois C. R. Co. v. Swisher, 74 Ill. App. 164.

But only such as are ordinarily incident to the employer's known manner of conducting the business. *Colson v. Craver*, 80 Ill. App. 99.

And such as have not been increased by the master's negligence. *Western Stone Co. v. Musial*, 85 Ill. App. 82.

Maltson v. Qualey Const. Co., 90 Ill. App. 260.

Risks incident to conditions of the weather are assumed. *Martin v. Chicago & C. R. Co.*, (Iowa) 87 N. W. Rep. 654.

Master's duty as to safety held inapplicable to dangers incident to the

employment. *Wahlquist v. Maple Grove Coal &c. Co.*, (Iowa) 89 N. W. Rep. 98.

Moon &c. Mines v. Hopkins, 111 Fed. Rep. 298.

Assumption of risks does not include such as may be prevented by the exercise of ordinary care by master. *Rhoades v. Varney*, 91 Me. 222.

Servant assumes risks and perils usually incident to his employment among which are such as it is his duty to take knowledge of by observation. *Illick v. Flint &c. R. Co.*, 67 Mich. 632.

St. Louis &c. R. Co., v. Tuohey, 67 Ark. 209; *Baltimore &c. R. Co. v. Welsh*, 17 Ind. App. 505; *Baltimore &c. R. Co. v. Amos*, 20 id. 378; *Bland v. Shreveport Belt R. Co.*, 48 La. Ann. 1057; *Stucke v. Orleans R. Co.*, 50 id. 172; *Moffet v. Koch*, 106 La. 371; *Journeaux v. Stafford Co.*, (Mich.) 81 N. W. Rep. 259; *Allen v. Boston & M. R. Co.*, (N. H.) 39 Atl. Rep. 978; *Ortlip v. Philadelphia &c. Traction Co.*, 9 Pa. Dist. 291; *Auburn v. National Tube Works Co.*, 14 Pa. Super. Ct. 568.

Servant assumes ordinary risks of the business so far as those risks are known to him, or should be readily discoverable by a person of his age and capacity, in the exercise of ordinary care. *Balle v. Detroit Leather Co.*, 73 Mich. 158.

Citing *Swoboda v. Ward*, 40 Mich. 423.

See, also, *Peterson v. New Pittsburg Coal &c. Co.*, 149 Ind. 260; *Foster v. Kansas Salt Co.*, 60 Kan. 859; *Cherokee & P. Coal M. Co. v. Britton*, 3 Kan. App. 292; *Jones v. Manufacturing &c. Co.*, 92 Me. 565; *Union Stock Yards Co. v. Goodwin*, 57 Neb. 138; *Chicago &c. R. Co. v. Sonderberg*, 50 id. 674; *Osborne v. Lehigh Valley Coal Co.*, 97 Wis. 27.

Servant is negligent in engaging in dangerous work when it cannot be performed even carefully without great risk of injury. *Cogdell v. Southern R. Co.*, 129 N. C. 398.

All the risks ordinarily inherent in a hazardous business are assumed. *Cleveland &c. R. Co. v. Kernochan*, 55 Oh. St. 306.

Weeks v. Sharer, 111 Fed. Rep. 330.

Risk of all such defects as the master could not, with reasonable care discover, are assumed. *Stewart v. Toledo Bridge Co.*, 15 Oh. C. C. 601.

Where the machine is perfect in its construction and operation, a servant cannot complain because its operation involves danger. *National Malleable Castings Co. v. Luscomb*, 19 Oh. C. C. 673.

Servants assume all risks incident to the operation of machinery in repair. *Record v. Chickasaw Cooperage Co.*, (Tenn.) 69 S. W. Rep. 334.

Only those risks are assumed that are ordinary. *Texas &c. R. Co. v. Eberheart*, 91 Tex. 321.

Waxahachie Cotton Oil Co. v. McLain, (Tex. Civ. App.) 66 S. W. Rep. 226; *Moore Line Co. v. Richardson*, 95 Va. 326. But see *Texas &c. R. Co. v. King*, 14 Tex. Civ. App. 290;

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And obvious. *Ft. Worth &c. R. Co. v. Kime*, 21 Tex. Civ. App. 271; s. c. aff'd, 54 S. W. Rep. 240.

Whether the service be hazardous or not. *Reese v. Wheeling &c. R. Co.*, 42 W. Va. 333.

Not those not ordinarily contemplated on entering the service. *Burke v. Anderson*, 69 Fed. Rep. 814.

Servant undertaking the duty of handling defective cars assumes the extra hazards from the defects. *Chesapeake &c. R. Co. v. Hennessey*, 96 Fed. Rep. 713.

The risks incident to service in the river trade are assumed. *Red River Line v. Smith*, 99 Fed. Rep. 520.

Risks incident to master's way of conducting his business no matter how that be, so long as it is reasonably safe, are assumed. *Bethlehem Iron Co. v. Weiss*, 100 Fed. Rep. 45.

Whether an extra hazard is assumed or not depends upon the special circumstances of the case. *Frank v. Bullion Beck &c. Co.*, 19 Utah, 35.

(b). WHAT RISKS HELD INCIDENTAL.

Railroads:

Locomotives and cars.—Liability of a break being defective, held not a risk incident to work of a railroad hand. *Hollingsworth v. Long Island R. Co.*, 91 Hun, 641.

But see *Windover v. Troy City R. Co.*, 4 App. Div. 202.

Risk of being overcome by the heat, held incident to oiling machinery over a boiler. *Stockwell v. Chicago &c. R. Co.*, 106 Iowa, 63.

Want of stakes or cleats on a car loaded with stone, held not *per se* a risk incident to the service of coupling. *Austin v. Fitchburg R. Co.*, 172 Mass. 484.

Southern P. Co. v. Johnson, 69 Fed. Rep. 559.

Where an air brake is ordinarily sufficient, engineer assumes the risk of its unaccountable failure to operate. *Whalen v. Michigan C. R. Co.*, 114 Mich. 512.

The breaking of a timber used as a lever sound and suitable will not render master liable; the fact that it was not large enough for the strain put upon it and might break was obvious to the person using it and was a risk incident to the business. *Bohn v. Chicago &c. R. Co.*, 106 Mo. 429.

A brakeman did not assume the risk of latent defects in a brake of a car. *Union Stock-yards Co. v. Goodwin*, 57 Neb. 138.

Risk of a defect in an engine that should have been discovered by the company and which the engineer did not have time to discover, held not to be assumed. *Missouri &c. R. Co. v. Durlin*, (Tex. Civ. App.) 50 S. W. Rep. 1034.

Risk of the fall of ties from a car by stopping it with a scantling was assumed. *Houston &c. R. Co. v. Martin*, 21 Tex. Civ. App. 207.

Risk of accumulation of grease on an engine step held not incident to work of cleaning the headlight. *Bookrum v. Galveston &c. R. Co.*, (Tex. Civ. App.) 57 S. W. Rep. 919.

Kerrigan v. Chicago &c. R. Co., (Minn.) 90 N. W. Rep. 976.

Increased hazard due to peculiar construction is assumed if the engine is otherwise ordinarily safe and free from defects. *Peirce v. Bane*, 80 Fed. Rep. 988.

Brakeman held to assume the risk incident to handling trains being made up of different sized cars unconnected by air brakes. *Rogers v. Louisville &c. R. Co.*, 88 Fed. Rep. 462.

Couplings.—Danger from meeting drawheads is one incident to coupling of cars. *Hannigan v. Lehigh &c. R. Co.*, 157 N. Y. 244; rev'g s. c., 91 Hun, 300.

Where the greater danger of a new coupling is obvious to one familiar with the ordinary device, the risk thereof is assumed. *Boland v. Louisville & N. R. Co.*, 106 Ala. 641.

One frequently required to couple cars whose drawheads were of different heights, held to have assumed the increased danger incident to one's being slightly higher than another. *Holmes v. Southern P. Co.*, 120 Cal. 357.

Hodges v. Kimball, 104 Fed. Rep. 745.

Brakeman assumed the risk of uncoupling cars upon being warned to be careful and instructed how to accomplish it. *Gorman v. Minneapolis &c. R. Co.*, (Iowa) 90 N. W. Rep. 79.

Zahn v. Milwaukee &c. R. Co., (Wis.) 89 N. W. Rep. 889.

Risk of cars moving while brakeman is executing a direction to repair a coupling, held not assumed. *Bowes v. New York &c. R. Co.*, (Mass.) 62 N. E. Rep. 949.

The dangers incident to an attempt to couple cars to an engine while standing upon the footboard of the latter, are assumed. *Puffer v. Chicago &c. R. Co.*, 65 Minn. 350.

A car coupler held to assume the risk in coupling foreign cars equipped with double deadwoods, though his own uses only single ones. *Chicago &c. R. Co. v. Curtis*, 51 Neb. 442.

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The question of whether a brakeman assumed the risk of coupling a car equipped with the link and pin device with another supplied with the Miller hook, was left to the jury. *Thompson v. Missouri P. R. Co.*, 51 Neb. 527.

Railroad employé assumed the risk of being caught between one car and the projecting load of another while coupling them. *Tucker v. Northern P. Co.*, (Or.) 68 Pac. Rep. 426.

A switchman required to select pins from those lying about the yard, held to run the risk of the insufficiency of one found lying on the draw-head. *Missouri &c. R. Co. v. Hauer*, (Tex. Civ. App.) 33 S. W. Rep. 1010.

Slipping on a defective guard rail while uncoupling, held not a risk incident to the service. *Curtis v. Chicago &c. R. Co.*, 95 Wis. 460.

Roadbed.—Trolley conductor, held not to assume the risk of the tracks being so near together as to prevent his collecting fares on the running board of the car with safety. *True v. Niagara Gorge R. Co.*, 70 App. Div. 383.

No recovery where brakeman, walking along a bridge in repair, on which train had stopped, fell through and was killed, this being a risk of the employment. *Koontz v. Chicago &c. R. Co.*, 65 Iowa, 224.

“Low joints” in a track caused by the action of frost is an incident to railroading. *Atchison &c. R. Co. v. Croll*, 3 Kan. App. 242.

A switchman in coupling cars is not required to assume the risk of a large clinker being thrown with ashes on the track. *Louisville &c. R. Co. v. Vestal*, (Ky.) 49 S. W. Rep. 204.

Brakeman assumed the risk in coupling on an unballasted side track. *Louisville &c. R. Co. v. Bowcock*, (Ky.) 51 S. W. Rep. 580; s. c., 53 id. 262.

Acceptance of the risks incident to a badly equipped road, held not to impose the risk of negligent operation over dangerous places. *Wilson v. Louisiana &c. R. Co.*, 51 La. Ann. 1133.

By undertaking to push a car across a trestle one does not assume the risk from a defective plank therein. *Houlihan v. Connecticut River R. Co.*, 164 Mass. 555.

Where one's work takes him across a bridge he assumes the risk of its use by a derrick car. *Olsen v. Andrews*, 168 Mass 261.

Brakeman assumes risk of coupling at cattle guards. *Fuller v. Lake Shore &c. R. Co.*, 108 Mich. 690.

But he does not as matter of law assume the risk of the defective planking of a crossing. *Fluhrer v. Lake Shore &c. R. Co.*, (Mich.) 80 N. W. Rep. 23.

Where the brakeman in coupling is not aware of the steep grade of the track, he does not assume the risk. *Leonard v. Minneapolis &c. R. Co.*, 63 Minn. 489.

Risk in repairing culvert held to include a change in conditions during temporary absence, though there is no opportunity of inspecting on his return. *Kletschka v. Minneapolis &c. R. Co.*, (Minn.) 83 N. W. Rep. 133.

Where cinders on the track do not extend above the rails, a brakeman assumes the risk of stumbling while engaged in making a coupling. *Houston &c. R. Co. v. Smith*, (Tex. Civ. App.) 38 S. W. Rep. 51; s. c., 38 id. 985.

Risk of a sliver being detached from the rail, is not assumed. *San Antonio &c. R. Co. v. Williams*, (Tex. Civ. App.) 52 S. W. Rep. 89.

Switchman in coupling held not as matter of law chargeable with any risk from a concealed pile of ashes. *Kennedy v. Lake Superior Terminal &c. R. Co.*, 93 Wis. 32.

Obstructions near the track.—An oil box so near the track as likely to endanger the safety of a switchman while engaged about his duty, held not an ordinary risk. *Louisville &c. R. Co. v. Bouldin*, 121 Ala. 197.

Risk of trees being allowed to project dangerously near the track, is not assumed. *Pittsburg &c. R. Co. v. Parish*, (Ind. App.) 62 N. E. Rep. 514.

A mail crane is an ordinary obstruction unless it was placed unnecessarily near the track. *Louisville &c. R. Co. v. Milliken*, (Ky.) 51 S. W. Rep. 796.

International &c. R. Co. v. Stephenson, 22 Tex. Civ. App. 220.

Switches are within the ordinary risk. *Dacey v. New York &c. R. Co.*, 168 Mass. 479.

A telegraph pole, so placed as likely to cause injury, is not. *Whipple v. New York &c. R. Co.*, 19 R. I. 587.

Nor is the projecting roof of an oil house. *Gulf &c. R. Co. v. Darby*, (Tex. Civ. App.) 67 S. W. Rep. 446.

See however in case of new brakeman, *Fitzgerald v. New York &c. R. Co.*, 37 App. Div. 127.

Switches.—Employé in freight yard held to have assumed the risk of the frog of a switch being unblocked. *Illinois C. R. Co. v. Campbell*, 170 Ill. 163; rev'g s. c., 58 Ill. App. 275.

Banks v. Georgia R. &c. Co., 112 Ga. 655.

Risks assumed do not *per se* include the leaving of a switch open at night without switch lights. *Chicago &c. R. Co. v. House*, 172 Ill. 601; aff'g s. c., 71 Ill. App. 147.

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A switchman does not in coupling cars assume the risk of guard rails being insufficiently blocked. *Curtis v. Chicago &c. R. Co.*, 95 Wis. 460.

Operation and construction.—Risk of rails rebounding when thrown on other rails is incident to such work. *Bichert v. Reed*, 20 App. Div. 635.

The jerking or sudden stopping of a car must have been unusual to put it beyond the ordinary risks of a switchman. *Louisville &c. R. Co. v. Smith*, 129 Ala. 553.

Shields v. Kansas City R. Co., 87 Mo. App. 637.

An employé does not assume the risks of dangers due to the negligent operation of a train or to defects in the engine. *Highland Ave. &c. R. Co. v. Miller*, 120 Ala. 535.

He assumes the risk of closing without notice, the opening between cars, in the course of switching operations. *Plunkett v. Central of Georgia R. Co.*, 105 Ga. 203.

Where an engineer did not know that the track was not fenced, he took no risk of a cow's getting on the track by reason thereof. *Terre Haute &c. R. Co. v. Williams*, 172 Ill. 379; aff'g s. c., 69 Ill. App. 392.

Brakeman was chargeable with the risk of a car being off the track where it was his duty to see that it was properly on it. *Chicago &c. R. Co. v. Driscoll*, 176 Ill. 330.

So a flagman chargeable with the flagging of all trains was not allowed to complain of injuries from one which failed to give the statutory signals. *Ruane v. Lake Shore &c. R. Co.*, 64 Ill. App. 359.

Operators of hand car assume the risk of collision with a train. *Chicago &c. R. Co. v. Goltz*, 71 Ill. App. 414.

One charged with the duty of cleaning snow from switches runs the risk of injury from the operation of trains thereon. *Chicago &c. R. Co. v. Maloney*, 77 Ill. App. 191.

Risk of derailment in using the uncompleted track for the purpose of transporting materials, held one incident to railroad construction. *Evansville & R. R. Co. v. Henderson*, 142 Ind. 596.

Violation of an ordinance as to speed is not an incidental risk. *Pittsburg &c. R. Co. v. Moore*, 152 Ind. 345.

Switchman, to avoid plunging horses in front, stepped back into a trailer passing in the rear. Held to be a danger incident to his situation. *Thompson v. Citizens' Street R. Co.*, 152 Ind. 461.

Risk from trains known to run at excessive speed is assumed. *Martin v. Chicago &c. R. Co.*, (Iowa), 87 N. W. Rep. 654.

Ditch digger along a track held not to assume the risk of a piece of coal

falling from an overloaded tender. *Crall v. Atchison &c. R. Co.*, 57 Kan. 548.

Handler of cars on repair tracks for purposes of repair, assumes the risks of defects. *Brown v. Chicago, R. I. &c. R. Co.*, 59 Kan. 70.

Chesapeake &c. R. Co. v. Hennessey, 96 Fed. Rep. 713.

An employé held not to assume the risk of derailment caused by running a work train so rapidly over an uneven track as to rock off a tie. *Wilson v. Louisiana &c. R. Co.*, 51 La. Ann. 1133.

Risk of negligence of fellow-servant assumed. Dirt trains were made up with cars without brakes. *Maryland &c. R. Co. v. Goodnow*, (Md.) 51 Atl. Rep. 292.

Risks incident to the customary mode of making up trains by setting in cars from both ends of the yard at the same time on the same track, held not to include the risk of collision due to dangerous speed in so doing. *Caron v. Boston &c. R. Co.*, 164 Mass. 523.

Employé held not to assume the risk of running rapidly over a switch on a rough road and coming to a sudden stop. *Coughlan v. Cambridge*, 166 Mass. 268.

An employé loading gravel, assumes the risk of its caving where it forms an almost perpendicular bank 20 feet high. *Reiter v. Winona & C. R. Co.*, 72 Minn. 225.

Danger of poles being unsafe held a risk incident to their replacement. *Broderick v. St. Paul City R. Co.*, 74 Minn. 163.

Iceiness of steps caused by the dripping of melted snow from a roof during the day time unknown to the night foreman held not a danger necessarily incident to his employment. *Harding v. Railway Transfer Co. &c.*, (Minn.) 83 N. W. Rep. 395.

Laborer killed while inspecting car, by the switching of another car, assumed the risk. *Hallihan v. Hannibal &c. R. Co.*, 71 Mo. 113.

Danger from use of a wide gauge car on a narrow gauge track was assumed by engineer. *Minner v. Sedalia &c. R. Co.*, 167 Mo. 99.

Where the service includes transportations, negligence of employés in charge of trains, is an ordinary hazard thereof. *Benignia v. Pennsylvania R. Co.*, 197 Pa. St. 384.

Risk of stepping in front of a train on one track while trying to avoid a train on another track, held incident to the vocation of a track walker. *Palko v. Central R. &c.*, 9 Kulp, 550.

A switchman, in making a coupling, held not to assume the risk of having other cars set against his while he is engaged between the cars. *Missouri &c. R. Co. v. Crane*, 13 Tex. Civ. App. 426.

Risk of negligence of engineer not assumed. Employé was assisting in loading the tender of an engine with coal when the engineer permitted

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the engine to move. *Missouri &c. R. Co. v. Felts*, (Tex. Civ. App.) 50 S. W. Rep. 1031.

Where an unexploded blast was left in a gravel bed, an employé, ignorant of its presence, did not assume the risk thereof. *Burke v. Anderson*, 69 Fed. Rep. 814.

Derailment of a train by horse coming unexpectedly upon the track, is one of the dangers a switchman must encounter. *Bowes v. Hopkins*, 84 Fed. Rep. 767.

One walking down a track at night along which empty cars are expected to pass by gravity assumes the risk of being struck. *Osborne v. Lehigh Valley C. Co.*, 97 Wis. 27.

Negligent construction of a semaphore was not assumed. *Welty v. Lake Superior Terminal &c. Co.*, 100 Wis. 128.

Factories, mills and machine shops:

An employé engaged as a carpet weaver, was injured by a wire flying out of a loom, which was accustomed to happen in spite of the greatest care. It was the weaver's duty to watch the wires, and if one broke to stop the loom and insert another. There was no proof of defective quality in the wires. The employé assumed the risks. *Daly v. Alexander Smith & Sons Carpet Co.*, 69 Hun, 77, aff'g nonsuit.

Danger to health is a risk incident to employment in a white lead factory. *Berry v. Atlantic White-Lead &c. Co.*, 30 App. Div. 205.

Meany v. Standard Oil Co., (N. J. L.) 47 Atl. Rep. 803.

Risks attending the use of dangerous machinery other than latent defects, the master knew or should have known of, are assumed. *Vilas v. Vanderbilt*, 20 Misc. 51.

The escape of steam from the boiler of a power house, held a risk incident to the work of hauling coal thereto. *Denver Tramway Co. v. O'Brien*, 8 Colo. App. 74.

Custom to leave a trap door open while in use imposed no assumption of risk of its being open while not in use. *Pullman Palace Car Co. v. Connell*, 74 Ill. App. 447.

A boiler inspector represented as being experienced, required to take the precautions necessary in the performance of the work. *Westville Coal Co. v. Milka*, 75 Ill. App. 638.

Deflection of rails is one of the ordinary occurrences in a rolling mill to be guarded against. *Inland Steel Co. v. Eastman*, 80 Ill. App. 59.

The risk of injury from negligence of competent fellow servants is assumed. *Rounds v. Carter*, 94 Me. 535.

It is presumed that master or foreman in charge of and conducting a

manufacturing business knows and is familiar with the dangers, latent and patent, ordinarily accompanying that business, and if there be any latent risk that a servant is, from ignorance or inexperience, incapable of understanding and appreciating, and which he would not be likely to know, the master should inform him. Servant should be informed of all extraordinary risks known, or that should be known, to the master.

Servant not expected to assume risks when knowledge of scientific facts is required. Servant was obliged to carry molten iron out doors; he slipped on ice and fell and the iron spilled on the ice and caused explosion. Master was liable. *Smith v. Peninsula Car Works*, 60 Mich. 501.

Davison v. Caswell, 132 N. Y. 234.

An assorter of rags in a paper mill, held not to assume the risk of poisoning from a noxious odor emitted by them. *Nickel v. Columbia Paper Stock Co.*, (Mo. App.) 68 S. W. Rep. 955.

A strip, nailed to the worn side of a pig lead elevator to protect it, held not to prevent the fall of a bar due to its being bent by the weight of the metal, from being an accident incident to the business. *Elliot v. Carter White Lead Co.*, 53 Neb. 458.

The unexpected and the unaccountable displacement of a bolt, causing a machine to move unexpectedly, held to be one of the contingencies covered by the service. *Coyle v. Griffing Iron Co.*, 62 N. J. L. 540; s. c. *aff'd*, 44 Atl. Rep. 665.

Mines, tunnels and excavations:

A blast in a quarry having exploded, the foreman directed one of the employés to drill a place some twenty feet distant. While he was so doing, the first fuse caught fire and the charge exploded causing the servant's death. Held, that the intestate took the risk of the employment and that, if the foreman were negligent in the distribution of the men, it was the negligence of a co-employé. *Cullen v. Norton*, 126 N. Y. 1, *rev'g judg't for pl'ff*.

Miller v. Western Stone Co., 61 Ill. App. 662.

Danger from unexploded dynamite in drill holes, an incident of blasting. *Hutchinson v. Parker Co.*, 39 App. Div. 133; s. c., *aff'd*, 169 N. Y. 579.

A ladder in a tunnel, where rock was excavated for an aqueduct, slipped and defendant's employé was killed by the consequent falling of a plank. The outgoing gang of excavators had placed the ladder on loose stones. The risk was incident to the employment. *Donnelly v. Brown*, 43 Hun, 470, *aff'g judg't for def't*.

WHAT RISKS HELD INCIDENTAL.

Risk of earth caving in was incidental to the work of excavating. *McCarthy v. Washburn*, 42 App. Div. 252.

Missouri &c. R. Co. v. Spellman, (Tex. Civ. App.) 34 S. W. Rep. 298; *Robinson v. Dininny*, 96 Va. 41. But see *McCoy v. Westboro*, 172 Mass. 504; *Hill v. Winston*, 73 Minn. 80.

On uncoupling a pipe that had been improperly laid, bent about a rock, deceased assumed the risk of its springing backward. *O'Sullivan v. Flynn*, 67 App. Div. 516.

Operator of steam shovel unconnected with the removal of the excavated material, held not subject to the risk of the place caving in. *Alton Paving &c. Co. v. Hudson*, 176 Ill. 270; aff'g s. c., 74 Ill. App. 612.

Fall of an improperly secured roof of a mine, held not one of the ordinary risks incident to the service. *Consolidated Coal Co. v. Scheiber*, 65 Ill. App. 304.

One takes the consequences in working near a pit by candle light. *McAleenan v. Myrick*, 68 Ill. App. 225.

A shot worker charged with the duty of pulling down loose coal after a blast held to assume the risk of the dangers naturally incident thereto. *Muddy Valley Min. &c. Co. v. Parrish*, 74 Ill. App. 559.

See, also, *Coal &c. Co. v. Nelson*, 87 Ill. App. 180; *Boemer v. Central Lead Co.*, 69 Mo. App. 601.

Quarryman held to assume the risk of the fall of earth and rocks from overhanging embankment and ledges. *Western Stone Co. v. Musial*, 85 Ill. App. 82.

Mielke v. Chicago &c. R. Co., 103 Wis. 1. But see *Peerless Stone Co. v. Wray*, 152 Ind. 27; *Collins v. Greenfield*, 172 Mass. 78.

Operation of dirt cars along a temporary track, necessarily uneven, held subject to the dangers incident to the use of the necessary appliances. *Mattson v. Qualey Construction Co.*, 90 Ill. App. 260.

Miner was injured by cars run in a passageway of a mine. It was a risk incident to the known use of the mine and one that was assumed. *Forbes v. Boone Valley Coal & R. Co.*, (Iowa) 84 N. W. Rep. 970.

Laborer held not to assume the risk from a tripod that was not only an improper appliance, but negligently used. *Powers v. Fall River*, 168 Mass. 60.

Risks incident to the dangerous method of removing earth by undermining the base and prying off the top, held not to embrace the risk of the master not prying off the overhanging dirt as fast as the excavation progressed. *Bradley v. Chicago &c. R. Co.*, 138 Mo. 293.

Miner does not assume the risk of master's failure to make the portion

of the tunnel completed safe. *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484.

A miner assumes the risk of the sudden presence of gas in a mine. *Sommers v. Carbon Hill Coal Co.*, 91 Fed. Rep. 337.

Building Operations:

Workmen in a building in course of construction does not necessarily assume risk of falling materials which he was usually protected against. *Pioneer Fireproof Const. Co. v. Howell*, 90 Ill. App. 122; s. c. aff'd, 189 Ill. 123.

Falling of shafting while being lowered is not a risk incident to the task. *Knight v. Overman Wheel Co.*, 174 Mass. 455.

Risk of tearing down a wall by beginning at the bottom is not as matter of law assumed. *Wolf v. Great Northern R. Co.*, 72 Minn. 435.

Rivet heater assumes the risk of passing to his platform over the bare stringers of the uncompleted building. *Dehning v. Detroit &c. Works*, 46 Neb. 556.

An employé unfamiliar with a rivet hammer, held not to assume the risk of its excessive liability to chip when cracked. *De La Vergne Refrigerating Mach. Co. v. Stahl*, (Tex. Civ. App.) 60 S. W. Rep. 319.

Buildings:

Liability of there being a hole in a cellar into which servant is sent is not a risk incident to the errand. *Eastland v. Clarke*, 165 N. Y. 420.

The deceased was engaged in grading a railway, while near by was an unfinished building. On the beam of the third story, were several posts, placed there to support the fourth story of the building, but the evidence did not show how they were fastened in position. One of them fell upon the deceased. Question of defendant's negligence was for the jury. As the deceased had no connection or knowledge of the building and he did not assume any risk with reference to it. *Mickee v. The Wood Mowing and Reaping Machine Co.*, 70 Hun, 456, rev'g nonsuit.

Fall of hammer into elevator shaft from hand of fellow employé, slipping on greasy ladder at top of shaft, held incident to running of elevator. *Shields v. Robins*, 3 App. Div. 582.

A master was not liable for injuries received by his servant, a painter, by the breaking of a defective plank over which he was passing to remove a scaffold, as the danger was incident to the employment. *Butterworth v. Clarkson*, 3 Misc. (N. Y.) 338.

Lack of proper fire escapes as required by law is not *per se* a natural and ordinary risk. *Landgraf v. Kuh*, 188 Ill. 484; rev'g s. c., 90 Ill. App. 134.

WHAT RISKS HELD INCIDENTAL.

One sent to clear away the debris of an exploded flywheel held to assume the risk of a piece of iron falling from the ceiling. *Kanz v. Page*, 168 Mass. 217.

An elevator, while deceased was in the act of operating it, suddenly started up; the automatic safety gate also raised catching deceased between them. Held a risk of the business. *Stagg v. Edward Western Tea &c. Co.* (Mo.) 69 S. W. Rep. 391.

See, also, *Perras v. Booth &c. Co.*, (Minn.) 84 N. W. Rep. 739.

One employed to sweep out the bottom of an elevator shaft must look out for the descent of the elevator while doing so. *Volk v. Sturtevant Co.*, 104 Fed. Rep. 276; aff'g s. c., 99 id. 532.

Shipping:

Placing covers upon hatches requires neither skill nor judgment so that the risks, if any, are assumed. *Preston v. Ocean S. S. Co.*, 33 App. Div. 193.

Member of a crew *passing* lumber off a ship held not to assume the risk arising from the mode of *piling* it by the crew to whom it is passed, not being an ordinary incident to the business he was engaged in. *John Spry Lumber Co. v. Duggan*, 182 Ill. 218; aff'g s. c., 80 Ill. App. 394.

Risk of slipping on a pipe lying on the deck was assumed by a deck hand. *Direct Nav. Co. v. Anderson*, (Tex. Civ. App.) 69 S. W. Rep. 174.

Miscellaneous instances:

Risk of defects in street are not assumed by driver of fire engine. *Farley v. New York*, 152 N. Y. 222; rev'g s. c., 9 App. Div. 536.

Employé was thrown from a car by its sudden turn in passing over a switch. Risk of such an accident was one that was incident to his service. *Donnelly v. N. Y. &c. R. Co.*, 3 App. Div. 408.

Risk of negligence of employés of another contractor on the building was assumed. *Murphy v. Altman*, 28 App. Div. 472.

Risk of the use by competent fellow servants of a derrick, itself in proper condition, was assumed. *Rosa v. Volkening*, 64 App. Div. 426.

See, also *World's Columbian Exposition v. Bell*, 76 Ill. App. 591; *Stewart v. International Paper Co.*, 96 Me. 30; *Schus v. Powers-Simpson Co.*, (Minn.) 89 N. W. Rep. 68; *O'Neill v. Great Northern R. Co.*, (Minn.) 82 id. 1086; *Reusch v. Groetinger*, 192 Pa. St. 74; *Missouri &c. R. Co. v. Lyons*, 54 Neb. 633.

Plaintiff, skilled in gunpowder blasting, assumed risk of drawing unexploded charge. *Vitto v. Farley*, 15 Misc. 153.

Risk of injury from a latent defect is not assumed. *Boyd v. Blumenthal*, (Del.) 52 Atl. Rep. 330.

Risk of injury from machinery started without warning is not assumed. *Chicago &c. R. Co. v. Spurney*, 197 Ill. 471; aff'g s. c., 97 Ill. App. 570.

Workmen in a car repairing company held not to assume the risk of the negligence of the railroad employé's in removing its cars without notice. *Street's Western &c. Line v. Bonander*, 97 Ill. App. 601; s. c. aff'd, 63 N. E. Rep. 688.

Risk of injury from contact with improperly insulated electric wire was not assumed. *Thompson v. New Orleans &c. R. Co.*, (La.) 32 South Rep. 177.

Risk of performing employer's direction to remove ensilage by undermining it instead of taking from the top, was assumed. *Welch v. Brainard*, 108 Mich. 38.

Lineman required to inspect poles before mounting them, assumed the risk of their being defective. *Krimmel v. Edison Illum. Co.*, (Mich.) 90 N. W. Rep. 336.

Saxton v. Northwestern Tel. Exch. Co., 81 Minn. 314.

One filling an ice house assumes the risk of the ice blocks slipping. *Shea v. Kansas City &c. R. Co.*, 76 Mo. App. 29.

Servant does not assume the risk of negligence of his master. *Christensen v. Lambert*, (N. J. L.) 51 Atl. Rep. 702.

Mayton v. Sonnefield, (Tex. Civ. App.) 48 S. W. Rep. 608; *George v. Clark*, 85 Fed. Rep. 608; or his representative, *Streets' Western &c. Line v. Bonander*, 196 Ill. 15; aff'g s. c., 97 Ill. App. 601; *San Antonio &c. R. Co. v. Waller*, (Tex. Civ. App.) 65 S. W. Rep. 210.

Injury from defects which are not discoverable by inspection is one of the risks assumed by a servant. *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464.

Risk of incompetency of fellow servant is not assumed. *Hicks v. Southern R. Co.*, 63 S. C. 559.

See *Giordano v. Brandywine Granite Co.*, (Del.) 52 Atl. Rep. 332.

It was error to charge that if defects in wires were not plainly obvious to lineman he might assume them to be safe. *Jackson &c. R. Co. v. Simmons*, (Tex. Civ. App.) 64 S. W. Rep. 705.

Risk of tools being defective is not assumed. *Smith v. Gulf &c. R. Co.*, (Tex. Civ. App.) 65 S. W. Rep. 83.

Risk of ascending another company's pole as a necessity incident to the erection of plaintiff's own is assumed. *Dixon v. Western &c. Teleg. Co.*, 71 Fed. Rep. 143.

By consenting to work in an enclosure with wild elk, deer, &c., one assumes the dangers incident thereto. *Bormann v. Milwaukee*, 93 Wis. 522.

WORK BEYOND SCOPE OF EMPLOYMENT.

When accident not due to the neglect of master's duties it must be held to be due to a risk incidental to the business. *Williams v. Northern Lumber Co.*, 113 Fed. Rep. 382.

Servant does not assume the risk of the place for work being unsafe. *Swensen v. Bender*, 114 Fed. Rep. 1.

Where all materials furnished by the master for raising a weight were proper and perfect, but by reason of the insecure fastening into the ground of an anchor post, the apparatus fell and injured plaintiff, there was no recovery, as the risk was that of the employment. *Peschel v. Chicago &c. R. Co.*, 62 Wis. 338.

See *Hoppin v. Worcester*, 149 Mass. 222; *Benn v. Null*, 65 Iowa, 407.

Risk from unsafe condition of a wagon furnished him was not assumed. *Boelter v. Ross Lumber Co.*, 103 Wis. 324.

(c). WORK BEYOND SCOPE OF EMPLOYMENT.

A servant who enters upon an employment from its nature hazardous, assumes the usual risks and perils of the service, and of the open, visible structures known to him, or which he might have known had he exercised ordinary care and observation. *Williams v. D., L. & W. R. Co.*, 116 N. Y. 628.

Appel v. B., N. Y. & P. R. Co., 111 N. Y. 550; *De Forest v. Jewett*, 88 id. 264; *Haas v. R. Co.*, 40 Hun, 145; *Gibson v. Erie*, 63 N. Y. 449; *Powers v. Erie*, 98 id. 274; *Rorer on Railroads*, vol. 2, p. 834, n. 2 &c.; *Hart v. Naumburg*, 123 N. Y. 642; *Odell v. Ry.*, 120 id. 323.

Infant was called upon to work a pump which was liable to fall apart while in use, a task more dangerous than that which he was employed for. Recovery was allowed. *Stimper v. Fuchs &c. Co.*, 26 App. Div. 333; s. c. aff'd, 161 N. Y. 636.

Engineer did not take any risk as to the condition of another company's tracks. *Arkansas C. R. Co. v. Jackson*, (Ark.) 67 S. W. Rep. 757.

Risks of service beyond the scope of duty are not assumed where the service does not involve an act of imprudence. *Dallemund v. Saalfeldt*, 175 Ill. 310; aff'g s. c., 73 Ill. App. 151.

If servant is sent into extraordinary dangers or those beyond the scope of his employment, whether by the master or a superior servant, the master is liable for injury. *Chicago &c. R. Co. v. Bayfield*, 37 Mich. 210.

Assumption of risk has no application outside the scope of one's employment. *Supple v. Agnew*, 191 Ill. 439; rev'g s. c., 80 Ill. App. 437.

Where a person of apparently sufficient age, physical ability and mental calibre to perform the service, seeks employment of a master, he impliedly represents that he is competent to perform the duties of the

position, and competent to apprehend and avoid all dangers that are discoverable by ordinary care.

Work outside of employment servant does not represent himself to do, and hence is not presumed capable of avoiding its danger.

Servant's implied assumption of risk is limited to the particular work for which he is employed, and if master orders him to work temporarily in another department, where the work is of such a different nature and character that it cannot be said to be within the scope of the employment, and where he is associated with a different class of employes, he will not, by obeying such an order, necessarily assume the risks incident to the work, and the negligence of other employes; but otherwise if, voluntarily and without direction from proper authority, he goes into hazardous work outside of his contract of hiring. But master will not be liable if the circumstances show that the servant is competent to appreciate the danger, and expressly or impliedly assumes the risk. *Pittsburg &c. R. Co. v. Adams*, 105 Ind. 151.

Citing *Atlas Engine Works v. Randall*, 100 Ind. 293; *Hill v. Gust*, 55 id. 45; *Hawkins v. Johnson* 105 id. 29; *Mann v. Oriental Works*, 11 R. I. 152; 14 Am. Reg. (N. S.) 728, note; *Railroad Co. v. Fort*, 17 Wall. 553; *Lalor v. Chicago &c. R. Co.*, 52 Ill. 401; *Coombes v. New Bedford Cordage Co.*, 102 Mass. 572; *Chicago &c. R. Co. v. Bayfield*, 37 Mich. 205; *Dowling v. Allen &c. Co.*, 74 Mo. 13; *Wood's Master & Servant*, secs. 349, 352, 439; *Beach Cont. Neg.*, sec. 132; *Thomp. Neg.*, pp. 975-6; sec. 7, p. 977; sec. 8, p. 979; sec. 9, p. 1016; sec. 21; *Pierce R.* 378.

Servant does not assume the risk incident to work beyond the scope of, and more hazardous than, the duties which he is hired to perform, unless he voluntarily goes into it. *Indiana &c. Gas Co. v. Marshall*, 22 Ind. App. 121.

See, also, *Cleveland &c. R. Co. v. Carr*, 95 Ill. App. 576.

Quarry carpenter, by acting as a volunteer, was deprived of the right to have a lookout kept for his safety. *Bowling Green Stone Co. v. Capshaw*, (Ky.) 64 S. W. Rep. 507.

Act beyond the scope of employment involved danger, but did not, in view of the lack of deliberation, in the emergency, appear to be reckless or imprudent. Risk not assumed. *Chicago &c. R. Co. v. McCarty*, 49 Neb. 475.

Floor sweeper did not assume the risk of injury incident to wiping a moving belt, which was beyond the scope of his employment. *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 100.

Elevatorman went to see what stopped his elevator. His act was not beyond his duty though he was ordered to report in case of trouble. *Stone v. Boscawen Mills*, (N. H.) 52 Atl. Rep. 119.

A fireman called upon by the engineer to aid in throwing on a belt,

WORK BEYOND SCOPE OF EMPLOYMENT.

and thus to work out of his sphere, subject to great and unknown risks, without information or caution, recovered from the master for injuries received, as the engineer represented the master. *Mann v. Oriental &c. Works*, 11 R. I. 152.

Where work is outside the scope of one's duties only such risks as are known or obvious are assumed. *Ft. Worth &c. R. Co. v. Wrenn*, 20 Tex. Civ. App. 628.

North Chicago Street R. Co. v. Conway, 76 Ill. App. 621; *Felton v. Girardy*, 104 Fed. Rep. 127; *Hillsboro Oil Co. v. White*, (Tex. Civ. App.) 54 S. W. Rep. 432.

Where an employé of mature years and ordinary intelligence consents to temporarily do work directed to be done outside of the employment for which he contracted, and he is injured while doing it, no negligence of the master can be predicated on this alone; as where the foreman of construction work was injured in coupling cars and did not recover therefor. *Cole v. R. Co.*, 71 Wis. 114.

Distinguishing Dill v. Homrighausen, 79 Wis. 634.

The plaintiff contended that the master was liable on the ground that there was no presumption that he assumed the risk, on the authority of the following cases: *Ohio &c. R. Co. v. Hammersley*, 28 Ind. 374; *Lalor v. C. B. &c. R. Co.*, 52 Ill. 401; *Pittsburg &c. R. Co. v. Adams*, 105 Ind. 151; *Jones v. L. S. &c. R. Co.*, 49 Mich. 573; *Mann v. Oriental Print Works*, 11 R. I. 152; *Chicago &c. R. Co. v. Bayfield*, 37 Mich. 205; *Broderick v. Detroit &c. Co.*, 56 id. 261; *Cook v. S. P. &c. R. Co.*, 34 Minn. 45; *Dowling v. Allen*, 74 Mo. 13; *Railroad Co. v. Fort*, 17 Wall. 553; *Benzing v. Steinway*, 101 N. Y. 547; *O'Connor v. Adams*, 120 Mass. 427; but the court followed: *McGinnis v. C. S. Co.*, 49 Mich. 466; *Wormwell v. M. C. R. Co.*, 10 Atl. Rep. (Me.) 49; *Rummell v. Dillworth*, 111 Pa. St. 343; *Leary v. B. & A. R. Co.*, 139 Mass. 587; *Railroad Co. v. Fort*, 17 Wall. 554; *Cahill v. Hilton*, 106 N. Y. 512; *Wood's R. L.* 1487; *Hillsboro Oil Co. v. White* (Tex. Civ. App.), 41 S. W. Rep. 874; *Wood's M. & S.*, sec. 344.

Mere placing a person at temporary work outside of his employment, does not place the risk on the master, if he do not object and be an adult of ordinary capacity, and if he must have known the dangers he takes the risk. *Paule v. Florence &c. Co.*, 80 Wis. 350.

VII. Fellow Servants.

Master not liable for injury from negligence of competent fellow servant:

(1). A master is not liable to an employé for the negligence of a fellow servant. A master is not responsible to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow servant engaged in the same general business. *Farwell v. Boston & Worcester R. Corp.*, 4 Metc. 49; *Brown v. Maxwell*, 6 Hill 592; *Coon*

v. Syracuse & Utica R. Co., 1 Seld. 492; *Sherman v. Rochester & Syracuse R. Co.*, 17 N. Y. 153; *Russell v. Hudson R. Co.*, id. 134; *Boldt v. N. Y. Cent. R. Co.*, 18 id. 432; *Hayes v. Western R. Corp.*, 3 Cush. 270; *Albro v. Agawam Canal Co.*, 6 id. 75; *Ray v. Boston & Worcester R. Corp.*, 10 id. 112; *Gillshanon v. Stony Brook R. Corp.*, 10 id. 228; *Hutchinson v. York & C. Railway Co.*, 5 Exch. R. 343.

(2). The rule exempting the master is the same, although the grade of the employment is different, and the one injured is subject to the control of the one by whose negligence the injury is caused. *Hayes v. Western R. Corp.*, *supra*; *Albro v. Agawam Canal Co.*, *supra*; *Wyman v. Jay*, 5 Exch. 352.

(3). It is not necessary that the servants, the one injured and the one causing it, should be engaged in the same work or operation. *Boldt v. N. Y. Cent. R. Co.*, *Coon v. Syracuse & Utica R. Co.*, *Farwell v. Boston & Worcester R. Corp.*, *Albro v. Agawam Canal Co.*, *Gillshanon v. Stony Brook R. Corp.*, *Wyman v. Jay*, *Hutchinson v. York & Newcastle Branch Railway Co.*, *supra*. The question is, whether they are under the same general control. *Abraham v. Reynolds*, 5 Hurl. & Norm. 142.

(4). The master is liable for personal negligence in employing unfit servants and agents, or in the furnishing of the work to be done, or the machinery supplied. *Priestly v. Fowler*, 3 M. & W. 1; *Hayden v. Smithville Man. Co.*, 29 Conn. 548; *Robert v. Smith*, 2 Hen. & Man. 213; *Williams v. Clough*, 3 id. 257; *Griffiths v. Godson*, id. 648; *Wyman v. Jay*, *supra*; *Owens v. Holland*, *Ellis, Blackb. & Ell.* 102; *Keegan v. W. R. Corp.*, 4 Seld. 175; *Patterson v. Wallace*, 28 L. & E. 48; *Marshall v. Stewart*, 33 id. 1.

(5). If the servant injured has same means of knowledge as master of unskillfulness of the servant, or deficiencies in the appliances, he cannot recover. *Priestly v. Fowler*, 3 M. & W. 1; *Hayden v. Smithville Man. Co.*, *Griffiths v. Godson*, *Williams v. Clough*, *Keegan v. Western R. Corp.*, *Paterson v. Wallace*, *supra*; *Skip v. Eastern Counties Railway Co.*, 24 L. & E. 396; s. c., 9 Exch. 223; *Wright v. N. Y. C. R. Co.*, 25 N. Y. 562.

Where, upon the trial of an action brought to recover damages resulting from the death of the plaintiff's intestate by reason of the alleged negligence of the defendant, it is shown that the accident which caused the death of the plaintiff's intestate was the result of negligence on the part of a co-employé of the plaintiff's intestate, damages therefor cannot be recovered from the employer. *Herrington v. Lake Shore & Michigan Southern R. Co.*, 83 Hun, 365.

WHEN THEY HAVE A COMMON MASTER.

Master is not responsible for the acts of competent fellow servant. *Nolan v. New York &c. R. Co.*, 70 Conn. 159.

Summerhays v. Kan. Pac. R. Co., 2 Colo. 484; *Kindel v. Hall*, 8 Colo. App. 63; *Davis v. Muscogee Man. Co.*, 106 Ga. 126; *Kerr v. Crown Cotton Mills*, 105 id. 510; *Terre Haute &c. R. Co. v. Leeper*, 60 Ill. App. 194; *Chicago &c. R. Co. v. Libey*, 68 id. 144; *Illinois Steel Co. v. Bauman*, 78 id. 73; s. c., aff'd, 178 Ill. 351; *Small v. Allington &c. Man. Co.*, 94 Me. 551; *Wosbigian v. Washburn &c. Man. Co.*, 167 Mass. 20; *Gorman v. Woodbury*, 173 id. 180; *Healey v. Blake Man. Co.*, 180 id. 270; *Walkowski v. Penokee &c. Mines*, 115 Mich. 629; s. c., 41 L. R. A. 33; *Duncan v. Roberts Co.*, 194 Pa. St. 563; *Northern P. R. Co. v. Peterson*, 162 U. S. 346; *Chicago &c. R. Co. v. Kellogg*, 54 Neb. 127; *Cooper v. Milwaukee &c. R. Co.*, 23 Wis. 668.

The rule applied in favor of a receiver of a company. *Youngblood v. Comer*, 97 Ga. 152.

Brown v. Comer, 97 Ga. 801; *Peirce v. Oliver*, 18 Ind. App. 87.

(a). WHEN SERVANTS ARE FELLOW SERVANTS.

1. WHEN THEY HAVE A COMMON MASTER.

Captain of lighter and employé of shipper have not. *Anderson v. Boyer*, 13 App. Div. 258.

Brakeman, an employé of a licensee or lessee railroad was not a co-servant with engineer of licensor or lessor though the trains of the former road were subject to the directions of the latter's division superintendent. *Hurl v. New York &c. R. Co.*, 68 App. Div. 400.

See, also, *Brennan v. Berlin &c. Build. Co.*, 74 Conn. 382.

The drumman of a hoisting machine in the employ of the ship owner was not a fellow servant with one in the employ of the stevedore, though both were engaged in loading the ship. *Lauro v. Standard Oil Co.*, 76 N. Y. Supp. 800.

Car inspector of one company was not the co-servant of a switchman of another, though both were members of an association which occupied the premises. *Kastl v. Wabash R. Co.*, 114 Mich. 53.

Kunzman v. Lehigh Valley R. Co., 10 Pa. Super. Ct. 1.

That two companies use the track of a third under rules made by the latter does not make their employés fellow servants. *Smithson v. Chicago &c. R. Co.*, 71 Minn. 216.

Where a railroad porter and an express company's messenger under a joint arrangement between the companies, engaged in unloading express and baggage together, they were held co-servants. *San Antonio &c. R. Co. v. Raylor*, (Tex. Civ. App.) 35 S. W. Rep. 855.

A car accountant of a terminal company, held not the fellow servant

of an engineer of a railroad using its track. *Northern P. R. Co. v. Craft*, 69 Fed. Rep. 124.

Bosworth v. Rogers, 82 Fed. Rep. 975; Brady v. Chicago &c. R. Co., 114 id. 100.

A boiler maker putting a patch on a tank and a carpenter fitting castings about it, held fellow servants though actually in the employ of different masters. *The Coleridge*, 72 Fed. Rep. 676.

One presenting an order for wages of a former employé was held not fellow servant of defendant's pay master to whom he presented such order. *Carroll v. Chicago &c. R. Co.*, 99 Wis. 399.

Temporary transfer of authority:

Horse and driver was sent to warehouseman to furnish power for hoisting. Driver was not latter's servant. *Murray v. Dwight*, 161 N. Y. 301; aff'g s. c., 15 App. Div. 241.

But see *Cunningham v. Syracuse Imp. Co.*, 20 App. Div. 171.

Railroad employé, in order to prevent collision with trains was directed to supervise a hand car, in use by a telegraph company. He was the servant of the former though paid by the latter. *Hallett v. New York &c. R. Co.*, 42 App. Div. 123.

The hands on a gravel train, put entirely at the disposal of a city by the railroad company were the city's servants. *Coughlan v. Cambridge*, 166 Mass. 268.

Where one becomes the servant of another for a particular work, he is a fellow servant of the employés of the latter, though he is still in the general employ of his original master. *Delaware &c. R. Co. v. Hardy*, 59 N. J. L. 35; aff'g s. c., 58 id. 205.

Independent contractors:

A "boss scooper" on a vessel with complete control over his work and authority over his men, is their master and not the owner of the vessel. *Kane v. Mitchell Transp. Co.*, 90 Hun, 65.

Servant of an independent sub-contractor to furnish an elevator and an employé of contractor were not fellow servants. *Mills v. Thomas Elevator Co.*, 54 App. Div. 124.

See, also, *Jansen v. Jersey City*, 61 N. J. L. 243; *Spry Lumber Co. v. Duggan*, 80 Ill. App. 394.

Whether employés are fellow servants is determined by the authority they are subject to rather than the party they are paid by. *Ingram v. Hilton &c. Lumber Co.*, 108 Ga. 194.

Company is not liable for injury to its servant from contractor changing gauge of road. *Toledo &c. R. Co. v. Conroy*, 39 Ill. App. 351.

WHEN THEY HAVE A COMMON MASTER.

Foreman of a gang of men employed to build a stone wall from stone furnished by the railroad company, held not a co-servant with the servants of the latter, bringing such stone to the place of construction. *Illinois C. R. Co. v. McCowan*, 70 Ill. App. 345.

A contractor with a mining company was not a fellow servant of the superintendent of the company, where his duties were to break down rock to disclose a vein at a stipulated price per foot. *Mayhew v. Sullivan Mining Co.*, 76 Me. 100.

One employed at a given rate per day *plus* a sum for each assistant, to do such work as shall be ordered by a superintendent, but having a discretion as to details was an independent contractor and not a superintendent of his employés. *Dane v. Cochrane Chemical Co.*, 164 Mass. 453.

Employés of a boss roller with full power to employ his own men were held fellow servants with employés of owner of mill in which he worked and to the direction of whose superintendent he was subject. *Andrews Bros. v. Burns*, 22 Oh. C. C. 437.

A carpenter and a bricklayer employed by separate independent contractors, held not fellow servants, though both worked under a superintendent employed to insure compliance with the contract. *Coates v. Chapman*, 195 Pa. St. 109.

A stevedore held not a fellow servant if a winchman of the ship assisting in the unloading by hauling the cargo out of the hold. *The Victoria*, 69 Fed. Rep. 160.

See, also, *The Anaces*, 93 Fed. Rep. 242; rev'g s. c., 87 id. 565; *The Terrier*, 73 id. 265.

Servant of one contracting to inspect and repair cars, was not a fellow servant of the railroad's train hands. *Sherman v. Delaware &c. Canal Co.*, 71 Vt. 325.

Servant of one who had contracted to repair the mill was not a fellow servant of the mill hands. *Hoadley v. International Paper Co.*, 72 Vt. 79.

Servant off duty:

The rule does not apply after working hours. *Sullivan v. New York &c. R. Co.*, 73 Conn. 203.

Nor when the servant is off duty. *Dickinson v. West End Street R. Co.*, 177 Mass. 365; s. c., 52 L. R. A. 326.

Volunteers:

Boy of eleven complied with request to release a "hawser." He was only a volunteer. *Giebel v. Elwell*, 19 App. Div. 285.

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One is not a volunteer where he complies with a request to give assistance in an emergency. *Empire Laundry Co. v. Brady*, 60 Ill. App. 379.

But there is no such emergency, where there are servants capable of rendering it. *Conkey v. Bucherer*, 84 Ill. App. 633.

Assistance, rendered at a servant's request for his own as well as his master's benefit, created relation of fellow servant. *Cleveland &c. R. Co. v. Marsh*, 63 Oh. St. 236; s. c., 52 L. R. A. 142.

So shippers' servant did not become a volunteer as to the carrier by complying with brakeman's request to give assistance in placing the car in position for loading, which helped to expedite his master's business. *Louisville &c. R. Co. v. Ward*, 98 Tenn. 123.

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The ruling requires that the servants of the same master, to be co-employés, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business, *i. e.*, the same line of employment, or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution. The idea is, that the relations between the servants must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against its consequences; and, of course, where there is no right or no opportunity of supervision, or where there is no independent will, and no right or opportunity to take measures to avoid the negligent acts of another without disobedience to the orders of his immediate superior, the doctrine can have no application. How can the laborer be profited by a knowledge of the usual manner of doing work in another department, if he is unable, in any reasonable way, while engaged in the proper discharge of his duties, and without disobedience to his immediate superiors, to influence the conduct of the laborers in that department? *Rolling Mill Co. v. Johnson*, 114 Ill. 57 (61).

Citing *Chicago & No. West. R. Co. v. Moranda*, 93 Ill. 302; *Chicago & Alton R. Co. v. May*, 108 id. 288; *Chicago & East. R. Co. v. Geary*, 110 id. 383.

Co-employés are those "who shall be directly co-operating with each other in a particular business—the same line of employment—or those whose usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of caution." *North Chicago &c. R. Co. v. Johnson*, 114 Ill. 64.

Their duties must be such as bring them into habitual association and

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in such a way as to promote proper caution toward each other. *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315; aff'g s. c., 68 Ill. App. 523.

And directly co-operate in the particular business on hand. *Swisher v. Illinois C. R. Co.*, 182 Ill. 533; aff'g s. c., 74 Ill. App. 164; *North Chicago Street R. Co. v. Conway*, 76 Ill. App. 621; *Chicago &c. R. Co. v. Stallings*, 90 id. 609.

Personal acquaintance is not necessary. *World's Columbian Exposition v. Bell*, 76 Ill. App. 591.

Nor physical contact. *Wilson v. Charleston &c. R. Co.*, 51 S. C. 79.

Whether two servants are fellow servants depends upon the relation of their duties to each other, and to the business in general. *Lebanon Coal &c. Asso. v. Zerwick*, 77 Ill. App. 486.

One employed in a separate and distinct department of work was not the fellow servant of other employés engaged to dig a well on the premises. *Indiana Pipe-Line &c. Co. v. Neubaum*, 21 Ind. App. 361.

Where servants are engaged in a common work they are fellow servants though under different foremen. *Trcka v. Burlington &c. R. Co.*, 100 Iowa, 205.

Where both servants are of the same rank and are engaged in the same kind of employment, they are co-servants. *Louisville &c. R. Co. v. Sander*, (Ky.) 44 S. W. Rep. 644.

Jackson v. Norfolk &c. R. Co., 43 W. Va. 380.

Railroads:

Members of same train crew.—A conductor and trainmen, including engineer, are fellow servants. *Slater v. Jewett*, 85 N. Y. 61.

Conductor and motorman on a car are fellow servants. *Savage v. Nassau &c. R. Co.*, 42 App. Div. 241; s. c. aff'd, 168 N. Y. 680.

Brakeman riding on an engine and a brakeman throwing the switch causing collision were fellow servants. *Vizelich v. Southern P. Co.*, 126 Cal. 587.

Baggage-man and engineer on a train are not. *Chicago &c. R. Co. v. Swan*, 176 Ill. 424; aff'g s. c., 70 Ill. App. 331.

Engineer of a locomotive engaged in shifting car was a co-servant of one of the shifting crew. *Creswell v. Wilmington &c. R. Co.*, (Del.) 43 Atl. Rep. 629.

Conductor and engineer held fellow servants under circumstances in which the company's rules give the latter the right to act independently of the former. *Meyer v. Illinois C. R. Co.*, 177 Ill. 591; aff'g s. c., 65 Ill. App. 531.

Engineer, forward brakeman and fireman, held fellow servants. *Chicago &c. R. Co. v. Brandau*, 65 Ill. App. 150.

Otherwise as to a foreman of a gang hauling dirt with a train and the conductor thereof. *Dobson v. New Orleans & W. R. Co.*, 52 La. Ann. 1127.

But a brakeman or conductor who failed to apply the automatic conductor's cord when the engineer whistled for brakes, was a fellow servant with the latter. *Whalen v. Michigan C. R. Co.*, 114 Mich. 512.

So, as to an engineer and yard master riding on switch train. *Farquhar v. Alabama &c. R. Co.*, 78 Miss. 193.

An expressman who also acted as baggage master, held not a fellow servant with the rest of the trainmen. *Cobb v. St. Louis &c. R. Co.*, 149 Mo. 609.

Conductor, fireman and engineer are. *Grattis v. Kansas City &c. R. Co.*, 153 Mo. 380; s. c., 48 L. R. A. 399.

Conductor is not a fellow servant of the flagman on his own train. *Hicks v. Southern R. Co.*, 63 S. C. 559.

Engineer and brakeman of a train in charge of conductor, are fellow servants. *East Tenn. &c. R. Co. v. Smith*, 89 Tenn. 114.

See, also, *Illinois C. R. Co. v. Meyer*, 65 Ill. App. 531; *Bell v. Globe Lumber Co.*, (La.) 31 South. Rep. 994; *Chaddick v. Lindsay*, 5 Okla. 616; *Central Trust Co. v. East Tennessee &c. R. Co.*, 69 Fed. Rep. 357; *McDonald v. Norfolk &c. R. Co.*, 95 Va. 98.

But engineer not acting as conductor is fellow servant of brakeman injured, but not of conductor. *East Tenn. &c. R. Co. v. Smith*, 89 Tenn. 114.

Engineer and fireman are fellow servants. *N. J. &c. Co. v. Young*, 49 Fed. Rep. 723.

Mulligan v. Montana U. R. Co., 19 Mont. 135.

Conductor and brakeman on a freight train, are. *Jackson v. Norfolk &c. R. Co.*, 43 W. Va. 380.

Ott v. Lake Shore &c. R. Co., 18 Oh. C. C. 395.

Train crews of different trains.—A switchman, while uncoupling cars, was injured by the starting of the train, which he ascribed to a defective valve; but it was shown that the alleged defect could only cause the valve to operate of itself when the engine was in motion and not when it was standing still; hence, the starting was caused by the negligence of the engineer. *Toms v. Buffalo Creek R. Co.*, 70 Hun, 84, rev'g judg't of nonsuit.

Crew of freight train, leaving a switch open, held not co-servants of

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that of a following passenger train. *Chicago & A. R. Co. v. House*, 172 Ill. 601; aff'g s. c., 71 Ill. App. 147.

But see *Swisher v. Illinois &c. R. Co.*, 182 Ill. 533; aff'g s. c., 74 Ill. App. 164.

Two switching crews in the same yard and at the same kind of work held fellow servants. *Chicago &c. R. Co. v. Driscoll*, 176 Ill. 330; rev'g s. c., 70 Ill. App. 910.

Chicago &c. R. Co. v. Hartley, 90 Ill. App. 284; *Elgin &c. R. Co. v. Malaney*, 59 Ill. App. 114; *Terre Haute &c. R. Co. v. Leeper*, 60 Ill. App. 194.

Engineer of switching crew making a train and the engineer and brakeman of the train made, held fellow servants. *Klees v. Chicago &c. R. Co.*, 68 Ill. App. 244.

So, as to conductor of one car, and the conductor and gripman of another. *North Chicago &c. R. Co. v. Dudgeon*, 69 Ill. App. 57.

Gripman of one car and conductor of another were not. *Chicago City R. Co. v. Leach*, 80 Ill. App. 354.

Switch crews on different trains held not fellow servants. *Illinois C. R. Co. v. Jones*, 97 Ill. App. 131.

Fireman on one train and engineer on another are fellow servants. *Chicago &c. R. Co. v. Thompson*, 99 Ill. App. 277.

Engineers of different trains held fellow servants. *Evansville &c. R. Co. v. Tohill*, 143 Ind. 60.

Conductor and injured engineer of another train are not fellow servants; otherwise if on the same train. *Louisville &c. R. Co. v. Cavens*, 9 Bush. 559.

Conductor in charge of a train on one division of a road held not a co-servant with those in charge of a train on another division. *Louisville &c. R. Co. v. Edmonds*, (Ky.) 64 S. W. Rep. 727.

Baggagemaster and switchman are fellow servants. *Roberts v. Railroad Co.*, 33 Minn. 218.

Brown v. Minn. &c. Co., 31 Minn. 553; *Collins v. St. Paul &c. R. Co.*, 30 id. 31.

Brakeman of one train and fireman of another, injured, are fellow servants. *Relyea v. Kansas &c. R. Co.*, 112 Mo. 86.

Brakeman of switch gang and engineer on switch engine are fellow servants. *Warmington v. Atchison &c. R. Co.*, 46 Mo. App. 159.

Engineer of one freight train and the conductor of another held fellow servants, where one signaled the other to pass a switch improperly turned. *Pleasants v. Raleigh &c. R. Co.*, 121 N. C. 492.

Engineer on a through freight train and the engineer and brakeman of a local freight, held not fellow servants as matter of law. *Galveston &c. R. Co. v. Worthy*, (Tex. Civ. App.) 32 S. W. Rep. 557.

Engineer and brakeman on different trains were not, though on the same division of the road. *Houston &c. R. Co. v. Patterson*, 20 Tex. Civ. App. 255.

A switchman of one engine was not the fellow servant of the switchman of another, though one engine was moved to get it out of the way of the other. *Galveston &c. R. Co. v. Masterson*, (Tex. Civ. App.) 51 S. W. Rep. 1091.

Engineer of one train and the conductor of another on the same road, were. *Oakes v. Mase*, 165 U. S. 363.

Conductor and baggage master on different trains are fellow servants. *Kerlin v. Chicago &c. R. Co.*, 50 Fed. Rep. 185.

Conductor and engineer of one train are fellow servants of brakeman on another train. *Baltimore &c. R. Co. v. Andrews*, 50 Fed. Rep. 728.

Conductors on different electric cars of the same line, were. *Baltimore Trust &c. Co. v. Atlantic T. Co.*, 69 Fed. Rep. 358.

Engineers on different engines but on same railroad are fellow servants. *Norfolk &c. R. Co. v. Donnelly*, 88 Va. 853.

Engineers on same road are fellow servants. *Ohio &c. R. Co. v. Robb*, 36 Ill. App. 627.

Trainmen, though on different trains, are. *Norfolk &c. R. Co. v. Houchins*, 95 Va. 398.

An engineer of one train is not a fellow servant of the conductor of another train, nor of a telegraph operator transmitting orders to the railroad employes. *Madden v. Railroad Co.*, 28 W. Va. 610.

Conductor of one train is not a fellow servant of a brakeman on another train. *Daniels v. Railroad Co.*, 36 W. Va. 397.

Brakeman recovered for negligence of engineer. *Chamberlain v. Railroad Co.*, 17 Wis. 238.

Train crew and servants employed on track, yard, etc.—A switchman was killed by the falling of timber from a passing car, loaded by defendant's employes. The negligence was of a co-employe and there was no liability. *Ford v. L. S. & M. S. R. Co.*, 117 N. Y. 638, rev'g judg't for pl'ff.

Distinguishing *Bushby v. N. Y., L. E. &c. R. Co.*, 107 N. Y. 374, where a brakeman upon a lumber car was injured because it was improperly loaded; and it was held that the defendant having provided a safe car and a safe system and competent men to inspect it was not responsible for the negligence of co-employes in performance of their work.

Brakeman, engineer and yardman were fellow servants. *Corcoran v. New York &c. R. Co.*, 46 App. Div. 201.

So, also, bridge foreman and a locomotive engineer. *St. Louis &c. R. Co. v. Henson*, 61 Ark. 302.

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A fireman and a switchman making up the train are fellow servants. *St. Louis &c. R. Co. v. Brown*, 67 Ark. 295.

Train dispatcher and engineer on train are fellow servants. *Darrigan v. N. Y. & N. E. R. Co.*, 52 Conn. 285.

Phillips v. Chicago &c. R. Co., 64 Wis. 475.

It was for the jury to say whether the relation of a switch crew and a transfer crew in a railway yard was that of fellow servants. *Hartley v. Chicago &c. R. Co.*, 197 Ill. 440; rev'g s. c., 96 Ill. App. 227.

Fireman and train dispatcher were held not to be. *Missouri &c. R. Co. v. Elliot*, (I. T.) 51 S. W. Rep. 1067.

Trainman, in coupling, and a conductor of freight train, were fellow servants. *Young v. Boston &c. R. Co.*, 168 Mass. 219.

Brakeman and servant loading cars are fellow servants. *Day v. Railroad Co.*, 42 Mich. 523.

Foreman of a section gang and the conductor and brakeman of a freight train in connection with a station agent, are. *Miller v. Michigan Cent. R. Co.*, (Mich.) 82 N. W. Rep. 58.

Station agent in charge of tracks about his station and injured engineer are fellow servants. *Brown v. Minn. R. Co.*, 31 Minn. 553.

Injured sectionman and trainman are fellow servants. *Connelly v. Minn. &c. R. Co.*, 38 Minn. 80.

Citing *Foster v. Minn. &c. R. Co.*, 14 Minn. 277; *Brown v. Winona R. Co.*, 27 id. 162; *Fraker v. St. Paul R. Co.*, 32 id. 54.

Motorman and track crew are, where company's rules require latter to give notice to the former. *Lundquist v. Duluth Street R. Co.*, 65 Minn. 387.

Rittenhouse v. Wilmington Street R. Co., 120 N. C. 544.

Bridge tender whose duty is to open and close a bridge for trains and a section hand on a hand car, are. *Illinois C. R. Co. v. Bishop*, 76 Miss. 758.

Foreman of section crew and a locomotive engineer not connected in work were not fellow servants. *Omaha &c. R. Co. v. Krayenbuhl*, 48 Neb. 553.

Conductor and car coupler, injured, were not fellow servants. *Mason v. Richmond &c. R. Co.*, 111 N. C. 482.

Switchman is fellow servant of engineer killed. *Miller v. So. Pac. R. Co.*, 20 Ore. 285.

There was a similar holding in *Harvey v. R. Co.*, 88 N. Y. 481; *Randall v. R. Co.*, 109 U. S. 478; *Walker v. R. Co.*, 128 Mass. 8.

Section master and trackman are fellow servants with a trainman,

where all are removing obstructions from the track. *Wellman v. Oregon &c. R. Co.*, 21 Ore. 530.

Brakeman was injured by lumber piled too near track by the negligence of station agent, of whom he was a fellow servant. *Gaffney v. N. Y. & N. E. R. Co.*, 15 R. I. 456.

Brown v. Minn. &c. R. Co., 31 Minn. 553; *Hodgkins v. Eastern R. Co.*, 119 Mass. 419.

From opinion.—"The lumber was piled beside the track under his (station agent's) direction and authority. But he was not a vice-principal. He had no authority over the plaintiff. He could neither hire nor discharge him, nor was the plaintiff, so far as appears, subject to his orders. Both were engaged in a common employment, serving a common principal; both were under the same general control. Their duties and authority were different, but they were still fellow servants. As this very question has been decided upon grounds satisfactory to us, it would be profitless to discuss it further, or to multiply authorities in its support."

See *Brown v. Minneapolis & St. Louis R. Co.*, 31 Minn. 553; 15 Am. & Eng. R. Cas. 333, and *Hodgkins v. Eastern R. Co.*, 119 Mass. 419.

Switchman stepped from engine upon cinders negligently left by the track foreman, and the master was liable. *Mo. Pac. R. Co. v. Bond*, 2 Tex. Civ. App. 104.

A telegraph operator is not a fellow servant of injured conductor. *East Tenn. &c. R. Co. v. Smith*, 89 Tenn. 114.

Nor of an engineer. *Madden v. R. Co.*, 28 W. Va. 610.

Or fireman. *St. Louis &c. R. Co. v. Turry*, 114 Fed. Rep. 898.

A conductor, coupler, signal man, pin puller, and engineer, all engaged in drilling cars in a yard, are. *Central R. Co. v. Keegan*, 82 Fed. Rep. 174.

An engineer and a telegraph operator having duties to perform in regard to the operation of trains, are. *Illinois Cent. R. Co. v. Bentz*, 99 Fed. Rep. 657.

Person to take number of cars coming into a station, killed, was co-servant of engineer of switching engine in same yard. *Benkring v. Chesapeake R. Co.*, 37 W. Va. 502.

Train crew and repairers, inspectors, &c.—A master is not liable to a servant for an injury received through the negligence of a co-servant.

The plaintiff was employed as a trackman to follow, in a hand car, passenger trains over a certain part of the defendant's road track to keep it in order and report defects; and while engaged in this duty, in the evening, was run over and very severely and permanently injured by a train of defendant's cars, without lights, not usually passing at that hour, and through the negligence (as was claimed) of its managers. Held, that the defendants were not liable to the plaintiff for the negli-

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gence of those in charge of the train. *Coon v. Syracuse & Utica R. Co.*, 5 N. Y. 492, aff'g 6 Barb. 231, and judg't of nonsuit.

Through negligence of mechanic in repairing locomotive it exploded and killed engineer; master liable. *Fuller v. Jewett*, 80 N. Y. 46.

An inspector of cars and brakeman are fellow servants. *Potter v. Railroad Co.*, 136 N. Y. 77.

Smith v. Potter, 46 Mich. 258; *Phila. &c. Co. v. Hughes*, 119 Pa. St. 301; *Nashville R. Co. v. Foster*, 10 Lea, 351.

Yard switchman injured by defective coupling through the alleged negligence of the inspector, was not a fellow servant of the latter. *Gibson v. No. Cent. R. Co.*, 22 Hun, 289.

Ohio &c. R. Co. v. Percy, 128 Ind. 197; *St. Louis &c. R. Co. v. Putnam*, 1 Tex. Civ. App. 142.

Engineer and oiler of machinery are fellow servants. *Henshaw v. Pond's &c. Co.*, 66 Hun, 632.

As to whether a brakeman bound to inspect and an inspector were. See *Eaton v. New York &c. R. Co.*, 14 App. Div. 20.

Car inspector is a fellow servant with engineer while going between cars not to inspect them, but to uncouple them. *Devoe v. New York &c. R. Co.*, 70 App. Div. 495.

Engineer and track laborers are fellow servants. *Mele v. D. & H. C. Co.*, 39 N. Y. S. R. 153.

A fellow servant is one engaged with another under a common master and in the same employment, so they are brought in contact with each other, notwithstanding they are subject to the orders and under the exclusive control of separate foremen and are at different work in the same service. So, a common laborer on the road bed or a gravel train could not be fellow servant of an engineer or conductor of a passenger train, but would be fellow servants of all employed on the road bed or gravel train, if brought in immediate contact in the common work, although under separate foremen. *Parish v. Railroad Co.*, 28 Fla. 251.

Fireman negligently threw a lump of coal off engine and hurt track repairer, and was not a fellow servant. *Chicago &c. R. Co. v. Moranda*, 93 Ill. 302.

Injured section foreman and negligent trainmen were not fellow servants. *Peoria &c. R. Co. v. Rice*, 144 Ill. 227.

To constitute servants of the same master "Fellow servants," within the rule *respondeat superior*, it is not enough that they are engaged in doing parts of the same work, or in the promotion of the same enterprise carried on by the master, not requiring co-operation, or bringing them together, or in such relations as that they may have an influence

upon each other, but it is essential that at the time it is claimed such relation exists, they shall be directly co-operating with each other in the particular business in hand, or that their usual duties shall bring them into habitual consociation, so that they may exercise an influence upon each other promotive of proper caution.

In the case of *Chicago & Northwestern Ry. Co. v. Moranda*, 93 Ill. 302, it was not intended to be decided as a matter of law that a section foreman of a gang of track repairers, and the engineer or fireman on an engine drawing a train, all employes of the defendant, were not directly co-operating with each other in their respective labors, and that their usual duties did not bring them into habitual consociation, so that they might exercise an influence upon each other promotive of proper care, but this was merely assumed as a hypothesis, for the purpose of eliminating from previous decisions the proper rule of law.

In a suit against a railway corporation to recover for negligence resulting in the death of a section foreman having charge and oversight of repairs upon a certain part of the road track, it is error to instruct the jury that such foreman is not engaged in the same line of duty with an engineer and fireman running with the defendant's locomotive engines, and therefore not within the rule which exempts the common employer from liability to one of its employes for damages resulting from the fault, etc., of a fellow servant. Whether such persons were so operating and consociating is a question of fact for the jury, and not of law. *Chicago &c. R. Co. v. Moranda*, 108 Ill. 576.

Citing *Wabash Ry. Co. v. Elliott*, 98 Ill. 481; *Pennsylvania Co. v. Conlan*, 101 id. 93; *Chicago & Alton R. Co. v. Bonifield*, 104 id. 223; *Indianapolis & St. Louis R. Co. v. Morganstern*, 106 id. 216.

Locomotive engineer injured and section boss were fellow servants. *New Orleans &c. R. Co. v. Hughes*, 49 Miss. 258.

Laborer to unload rails is not co-servant of engineer, who has neglected to report a defective engine. *Peoria &c. Co. v. Johns*, 43 Ill. App. 83.

North Chicago &c. R. Co. v. Johnson, 114 Ill. 57, (not fellow servants).

A carpenter in a switch yard and a locomotive engineer are not. *Egmann v. East St. Louis &c. R. Co.*, 65 Ill. App. 345.

Trackmen and trainmen held not fellow servants. *Chicago &c. R. Co. v. Eaton*, 96 Ill. App. 570; s. c. aff'd, 62 N. E. 784.

Northern P. R. Co. v. Charles, 162 U. S. 359; *Wright v. Southern R. Co.*, 80 Fed. Rep. 260.

Injured track repairer and engineer are fellow servants. *Gormley v. Ohio &c. R. Co.*, 72 Ind. 31.

Penn. R. Co. v. Wachler, 60 Md. 395; *Blake v. Railroad Co.*, 70 Me. 60; *Schultz*

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v. Railroad Co., 67 Wis. 616; Clifford v. Railroad Co., 141 Mass. 564; Van Wickle v. Man. R. Co., 32 Fed. Rep. 278; Contra, Howard v. D. & H. C. Co., 40 Fed. Rep. 195, citing Railway Co. v. Ross, 112 U. S. 377; Davis v. Railroad Co., 55 Vt. 84. See, also, Schlereth v. Mo. Pac. R. Co., 115 Mo. 87.

One engaged in work of constructing and repairing tunnels upon the line of a railroad, injured while being carried from one point to another upon the road, is a fellow servant of the engineer and other persons in charge of train. *Capper v. Louisville &c. R. Co.*, 103 Ind. 305.

Citing *Ohio &c. R. Co. v. Tindall*, 13 Ind. 366; *Wilson v. Madison &c. R. Co.*, 18 id. 226; *Slattery v. Toledo &c. R. Co.*, 23 id. 81; *Thayer v. St. Louis &c. R. Co.*, 22 id. 26; *Ohio &c. R. Co. v. Hamersley*, 28 id. 371; *O'Brien v. Boston &c. R. Co.*, 19 Rep. 462; *Gillshannon v. Stony Brook Co.*, 10 Cush. 228; *Russell v. Hudson R. Co.*, 17 N. Y. 134; *Holden v. Fitchburg R. Co.*, 129 Mass. 268; *Manville v. Cleveland &c. R. Co.*, 11 Oh. St. 417; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; *Vic. v. N. Y. &c. R. Co.*, 95 N. Y. 267; *Thompson v. Chicago &c. R. Co.*, 18 Fed. Rep. 239; *Penn. R. Co. v. Wachter*, 60 Md. 395; *Dallas v. Gulf &c. R. Co.*, 61 Tex. 190; *Troughear v. Lower Vein Coal Co.*, 62 Iowa, 576; *Brown v. Minneapolis &c. R. Co.*, 31 Minn. 553; *Heine v. Chicago &c. R. Co.*, 58 Wis. 525; *Chicago &c. R. Co. v. Moranda*, 93 Ill. 302; *Cunningham v. International R. Co.*, 51 Tex. 503.

Servants supplying and keeping plant in repair and operative are not fellow servants. *Cin. R. Co. v. McMullen*, 117 Ind. 439.

Theleman v. Moeller, 73 Iowa, 108; *Covey v. Railroad Co.*, 86 Mo. 635.

One in charge of locomotive in yard and another engaged in cleaning it are fellow servants. *Spencer v. Ohio &c. R. Co.*, 130 Ind. 181.

Citing *Wilson v. Mad. &c. R. Co.*, 18 Ind. 226; *Gormley v. Ohio &c. R. Co.*, 72 id. 31; *Ewald v. Chicago &c. R. Co.*, 70 Wis. 420; *Pease v. Chicago &c. R. Co.*, 61 id. 163; *Bergstrom v. Staples*, 82 Mich. 654.

A railroad company would be liable to any one of its servants operating its road, for the negligence of any other one of its servants whose duty it was to keep the road in good condition, and who culpably failed to perform such duty, or to give proper warning; for, in such case, the two classes of servants would not be fellow servants or co-employés, but the latter class would really be the representative of the master, the railroad company, and the failure of the servant would be within the line of his duties. But a railroad company, at common law, and in Texas, (if it has in other respects performed its duty) is not liable to its servants for the negligence of its co-employés, or fellow servants, or for the failure of still other servants to perform certain acts, where the performance of such acts does not come within the proper line of their duties. (*Hannibal & St. J. R. Co. v. Fox*, 31 Kan. 586; 3 Pac. Rep. 320.) *Atchison &c. R. Co. v. Moore*, 29 Kan. 452.

(See extract from opinion in this case p. 1652.)

Drymala v. Thompson, 26 Minn. 40.

A car repairer or inspector of a railway company is not a fellow servant with a brakeman operating the brakes of a car, within the meaning of that rule of the common law which exempts the master from liability for negligence between fellow servants.

So, a company is liable to a brakeman for injuries received in the performance of his duties through the negligence of the company's inspector of machinery, in failing to discover and remedy a defect in a brake-staff, discoverable by exercise of reasonable care. *Mo. P. R. Co. v. Dwyer*, 36 Kas. 58.

Citing *A. T. & C. Co. v. Moore*, 29 Kas. 633; *St. L. & C. R. Co. v. Weaver*, 35 id. 412; *Long v. R. Co.*, 65 Mo. 225; *Condon v. R. Co.*, 78 id. 567.

See, also, *Morton v. Railroad Co.*, 81 Mich. 423; *Condon v. Mo. P. R. Co.*, 78 Mo. 567.

Conductor of a train and an inspector of the cars thereof, are not. *Illinois C. R. Co. v. Hilliard*, (Ky.) 37 S. W. Rep. 75.

Contra, *Shingard v. Union T. Co.*, 201 Pa. St. 562.

Car inspector and those in charge of an engine are not co-servants. *Louisville & C. R. Co. v. Lowe*, (Ky.) 66 S. W. Rep. 736.

They are fellow servants who are engaged in accomplishing the ultimate purpose in view, as in running a railway, such as brakemen and machinist in repair shops, inspectors of machinery and superintendent of transportation. *Wonder v. Baltimore & C. R. Co.*, 32 Md. 418.

Yates v. McCullough Iron Co., 69 Md. 370.

Engineer and carpenter on train to repair bridges, etc., are co-servants. *Seaver v. B. M. R. Co.*, 14 Gray, 466.

Ryan v. C. V. R. Co., 23 Penn. St. 384.

Brakemen and men working upon trains are fellow servants, where too short pin was used, when proper one was available. *Thyng v. Railroad Co.*, 156 Mass. 12.

Inspector of ways and repairer of bridge and brakeman are fellow servants. *Harrison v. Central R. Co.*, 31 N. J. L. 293.

An employé in blacksmith shop repaired a chain to be used in raising driving wheels of a locomotive to be worked on by "B.," another servant employed at the same works. Upon use a link broke and injured "B." "A." and "B." were fellow servants, and company was not liable for "A.'s" negligence. *Rogers & C. Works v. Hand*, 50 N. J. L. 464.

Citing *Harrison v. Central R. Co.*, 2 Vroom. 293; *McAndrews v. Burns*, 10 id. 117; *Ewan v. Lippincott*, 18 id. 192.

From opinion.—"The test which will determine what is a common employment of workmen, to which their implied undertakings will apply, has been fixed in this state. The court of errors has declared a fellow servant to be one who serves and is controlled by the same master, and common employment to be service of such kind that, in the exercise of ordinary sagacity, all who engage in it

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may be able to foresee, when accepting it, that, through the negligence of fellow servants, they may be exposed to injury. *McAndrews v. Burns*, 10 Vroom. 117. This doctrine was so fully discussed and illustrated in *Ewan v. Lippincott*, 18 Vroom. 192, that further discussion of it is unnecessary."

Engineer of locomotive, who was killed by explosion, and boiler repairer are not fellow servants. *Penn. &c. R. Co. v. Mason*, 109 Pa. St. 296.

Trainmen and employés of a shop are fellow servants. *N. Y. &c. R. Co. v. Bell*, 112 Pa. St. 400.

A car repairer was not a fellow servant of switchman, or "hostler," in a different yard. *San Antonio &c. R. Co. v. Keller*, 11 Tex. Civ. App. 569.

But see *Campbell v. Texas &c. R. Co.*, 16 Tex. Civ. App. 665, where they were in the same yard.

Smith v. Chicago &c. R. Co., 91 Wis. 503.

Train operators and one engaged to paint a coal house, are not. *Missouri &c. R. Co. v. Collins*, 15 Tex. Civ. App. 21.

Inspectors of foreign cars and operatives are not fellow servants. *Northern P. R. Co. v. Herbert*, 116 U. S. 642.

Louisville &c. R. Co. v. Buck, 116 Ind. 566; *Little Miami R. Co. v. Fitzpatrick*, 42 Oh. St. 318; *Mackin v. Boston &c. R. Co.*, 135 Mass. 201, fellow servants.

So of crew of work train and section foreman in charge of a hand car. *Martin v. Atchison &c. R. Co.*, 166 U. S. 399.

Boiler inspectors of engines are not fellow servants of engineers thereon. *Texas &c. R. Co. v. Thompson*, 70 Fed. Rep. 944.

See, also, *Slavens v. Northern P. R. Co.*, 97 Fed. Rep. 255.

A track walker, traveling to summon a section crew to assist in clearing away a wreck and an engineer running his engine in pursuit of the same object, are. *Stephani v. Southern P. R. Co.*, 19 Utah, 196.

Laborer in car shops and the foreman of switchmen in the train department, held not. *Pool v. Southern P. Co.*, 20 Utah, 210.

A section boss whose duty it was to remove a stake dangerously near defendant's track, is not a fellow servant of a brakeman injured by the same. *Riley v. Railroad Co.*, 27 W. Va. 145.

Inspector represents the master and is not fellow servant of brakeman. *Johnson v. Chesapeake &c. Co.*, 36 W. Va., 73.

Brakeman killed by removal of rails; no liability. *Moseley v. Chamberlain*, 18 Wis. 700; *contra*, *Cooper v. Railroad Co.*, 23 id. 668.

Station agent charged with duty of keeping his station free from obstructions was a fellow servant of trainmen injured by car blown on the track by a violent wind. *Toner v. Railroad Co.*, 69 Wis. 188.

Train crew and employé riding to or from work.—A laborer employed by a railroad company, under an arrangement by which he was to be conveyed to and from his home, was not allowed to recover for the negligence of the engineer of such train, whereby he was injured. *Russell v. H. R. R. Co.*, 17 N. Y. 134, rev'g judg't for pl'ff.

From opinion.—"The general rule that where several persons are employed in the same general service, and one is injured by the carelessness of another, the employer is not responsible, is now too well settled to be disputed. *Hutchinson v. N. Y. & C. R. Co.*, 14 Jurist, 827; *Wigget v. Fox*, 36 Eng. L. & Eq. R. 486; *Tarrant v. Webb*, 37 id. 281; *Farwell v. Boston & Worcester R. Co.*, 4 Metc. 49; *Hayes v. Western R. Co.*, 3 Cush. 270; *Murray v. S. C. R. Co.*, 1 McMullan R. 285; *Ryan v. Cumberland Valley R. Co.*, 23 Penn. 386; *Coon v. Syracuse & Utica R. Co.*, 1 Seld. 494."

Where a person, as a part of his compensation for services, rides to and from his work, he is riding as an employé, and for injury through the negligence of a co-employé, master was not liable. *Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267, rev'g judg't for pl'ff.

From opinion.—"In the case of *Ross' Administratrix v. N. Y. C. & H. R. R. Co.*, 5 Hun, 488; affirmed in this court in 74 N. Y. 617, the intestate was killed by an accident on the defendant's road. He was an assistant surveyor employed by the month, and had no duty to perform in connection with the running of the defendant's train, nor any care in reference to the road. His death occurred while being transported on defendant's cars, free of charge, from his home to the place where he was to perform work.

There was no direct proof that the contract provided for his transportation upon the road free of charge, but it may be implied from the circumstances that such was the understanding. * * *

In the case of *Russell v. H. R. R. Co.*, 17 N. Y. 134, the deceased was employed to work under an arrangement by which he was to be conveyed home every night in the cars, in connection with which he was working, free of charge. He was to be taken home upon the gravel train at night, and when his day's work was completed he was under no further obligation to do any more work for the company. Carrying him home constituted a part of his wages. * * * In the case of *Gillshannon v. Stony Brook Railroad Corporation*, 10 Cush. 228, it appeared that the plaintiff was a laborer on the road and was conveyed in the defendant's cars to and from the place of his work with the consent of the company for mutual convenience, there being no contract between them as to his transportation. He was injured while thus on his way to his work, and the court says: 'If the plaintiff was, by the contract of service, to be carried by the defendant to the place of his labor, then the injury was received while engaged in the service for which he was employed, and so falls within the ordinary cases of servants sustaining injury from the negligence of other servants.' This case sustains the doctrine that if the traveling was done under the contract for service, then the defendant is not liable, and bears directly upon that question as presented in the case at bar. The cases of *Seaver v. Boston & Maine Railroad*, 14 Gray, 466, and *Tunney v. Midland Railway Co.*, L. R. 1 C. P. 291, also sustain the doctrine contended for by the appellant's counsel. Of a contrary import is the case of *O'Donnell v. A. V. R. R. Co.*, 59 Pa. St. 239, which is in conflict with the rule which obtains in this state and is not sound law."

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Plaintiff, surveyor in defendant's employ, while being transported from his residence to place of work, was injured by the negligence of conductor. Negligence of co-employé. *Ross v. N. Y. C. & H. R. Co.*, 5 Hun, 488, rev'g judg't for pl'ff. See *Wooden v. Western &c. R. Co.*, 147 N. Y. 508.

From opinion.—"We are referred to several cases in other states, where a different rule is asserted. In *Ryan v. The Chicago & N. W. R.* (60 Ill. 171) and *Lake v. The Chicago, B. & Q. R. R. Co.*, (52 id. 401) and *Fitzpatrick v. The New Albany R. R. Co.*, (7 Ind. 438) and others, it is held that a railroad company is liable to a servant for an injury occasioned by the negligence of another servant, when the duties of the latter, in connection with which the injury happened, were not in common, nor in the same department with those of the injured servant, and where the negligence of the injured servant did not contribute to the injury.

These cases, it seems to me, overlook or mistake the true principle upon which the master's liability in such cases rests. All the servants of a common master stand to him in the same relation; they severally undertake to work for the same master, and take and assume, on their part, the risk of all dangers ordinarily incident to their employment. The master, impliedly, undertakes on his part to exercise ordinary care to protect them from all unreasonable risks and dangers pertaining to such work, resulting from the employment of incompetent servants in other departments of his work.

Conductor and laborer being transported, were not fellow servants. *Pendergast v. Union R. Co.*, 10 App. Div. 207.

Chicago &c. R. Co. v. Bayfield, 37 Mich. 205; *Missouri &c. R. Co. v. Hines*, (Tex. Civ. App.) 40 S. W. Rep. 152; *Southern P. Co. v. McGill*, (Ariz.) 44 Pac. Rep. 302.

Engineer and blacksmith injured on wrecking train are fellow servants. *Abend v. Terre Haute &c. R. Co.*, 111 Ill. 202.

See, also, *Miller v. Ohio &c. R. Co.*, 24 Ill. App. 326; *Watts v. Hart*, 7 Wash. 178; *Tomlinson v. Chicago &c. R. Co.*, 97 Fed. Rep. 252; *Wright v. Northampton &c. R. Co.*, 122 N. C. 852.

Section man crossing track on his way home was injured by construction train on which he had returned home; he was not fellow servant with trainman. *Columbus &c. R. Co. v. O'Brien*, 4 Oh. City Ct. R. 515.

One engaged to keep pumps, tanks, etc., in repair, and the engineer transporting him, were not. *Stuber v. Louisville &c. R. Co.*, 102 Fed. Rep. 421.

Servant, engine wiper, going to and from his work on train or on foot, is in the service of the master, and if injured by the negligence of trainmen, master is not liable. *Ewald v. Chicago &c. R. Co.*, 70 Wis. 420.

Keyes v. Penn. R. Co., 3 Atl. Rep. (Pa.) 15.

Miscellaneous instances.—A switch tender's negligence set cars in motion, and a flagman to flag the trains at a street crossing was found

dead on the track where his duty did not call him. It was the negligence of a co-employé and contributory negligence was for the jury. *Sammon v. N. Y. C. & H. R. R. Co.*, 62 N. Y. 251, aff'g judg't of nonsuit.

The plaintiff's intestate was an assistant to the defendant's yard master, "L.," and was hired by him and under his control.

While coupling damaged cars, "L." gave the signal and the engineer backed the train against the cars and the intestate was killed between the cars. "L." and the deceased were co-servants and the defendant was not liable. *McClosker v. L. I. R. Co.*, 84 N. Y. 77, rev'g 21 Hun, 500, and judg't for pl'ff.

A locomotive was sent to the shop for repair. It passed all the departments of the repair shop and came in turn to "M." to have the safety valve set, during which process it exploded and killed "M." through a defect in the boiler which was overlooked by the boiler repairer while in his hands. Negligence was that of the co-employé, and no recovery was allowed. *Murphy v. B. & A. R. Co.*, 88 N. Y. 146, aff'g judg't on nonsuit.

Distinguishing *Fuller v. Jewett*, 80 N. Y. 46.

The plaintiff's co-employés took up a plank, covering a cable ditch between the tracks; the next day the plaintiff fell into the ditch. It was the negligence of the co-employés. *Filbert v. Prest. &c. D. & H. C. Co.*, 121 N. Y. 207, rev'g 24 J. & S. 170, and judg't for pl'ff.

From opinion.—"This is like the case of a master builder who builds a platform upon the side of a building for his employés to work upon, and one of them removes from the platform a plank, and in consequence another employé falls through the aperture thus made and is injured; and in such a case it is well settled that the master is not responsible for the injury. If this defendant had been engaged in repairing a bridge, and one of its employés had taken up a plank and had not replaced it, and another employé had fallen through the hole in consequence of such carelessness, the defendant would not have been responsible."

Machinist in repair shop for locomotives and supervisor of track are fellow servants of fireman on locomotive. *Mobile &c. R. Co. v. Thomas*, 42 Ala. 672.

Mobile &c. R. Co. v. Smith, 59 Ala. 245.

Inspector of cars and foreman injured in yard are fellow servants, but not so in case of general inspector to pass on necessity of general repairs. *St. Louis &c. R. Co. v. Rice*, 51 Ark. 467.

"Fire knocker" and a "hostler" were not fellow servants, though both were under the supervision of the train dispatcher. *St. Louis &c. R. Co. v. Hurimond*, (Ark.) 68 S. W. Rep. 488.

Master mechanic in control of engine, and engineers and fireman are fellow servants. *Ohio &c. R. Co. v. Collarn*, 73 Ind. 261.

Hard v. V. & C. R. Co., 32 Vt. 473.

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Trainman injured while tunnelling was a co-servant with engineer of construction train. *Capper v. Louisville &c. R. Co.*, 103 Ind. 305.

Ohio &c. R. Co. v. Tindall, 13 Ind. 366; Wilson v. Mad. R. R. Co., 18 id. 226; Slattery v. Toledo &c. R. Co., 23 id. 81; Thayer v. St. Louis &c. R. Co., 22 id. 26; Ohio &c. R. Co. v. Hammersley, 28 id. 371; Gormley v. Ohio &c. R. Co., 72 id. 31; Gillshannon v. Stony Brook R. Co., 10 Cush. 228; Manville v. Cleveland &c. R. Co., 11 Oh. St. 417; Keystone Bridge Co. v. Newberry, 96 Pa. St. 246; Thompson v. Chicago &c. R. Co., 18 Fed. Rep. 239; Penn. R. Co. v. Wachter, 60 Md. 395; Dallas v. Gulf &c. R. Co., 61 Tex. 196; Troughear v. Lower Vein Coal Co., 62 Iowa, 576; Brown v. Minn. &c. R. Co., 31 Minn. 553; Heine v. Chicago &c. R. Co., 58 Wis. 525.

Foreman of one section gang and member of another are fellow servants. *Clarke v. Penn. Co.*, 132 Ind. 199.

"Where employ  s work in different employment, one having no means of knowing anything about the business or qualification of the other, and being wholly unacquainted with it, they cannot be said to be fellow servants within the meaning of the rule." *Atchison &c. R. Co. v. McKee*, 37 Kas. 592.

East Tenn. &c. R. Co. v. Rush, 15 Lea, (Tenn.) 145; Richmond &c. R. Co. v. Norment, 84 Va. 167.

Defect in a brake resulting from want of care in fellow servants of a brakeman injured by it, is not chargeable to the railroad company. *Wonder v. Baltimore &c. R. Co.*, 32 Md. 411.

It is immaterial, on the question of a common carrier, that servants are in different departments. *Holden v. Fitchburg R. Co.*, 129 Mass. 271.

Roadmaster and section men are fellow servants. *Brown v. Railroad Co.*, 27 Minn. 163; Foster v. Minn. Cent. R. Co., 14 id. 360.

So all engaged in construction of road or appliances. *Lindvall v. Woods*, 41 Minn. 211.

Servants making repairs are fellow servants as to each other. *Ling v. Railroad Co.*, 50 Minn. 160.

Sectionmen and a bridge gang, were fellow servants. *Brunnell v. Southern P. Co.*, 34 Ore. 256.

Injury to track employ   from negligence of servant in machine shop, is not chargeable to the company. *Rogers &c. Works v. Hand*, 50 N. J. L. 464.

Where engineer, by using a dangerous engine, injured one engaged in the same general business, the master was not liable. *Phila. &c. R. Co. v. Davis*, 111 Pa. St. 597.

The doctrine that employ  s in different departments are not fellow

servants has no application, except to railroads. *Coal Creek R. Co. v. Davis*, 90 Tenn. 711.

Member of bridge gang and servant in transportation department are fellow servants. *International &c. Co. v. Ryan*, 82 Tex. 565.

Employés of roundhouse firemen and those of the yardmaster, were not fellow servants, though the duties of each required them to take coal from the same car. *Houston &c. R. Co. v. Talley*, 15 Tex. Civ. App. 115.

Plaintiff under an engine by order of a foreman inside a roundhouse, was not a fellow servant with a foreman outside. *Texas &c. R. Co. v. Scruggs*, (Tex. Civ. App.) 58 S. W. Rep. 186.

Express messenger and a guard to protect the goods are fellow servants. *Wells Fargo Express Co. v. Page*, (Tex. Civ. App.) 68 S. W. Rep. 528.

Foreman of freight car repair sheds and a car repairer were fellow servants. *Grady v. Southern R. Co.*, 92 Fed. Rep. 491.

General yard master and the yard foreman were. *Cincinnati &c. R. Co. v. Gray*, 101 Fed. Rep. 623.

One in charge of construction of a semaphore and those charged with the duty of climbing it, were not. *Welty v. Lake Superior &c. Co.*, 100 Wis. 128.

Factories, mills and machine shops:

A chemist in a different department of a mill started machinery and killed a co-employé. Negligence of co-employé. *Wilson v. Hudson River Water Co.*, 71 Hun, 292, aff'g judg't of nonsuit.

Woodcutter and engineer of a lumbering train are fellow servants. *Railey v. Garbutt*, 112 Ga. 288.

Operator of a trimming saw in a mill and servants in charge of the rolls are. *Demers v. Deering*, 93 Me. 272.

Inspector of premises and machinery is not a fellow servant of other employés serving the same. *Van Dusen v. Lettelier*, 78 Mich. 492.

Engineer of saw mill started saw when mill laborer was under it cleaning it out, and was fellow servant of latter. *Bergstrom v. Staples*, 82 Mich. 654.

Employés of flour rolling mills and of feed mills on the same floor using each other's rollers, are. *Frazee v. Stott*, (Mich.) 79 N. W. Rep. 896.

Night watchman and carpenter are. *Bodwell v. Nashua Man. Co.*, (N. H.) 47 Atl. Rep. 613.

Servants are in a common service when they may be able to foresee, when accepting it, that through the negligence of their fellow servants they may be exposed to injury. *Rogers &c. Works v. Hand*, 50 N. J. L. 464.

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Employé under master machinist sent to repair a wheel of a mill was injured by the engineer negligently starting the wheel. It was understood between the repairer and defendant that the mill would run at such time as they were not actually at work on the wheel. Plaintiff and engineer were fellow servants of the defendant. *Ewan v. Lippincott*, 47 N. J. L. 192.

See, also, *Harrison v. Central R. Co.*, 31 N. J. L. 293, 297.

A helper at one of the furnaces in a copper smelting factory and one engaged in taking copper from another furnace and throwing it into a pit of water some distance away, were. *Guggenheim Smelting Co. v. Scofield*, (N. J. L.) 46 Atl. Rep. 711; s. c., 50 L. R. A. 417.

If the general scope of employment is the same, servants are co-servants. *Nat. Tube Co. v. Bidell*, 96 Pa. St. 175.

Operator of machine and shop carpenter were fellow servants. *Nemier v. Riter*, 179 Pa. St. 557.

Servants in common service, although in different departments, are fellow servants. *Brodeur v. Valley Falls Co.*, 16 R. I. 448.

All who were assisting in moving a large grindstone, were. *Sullivan v. Nicholson File Co.*, (R. I.) 45 Atl. Rep. 549.

One feeding a machine and one cleaning out a gearing pit on the same floor, were. *Burke v. National India-Rubber Co.*, (R. I.) 44 Atl. Rep. 307.

A millwright, engaged in constructing an addition to a mill, and one operating machinery therein, were not. *Hammarberg v. St. Paul &c. Lumber Co.*, 19 Wash. 537.

Mines, quarries and excavations:

Employés who opened a trench and those who placed pipe therein, were not. *Schmidt v. Gillen*, 41 App. Div. 302.

One who is to lay bricks in a trench and one who prepares the trench and the foreman of both, were. *Curley v. Hoff*, 62 N. J. L. 758.

See, also, *Schott v. Onondaga S. Bk.*, 49 App. Div. 503.

A separate gang of diggers on a conduit were not co-employés of those doing the mason work. *Eicholz v. Niagara &c. Power Co.*, 68 App. Div. 441.

Engineer of a tramway engine on a running slope and the engineer of a pump engine in the mine, were. *Whatley v. Zenida Coal Co.*, (Ala.) 26 South. Rep. 124.

One chargeable with the safe condition of a train in a mine and one spragging the wheels of a coal car thereon, were. *Woodward Iron Co. v. Cook*, 124 Ala. 349.

Engineer to lower car into shaft, and track layer in a mine are fellow servants. *Ninantie &c. Co. v. Leonard*, 126 Ill. 216.

Servant who hauled cars in a tunnel to the shaft and turned them over to another for hoisting, was not a fellow servant of an engineer in charge of the hoisting apparatus. *Duffy v. Kivilin*, 195 Ill. 630; aff'g s. c., 98 Ill. App. 483.

Helper at a drill and fireman in charge of the boiler to the engine running it, were not fellow servants. *Heldmaier v. Cobbs*, 96 Ill. App. 315; s. c. aff'd, 62 N. E. Rep. 853.

One in charge of the apparatus to draw cars up an incline and one whose duty was to see to their dumping, were. *Clark County Cement Co. v. Wright*, 16 Ind. App. 630.

Two servants assisting in moving a stone under direction of a third, were fellow servants. *Smallwood v. Bedford Quarries Co.*, (Ind. App.) 63 N. E. Rep. 869.

Workman charged with the timbering a mine was not a fellow servant of a miner. *Cushman v. Carbondale Fuel Co.*, (Iowa) 88 N. W. Rep. 817.

One in charge of an apparatus for hoisting stone was a co-servant with the regular quarrymen. *Chapman v. Reynolds*, 77 Fed. Rep. 274.

"Pushers" in charge of different shifts of men, bound to notify each other, in changing shifts, of unexploded holes in the shaft, were fellow servants. *Anderson v. Daly Min. Co.*, 16 Utah, 28.

Servant in charge of fan in a mine, but having no power of direction or discharge over others, held a fellow servant only. *Hughes v. Oregon Imp. Co.*, 20 Wash. 294.

Gas tester in a mine was not a fellow servant with the miners. *Costa v. Pacific Coast Co.*, 26 Wash. 138.

One engaged in emptying, and attaching to a rope for the purpose of lowering, an ore bucket, which another at the bottom of the shaft was engaged to fill, was a co-servant with the latter. *Adams v. Snow*, (Wis.) 81 N. W. Rep. 983.

Building operations:

Driver of a wagon of a meat shop and a hod carrier engaged in erecting an addition to the premises, were not. *McTaggart v. Eastman's Co.*, 28 Misc. 127; aff'g s. c., 27 id. 184.

Carpenter constructing a building and one employed to clean up the rubbish therein, were. *Spillane v. Eastman's Co.*, 33 Misc. 463; rev'g s. c., 32 id. 235.

Painters under the same foreman, though on different gangs, were.

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World's Columbian Exposition v. Lehigh, 196 Ill. 612; rev'g s. c., 94 Ill. App. 433.

World's Columbian Exposition Co. v. Bell, 76 Ill. App. 591.

Carpenters and bricklayers under different foremen and whose work was entirely distinct, were not. *Chicago &c. R. Co. v. Maroney*, 67 Ill. App. 618.

Operators of elevators in an uncompleted building and carpenters therein, were not. *Leiter v. Kinnare*, 68 Ill. App. 558.

Masons and carpenters on bridge work are fellow servants. *Bier v. Railroad Co.*, 132 Ind. 78.

Carpenters constructing a scaffold together, were. *Perigo v. Indianapolis Brew. Co.*, 21 Ind. App. 338.

One using a bridge in returning to work and one operating a derrick car repairing it, were. *Olsen v. Andrews*, 168 Mass. 261.

Injury through lowering a large timber without taking it apart, was due to method adopted by fellow servant in dealing with a temporary condition. *Cogan v. Burnham*, 175 Mass. 391.

A hod carrier was a co-servant with the masons. *Maher v. McGrath*, 58 N. J. L. 469.

One bolting iron plates to a vessel and the carpenter who constructed his scaffold, were *Pfeiffer v. Dialogue*, (N. J. L.) 46 Atl. Rep. 772.

Mason and one employed to superintend carpenter work on barn on city's property, were. *Olmstead v. Raleigh*, (N. C.) 41 S. E. Rep. 292.

Buildings:

Plaintiff, with others in the employ of the defendant, was engaged in putting a heavy tank into a hole onto a supporting iron girder about eight feet below the second floor of a building. A two-inch rope was put through a hole in the bottom of the tank to be there securely fastened, with a view of raising and placing the tank by means of a tackle above. For the purpose of putting the rope through and securing it there, the plaintiff and others were on a plank. It broke and he was precipitated to the bottom of the building. Negligence of co-employees. *Mahoney v. Vacuum Oil Co.*, 76 Hun, 579, aff'g nonsuit.

Plumbers engaged for regular service on a building were co-servants with floor cleaners thereof. *Bateman v. New York &c. R. Co.*, 67 App. Div. 241.

Foreman of workmen and an engineer in charge of a freight elevator of a building in course of construction, were fellow servants. *Ingram v. Fosburgh*, 73 App. Div. 129.

An elevator boy and an electrician and engineer in a hotel, were. *McCarty v. Rood Hotel Co.*, 144 Mo. 397.

An elevator man and one engaged in the tailoring department of a dry goods store, were. *Spees v. Boggs*, 198 Pa. St. 112.

Shipping:

The owner of a ship is not liable for injuries occasioned to a sailor through the negligence of a mate. *Olson v. Clyde*, 32 Hun, 425, aff'g demurrer to complaint.

But see *Scarff v. Metcalf*, 107 N. Y. 211.

Man in charge of winch in unloading lumber and man piling the unloaded lumber, were. *Olesen v. Starin*, 43 App. Div. 422.

See, also, *Kelley v. Hogan*, 76 N. Y. Supp. 913.

A laborer engaged in shoveling grain from cars into an elevator, is a fellow servant of the captain of a steam tug towing a vessel to be loaded from the elevators; so that negligence of the latter in allowing the masts of the vessel to come in contact with the elevator and detach a piece of wood by which laborer was injured, is not chargeable to their common master. *Baltimore Elevator Co. v. Neal*, 65 Md. 438.

One engaged in unloading lumber from a vessel and one engaged in piling it on shore, were not; the former being a servant of an independent contractor. *Spry Lumber Co. v. Duggan*, 182 Ill. 218; aff'g s. c., 80 Ill. App. 394.

A cook on a tug, killed by negligence, was not a fellow servant of a negligent engineer. *Grimsley v. Hankins*, 40 Fed. Rep. 400.

Engineer on a vessel neglecting to repair electric lights, whereby coal trimmer was a fellow servant of the latter. *Mellen v. Thomas Wilson &c. Co.*, 159 Mass. 88.

Benson v. Goodwin, 147 Mass. 237; *The A. Heaton*, 43 Fed. Rep. 592.

Mate, lowering a mast, and a boatswain who went up to unfasten it, were. *The Miami*, 87 Fed. Rep. 757.

The man in charge of the stern painter of a pilot yawl, and the man charged with the direction of its movements were co-servants with the rest of the crew thereof. *Carlson v. United &c. Asso.*, 93 Fed. Rep. 468.

Longshoreman unloading ship and those in charge of its supplies, were not. *Sansol v. Compagnie Generale Transatlantique*, 101 Fed. Rep. 390.

All servants on a vessel irrespective of grade were fellow servants engaged in a common undertaking. *Olson v. Oregon &c. Nav. Co.*, 104 Fed. Rep. 574.

BUT NOT WHEN ENGAGED IN DUTY OWED BY MASTER TO HIS SERVANTS.

Miscellaneous instances:

Watchman of a traveling show and one charged with the duty of maintaining discipline among the employés, were. *McKay v. Buffalo Bill's &c. Co.*, 17 Misc. 601.

One in charge of boilers in a power house and a teamster engaged to haul coal thereto, were. *Denver T. Co. v. O'Brien*, 8 Colo. App. 74.

Workmen on a scaffold in a lumber yard and one employed to construct it, were not. *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315; aff'd s. c., 68 Ill. App. 523.

Founder in blast furnace and engineer of locomotive moving cars on same premises are fellow servants. *Adams v. Iron Cliffs Co.*, 78 Mich. 271.

Sell v. Lumber Co., 70 Mich. 479.

3. AND ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT.

Plaintiff boarded a car on a moving turntable to get his pay when it was wholly unnecessary and not pursuant to any compulsion from his master. No recovery. *St. Louis &c. R. Co. v. Ferguson*, 65 Ark. 126.

Employé quit his work and left by a window not intended as a means of exit. No recovery. *Swift v. McInery*, 90 Ill. App. 294.

Fellow servants engaged in a scrimmage as the result of a political discussion, pushed plaintiff off a moving car. No recovery. *Kincade v. Chicago &c. R. Co.*, 107 Iowa, 682.

Servant employed as a common laborer, without orders from master, attempted to thaw stick of frozen daulin by holding it over a fire. Master was not liable on ground of his incompetency. *McManus v. Staples*, 171 Mass. 150.

Act of a fireman in jumping from a moving train to avoid injury held not within the course of the performance of his duties. *Jackson v. Galveston &c. R. Co.*, 14 Tex. Civ. App. 685; s. c. aff'd, 90 Tex. 372.

Railroad company is not liable for willful conduct which it had no means of preventing. *McPeck v. Central Vt. R. Co.*, 79 Fed. Rep. 590.

4. BUT NOT WHEN ONE IS ENGAGED IN PERFORMANCE OF DUTY OWED BY MASTER TO HIS SERVANTS.

A corporation is not liable for the negligence of its employé in the observance of its regulations respecting the running of trains whereby another employé is injured.

The trains were started so close together that the brakeman was hurt.

There was no evidence as to time tables, rules, etc. *Rose v. Boston A. R. W. Co.*, 58 N. Y. 217, rev'g judg't for pl'ff.

Distinguishing *Flike v. B. & A. R. Co.*, 53 N. Y. 533.

The master was not liable for an injury to an employé, from the negligence of a competent foreman, to whom no delegation of power and control of business, or a branch thereof, was made, but who was charged only with certain duties, performed under the direction of the master. It is only when the master withdraws from business, or when, as in the case of a corporation, it is necessary to commit duties to an agent, that the master or superior is liable.

The defendant employed a carpenter to examine and put the brewery in repair. A mash-tub fell and killed an employé. There was no evidence that the master ought to have known of the defect. *Malone v. Hathaway*, 64 N. Y. 5, rev'g judg't for pl'ff.

Citing *Hoffnagle v. N. Y. Cent. R. Co.*, 55 N. Y. 608; *Wright v. N. Y. C. R. Co.*, 25 id. 562.

Acts of fellow servants in performance of duties of the master bind him. *Sciolina v. Erie Preserving Co.*, 7 App. Div. 417; s. c. aff'd, 151 N. Y. 50.

Galasso v. National S. S. Co., 27 App. Div. 169; *Egan v. Dry Dock &c. R. Co.*, 12 id. 556; *Cavanaugh v. O'Neill*, 27 id. 48; *Camp v. Hall*, 39 Fla. 535.

Plaintiff, a bricklayer, in the employ of defendants, was directed by the foreman over the mason work to go to work on a pier which was near a derrick, and shortly after was injured by the fall of the derrick, caused by the absence of a check rope, which a fellow servant who had charge of the derrick forgot to attach to it. Defendants were not responsible for the failure of the foreman to see that the rope was attached to the derrick. *Jenkinson v. Carlin*, 10 Misc. 22.

Foreman cannot make a fellow servant a vice-principal by attempting to delegate his authority to him. *Boyd v. Indian Head Mills*, (Ala.) 31 South. Rep. 80.

Whether one is a fellow servant or not does not depend on the difference in rank or the power to control and direct the work, or to discharge from service, but whether the act in question involved a duty owing by the master. *Robertson v. Chicago &c. R. Co.*, 146 Ind. 486.

See, also, *Kerner v. Baltimore &c. R. Co.*, 149 Ind. 21; *Peirce v. Oliver*, 18 Ind. App. 87.

If the duty was not one owed by the master to the injured servant, but one owed by the injured servant to the master they are co-servants. *American Teleph. &c. Co. v. Bower*, 20 Ind. App. 32.

Where the negligence was not in the failure to furnish proper ap-

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pliances, but in the failure to use them properly, the master was not liable. *Trcka v. Burlington &c. R. Co.*, 100 Iowa, 205.

Ryan v. Smith, 85 Fed. Rep. 758.

The test is not one's rank or authority over other employés but the nature of the duty which he performs. *Carlson v. Northwestern Teleph. &c. Co.*, 63 Minn. 428.

Lundberg v. Shevlin-Carpenter Co., 68 Minn. 135; *Guggenheim Smelting Co. v. Sofield*, (N. J. L.) 46 Atl. Rep. 711; s. c., 50 L. R. A. 417; *Wilson v. Charleston & S. R. Co.*, 51 S. C. 79; *Jackson v. Norfolk &c. R. Co.*, 43 W. Va. 380.

Acts are not those of a fellow servant where they are done under the direct orders of the master. *Swensen v. Bender*, 114 Fed. Rep. 1.

Machinery, appliances and place to work:

Where an engineer upon a railroad locomotive was killed by an explosion of a boiler which had been for some time out of repair, and had been frequently reported and sent to the repair shop for repairs, the defendant who was operating the road was not excused from liability by the fact that there was no negligence on his part in the employment of a superintendent of repairs, or in omitting to make proper regulations, that the master mechanic having charge gave proper instructions for the thorough examination and repair of the engine, and that the negligence causing the accident was that of the mechanics directed to make the repairs. *Fuller v. Jewett*, 80 N. Y. 46; aff'g judg't for pl'ff.

It has been held the duty of the master to provide against explosion of a boiler by naphtha left in pipe connected with it. *O'Donnell v. East River Gas Co.*, 91 Hun, 184.

Egan v. Dry Dock &c. R. Co., 12 App. Div. 536; *Fox v. Le Compte*, 2 id. 61.

To see that hoisting apparatus is safe. *Tomsaelli v. Griffiths &c. Corp.*, 9 App. Div. 127; *Dougherty v. Milliken*, 26 id. 386.

To see that gas jet to furnish light, was properly lit. *Simmons v. Peters*, 20 App. Div. 251.

To secure a pump to prevent its falling apart. *Stimper v. Fuchs Man. Co.*, 26 App. Div. 333; s. c. aff'd, 161 N. Y. 636.

To see that scaffolding was safe. *Hatton v. Hilton &c. Co.*, 42 App. Div. 398.

To select proper guy wire. *Sarno v. Atlantic Stevedoring Co.*, 66 App. Div. 611.

To see that a cable is not put in operation after promising a servant, entering a hole through which it runs, that he would do so. *Mullane v. Houston &c. R. Co.*, 21 Misc. 10; aff'g s. c., 20 id. 434.

Duty to use reasonable care as to the safety of appliances, of a place

to work and as to giving notice of special dangers cannot be delegated. *Norton v. Volzke*, 158 Ill. 402.

Donnelly v. San Francisco Bridge Co., 117 Cal. 417; *Denver T. Co. v. Crumbaugh*, 23 Colo. 363; *McCauley v. Southern R. Co.*, 10 App. D. C. 560; *Camp v. Hall*, 39 Fla. 535; *Hess v. Rosenthal*, 160 Ill. 621; *Chicago &c. R. Co. v. Scanlan*, 170 Ill. 106; *Chicago &c. R. Co. v. Maroney*, 170 Ill. 520; aff'g s. c., 67 Ill. App. 618; *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315; aff'g s. c., 68 Ill. App. 523; *Leonard v. Kinnare*, 174 Ill. 532; aff'g s. c., 75 Ill. App. 145; *Chicago &c. R. Co. v. Driscoll*, 70 Ill. App. 91; *Kewanee Boiler Co. v. Erickson*, 78 id. 35; *Lauter v. Duckworth*, 19 Ind. App. 535; *Indiana Iron Co. v. Cray*, id. 565; *Blazenic v. Iowa &c. Coal Co.*, 102 Iowa, 706; *Cherokee &c. Coal & M. Co. v. Britton*, 3 Kan. App. 292; *Maher v. Thropp*, 59 N. J. L. 186; *Laporte v. Cook*, 21 R. I. 158; *Bosworth v. Rogers*, 82 Fed. Rep. 975; *Ogle v. Jones*, 16 Wash. 319.

Engineer or foreman in erecting a derrick is not a fellow servant. *Ambrose v. Angus*, 61 Ill. App. 304.

That the foreman assisted in the work does not relieve the master, for the former's direction to work in a dangerous place. *Kolb v. Carrington*, 75 Ill. App. 159.

Division roadmaster exercises the functions of the company in superintending the construction of a switch. *Rouse v. Downs*, 5 Kan. App. 549.

A servant intrusted with the duty of selecting a safe place to work in and providing safe appliances acts as the representative of his master. *Stucke v. Orleans R. Co.*, 50 La. Ann. 173.

Swift & Co. v. Wyatt, 75 Ill. App. 348; *Small v. Allington &c. Man. Co.*, 94 Me. 551; *Kerr-Murry Man. Co. v. Hess*, 98 Fed. Rep. 56; *Lehigh Valley Coal Co. v. Wavrek*, 84 Fed. Rep. 866; *Troxler v. Southern R. Co.*, 124 N. C. 189.

That similar appliances were ordinarily constructed by servants, did not relieve master of duty of seeing that they were safely constructed. *Donnelly v. Booth Bros. &c. Granite Co.*, 90 Me. 110.

Master liable for act of superintendent in setting machine in motion while plaintiff was engaged in repairing it. *Roche v. Lowell Bleachery*, (Mass.) 63 N. E. Rep. 943.

Servants digging a trench in lumber yard and those handling lumber therein, are not fellow servants; the former are doing the master's duty. *Sandowski v. Michigan Car Co.*, 84 Mich. 100.

A shift boss in a mine was a fellow servant as to a direction involving a detail of the work. *Petaja v. Aurora Iron Min. Co.*, 106 Mich. 463.

Master was chargeable with the defective condition of a track, the repair of which was intrusted to servant. *Balhoff v. Michigan, C. R. Co.*, 106 Mich. 606.

Employer was chargeable with a failure to make a sewer trench safe to work in, though he had appointed a boss or supervisor to do it for him. *Van Steenburgh v. Thornton*, 58 N. J. L. 160.

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Negligence in furnishing safe and suitable appliances is that of the master; in handling them, that of the servant. *Gann v. Railroad*, 101 Tenn. 380.

But the failure to provide proper appliance for making up trains, does not effect the failure of the yard crew to use ordinary care in making up a train. *Gulf &c. R. Co. v. Williams*, (Tex. Civ. App.) 39 S. W. Rep. 967.

The act of a foreman in charge of the erection of compress machinery, in using a greasy timber as a hoisting plank was performed in the capacity of the master's representative. *Terrell Compress Co. v. Arrington*, (Tex. Civ. App.) 48 S. W. Rep. 59.

Duty in regard to the handling of cars may be delegated, subject, however, to the duty of providing proper rules therefor. *Sanner v. Atchison &c. R. Co.*, 17 Tex. Civ. App. 337.

Brakeman charged with the duty of operating a switch represented the master and was not a fellow servant of the engineer. *St. Louis &c. R. Co. v. Kelton*, (Tex. Civ. App.) 66 S. W. Rep. 887.

Negligence of servants in failing to guard a ditch, charged to master, *Missouri &c. R. Co. v. Johnson*, (Tex.) 67 S. W. Rep. 769.

Negligence of superintendent of excavation for a railroad bed in setting an employé to work after a blast, where a portion of the explosives in the ground had not gone off, was that of the master. *Burke v. Anderson*, 69 Fed. Rep. 814.

The supplying of standards for use in loading timber on a flat car constitutes a part of the master's duties. *Pennsylvania R. Co. v. La Rue*, 81 Fed. Rep. 148.

Port Blakeley Mill Co. v. Garret, 97 Fed. Rep. 537.

Negligence in the erection of a scaffold for work by one charged with the construction of a bridge was chargeable to his master. *Austin Man. Co. v. Johnson*, 89 Fed. Rep. 677.

Stretching a guy across a railroad track pertained to the duty of the master to provide a safe track which he could not escape liability for. *New York &c. R. Co. v. O'Leary*, 93 Fed. Rep. 737.

So, as to the custody of dangerous articles, like dynamite. *Rush v. Spokane Falls &c. Co.*, 23 Wash. 501.

Shift boss acts in the capacity of his master's representative in sending an employé to a part of a mine where he knows there are unexploded blasts. *McMahon v. Ida Min. Co.*, 95 Wis. 308.

Master was not allowed to set up a custom unknown to plaintiff, imposing on servants the duty of seeing that appliances were safe. *Boelter v. Ross Lumber Co.*, 103 Wis. 324.

Inspection and repair:

The defendant's foreman was negligent in not removing mud from spaces where the flange went, whereby a gravel train was derailed and the defendant's servant thereon, a laborer, was killed. It was held to be the negligence of the co-employé and no liability. *Brick v. R. Co.*, 98 N. Y. 211.

Duty of inspection of brakes was that of the master. *Woods v. Long Island R. Co.*, 159 N. Y. 546, aff'g s. c., 11 App. Div. 16.

True v. Lehigh Valley R. Co., 22 App. Div. 588.

Car inspector represents master. *Eaton v. New York &c. R. Co.*, 163 N. Y. 391; rev'g s. c., 14 App. Div. 20.

See, also, *Louisville &c. R. Co. v. Bates*, 146 Ind. 564; *Illinois C. R. Co. v. Hilliard*, (Ky.) 37 S. W. Rep. 75; *Lellis v. Michigan Cent. R. Co.*, (Mich.) 82 N. W. Rep. 828; *Chicago &c. R. Co. v. Kellogg*, 54 Neb. 127; *Cameron v. Great Northern R. Co.*, 8 N. D. 124; *Felton v. Bullard*, 94 Fed. Rep. 781.

So as to mine inspector. *Western Min. Co. v. Ingraham*, 70 Fed. Rep. 219; *Cerrillos Coal &c. Co. v. Deserant*, 9 N. M. 49. So as to inspection for explosive gas. *Gowen v. Bush*, 76 Fed. Rep. 349. So as to repair of bridge. *Chicago &c. R. Co. v. Healy*, 86 Fed. Rep. 245.

A yard switchman caught his glove on a defective coupling iron and claimed that the inspector was negligent in not sending the car to the shop. Negligence of co-servant. *Gibson v. Northern C. R. Co.*, 22 Hun, 289.

Where a master has provided additional bolts for a machine and has delegated the duty of inspecting the same to men in charge of such machines, negligence of the latter to so inspect whereby another servant is injured is the act of the fellow servant, for which the master is not liable. *Headifen v. Cooper*, 6 Misc. 263, aff'g nonsuit.

The duty of inspection for defects due to wear and tear cannot be imposed upon servants who have not had the opportunity to make it. *McKnight v. Brooklyn Heights R. Co.*, 23 Misc. 527.

He cannot delegate the duty of inspecting appliances. *Baltimore & P. R. Co. v. Elliot*, 9 App. D. C. 341.

Kansas City &c. R. Co. v. Becker, 67 Ark. 1; s. c., 46 L. R. A. 814; *Chicago &c. R. Co. v. Gillison*, 72 Ill. App. 207.

Accident due to operation of machine while master's representative was repairing it, was not the act of a fellow servant. *Consolidated Coal Co. v. Gruber*, 188 Ill. 584; aff'g s. c., 91 Ill. App. 15.

Negligence of trainmen, invested with inspection duties bind the master. *Chicago &c. R. Co. v. Cullen*, 87 Ill. App. 374.

Kingan v. Pittsburg T. Co., 5 Pa. Super. Ct. 436.

The plaintiff, a car repairer, while at work under a car by the direc-

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tion of a foreman, was injured by other cars being pushed against the one upon which he was working. The entire work of repairing cars was left by the master to the control of subordinate employés, and the protection of car repairers devolved upon the foreman. No signals or flags were furnished by the company or used by the foreman to designate the car undergoing repair. The company was liable. *Hannibal &c. R. Co. v. Fox*, 31 Kas. 586.

Citing *Hough v. R. Co.*, 100 U. S. 213; *R. Co. v. Lavalley*, 36 Oh. St. 221; *R. Co. v. Holt*, 29 Kas. 152; *R. Co. v. Moore*, 29 id. 633; *R. Co. v. Salmon*, 14 id. 524, from which last case was copied, with seeming approval, the following: (596)

"These higher officers, agents or servants cannot, with any degree of propriety, be termed fellow servants with the other employés, who do not possess any such extensive powers, and who have no choice but to obey such superior officers, agents or servants. Such higher officers, agents or servants must be deemed in all cases, when they act within the scope of their authority, to act for their principal, in the place of their principal, and in fact to be the principal. We also think that it is the duty of a railroad company, with reference to both passengers and employés, to exercise reasonable care and diligence in making sufficient regulations for the safe running of trains, so as to avoid injury from collision or from any other source.

* * * If any employé performs the duties of one of the higher officers, agents or servants of which we have already spoken, the company is generally responsible for his negligence, whatever may be his grade."

Where the master assigned to servants the duty of inspecting machinery and providing new when necessary, and seeing to it that such machinery was kept in suitable condition, the servants while so engaged were vice-principals as regards another servant using such machinery. *Atchison R. Co. v. McKee*, 37 Kan. 592.

Citing *St. L. & S. F. R. Co. v. Weaver*, 35 Kan. 412; *A. T. &c. R. Co. v. Moore*, 29 id. 632; *K. P. R. Co. v. Little*, 19 id. 267; *C. & M. R. Co. v. Ross*, 112 U. S. 377; *Brabbits v. C. & N. W. R. Co.*, 38 Wis. 289.

Servants charged with the keeping of the stairs of a factory in a safe condition are not fellow servants in regard to the neglect of such duty. *Ferris v. Hensheim*, 51 La. Ann. 178.

So as to negligence in the discharge of the duty of adjusting a grindstone in a mill. *Hall v. Emerson-Stevens Man. Co.*, 94 Me. 445.

Negligence of assistant roadmaster in failing to see that a defect was properly repaired, was chargeable to master. *Anderson v. Michigan C. R. Co.*, 107 Mich. 591.

So as to repair of ladder. *Huth v. Dohle*, 76 Mo. App. 671.

Master's duty to inspect a scaffold could not be delegated and so the negligence of a fellow servant therein contributing to the injury did not defeat plaintiff's recovery. *Cole v. Warren Man. Co.*, 62 N. J. L. 626.

Master cannot delegate the duty of keeping an electric crane in a safe condition to an independent contractor so as to relieve itself of liability for its unsafe condition. *Moran v. Corress Steam-Engine Co.*, (R. I.) 43 Atl. Rep. 874; s. c., 45 L. R. A. 267.

Negligence of those charged with keeping a track in repair is the negligence of those delegating the duty. *Galveston &c. R. Co. v. Pitts*, (Tex. Civ. App.) 42 S. W. Rep. 255.

The act of wiring a shoe forming part of the clutch of a rapidly revolving wheel, after it has been broken is one required of the master himself. *Swift & Co. v. Short*, 92 Fed. Rep. 567.

See, also, *Chapman v. Southern P. Co.*, 12 Utah, 30.

Hustis v. James Banister Co., (N. J. L.) 43 Atl. Rep. 651; *Chesson v. Roper Lumber Co.*, 118 N. C. 59.

Where a conductor is vested with the duty of inspecting couplings he is not a fellow servant of a brakeman in regard to such matters. *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108.

See, also, *Missouri &c. R. Co. v. Ferch*, 18 Tex. Civ. App. 46.

Negligence of a section foreman charged with the duty of keeping the track in repair is not that of a fellow servant. *Bateman v. Peninsular R. Co.*, 20 Wash. 133.

Wright v. Southern R. Co., 123 N. C. 280.

A "carpenter gang" charged with the duty of replacing planks about a machine perform the duty of the master. *Eingartner v. Illinois Steel Co.*, 94 Wis. 70; s. c., 34 L. R. A. 503.

Failure of a foreman to discontinue the use of a wagon reported unsafe was chargeable to the master. *Boelter v. Ross Lumber Co.*, 103 Wis. 324.

Instructions and warnings:

One of the defendant's co-employés sent the plaintiff, a co-employé, to clean snow from a roof. In descending, to avoid a drift, he jumped off and fell through a skylight, concealed by snow. Held, that he took the risk and, if he was not properly advised, it was the negligence of a co-employé; and that no duty was required of the defendant to notify the plaintiff of the skylight. *Reinig v. B. R. Co. of Brooklyn*, 49 Hun, 269, aff'g nonsuit.

Duty of warning inexperienced servants is that of master. *O'Connor v. Barker*, 25 App. Div. 121.

Master liable for negligence of an assistant foreman in a factory in setting a boy to work at a dangerous machine. *Foley v. California Horse-shoe Co.*, 115 Cal. 184.

Southern Agricultural Works v. Franklin, 111 Ga. 319.

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Master may fix upon a fellow servant the duty of warning other servants of a danger which is incident to the employment, which does not enter into the creation of a safe place for work. *Rex v. Pullman's Palace-Car Co.*, 2 Marv. (Del.) 337.

Master liable for negligence of a foreman directing movement of defective cars onto repair track in failing to warn one he had ordered to work under a defective car of the approach of other cars on the same track. *Metropolitan West Side El. R. Co. v. Skola*, 183 Ill. 454; aff'g s. c., 83 Ill. App. 659.

Driscoll v. Chicago &c. R. Co., 97 Ill. App. 668.

And for negligence of a foreman in failing to warn an elevator man of the presence of one in the shaft whom he has sent there to work. *Kirk v. Senzig*, 79 Ill. App. 251.

Or for failing to warn men in a trench of intention to let a pipe fall of its own weight, though he assisted in the work. *Chicago v. Cronin*, 91 Ill. App. 466.

Master liable for failure to give warning of plank thrown down a chimney to put out a fire. *Cote v. Lawrence Man. Co.*, (Mass.) 59 N. E. Rep. 656.

And for act of foreman in placing men to work in dangerous position on hard pan. *Hill v. Winston*, 73 Minn. 80.

See, also, *Bradley v. Chicago &c. R. Co.*, 138 Mo. 293.

But not for failure of foreman to warn in respect to details of work as it progresses. *O'Neill v. Great Northern R. Co.*, (Minn.) 82 N. W. Rep. 1086.

Kerner v. Baltimore &c. R. Co., 149 Ind. 21; *McLane v. Head &c. Co.*, (N. H.) 52 Atl. Rep. 545; See *Knitter v. New York &c. R. Co.*, (N. J. L.) 52 Atl. Rep. 565; *O'Dowd v. Burnham*, 19 Pa. Super. Ct. 464; *Reed v. Missouri &c. R. Co.*, (Mo. App.) 68 S. W. Rep. 364; *Young v. Hahn*, (Tex. Civ. App.) 69 S. W. Rep. 203.

Even though he is instructed to call on others in case of necessity. *Durst v. Carnegie Steel Co.*, 173 Pa. St. 162.

Duty to give warnings of danger incident to the employment to one, who, through immaturity, or inexperience, is ignorant thereof, cannot be delegated. *Smith v. Hillside Coal &c. I. Co.*, 186 Pa. St. 28.

See, also, *Addicks v. Christoph*, 62 N. J. L. 786; *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517.

Master liable for negligence of servant directed to repeat the signals of a foreman. *Sroufe v. Moran Bros. Co.*, (Wash.) 68 Pac. Rep. 896.

The duty of warning employes of the starting of machinery may be delegated to a competent person. *Portance v. Lehigh Valley Coal Co.*, 101 Wis. 574.

Competent and sufficient servants:

Master not liable where, sufficient number of servants having been ordered to remove a hatch, one attempted to do so, whereby it fell and injured servant working below; the act was one of operation and did not pertain to the duty of a master. *Hussey v. Cogger*, 112 N. Y. 614, rev'g 39 Hun, 539.

The duty as to employing competent assistants cannot be delegated. *Murphy v. Hughes*, 1 Penn. (Del.) 250.

Baltimore &c. R. Co. v. Henthorne, 73 Fed. Rep. 634; *Olsen v. Andrews*, 168 Mass. 261; *Postal Tel. Cable Co. of Texas v. Coote*, (Tex. Civ. App.) 57 S. W. 912; *Galveston &c. R. Co. v. Eckles*, 60 id. 830.

That the employé uses the best care he is capable of is no defense by the master as against his actual incompetence. *Nofsinger v. Goldman*, 122 Cal. 609.

Fraser v. Schroeder, 163 Ill. 459; *Galveston &c. R. Co. v. Sherwood*, (Tex. Civ. App.) 67 S. W. 776.

Rules:

The headlight of a locomotive was inspected at Syracuse and found to be in order. Upon the arrival of the train at Rochester the engineer discovered that it had become so defective that the light had been extinguished, and he proceeded on his way using a signal light of about the size of an ordinary track lantern and thereafter struck and killed a flagman. The rules required the engineer to stop and take the engine to a repair shop, as soon as the defect was discovered and use every precaution for safety. There was a repair shop at Rochester. The negligence was that of the co-employé of the flagman, and the defendant was not negligent. The inspection at Syracuse was an act required of an operative merely and not of the defendant. *McDonald v. N. Y. C. & H. R. R. Co.*, 63 Hun, 587, reversing order denying new trial of the verdict for plaintiff.

Master was not liable for failure of co-servants to observe rules for the operation of its trains. *Evansville &c. R. Co. v. Tohill*, 143 Ind. 49.

Disobedience of a rule requiring a motorman to give notice to a track crew is the negligence of a fellow servant and not of the master in failing to provide a safe place to work. *Lundquist v. Duluth Street R. Co.*, 65 Minn. 387.

Where an act is in disobedience of a foreman's order it is not the act of the master but of a fellow servant. *Graesel v. Weber*, 76 Mo. App. 677.

A foreman having the power of promulgating and abrogating rules for the guidance of men under him acts as a vice-principal in exercising it. *Richmond Granite Co. v. Bailey*, 92 Va. 554.

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Choice of material, methods, &c.:

Evidence that it was a particular branch of mechanical occupation to put up scaffolds to plaster a building; the scaffold was insufficient, and thereby a man was hurt. Whether the man was an employé of the defendant, and whether the defendant contracted the work was for the jury.

It was not sufficient that there was enough of suitable material provided to build the scaffold. It was needed that there should be skill and judgment in the use thereof. *Manning v. Hogan*, 78 N. Y. 615, aff'g judg't for pl'ff.

Defendant contracted for the painting of its ship, and engaged to furnish rope for staging. The rope offered by it for the purpose was rejected as improper, and the persons putting up the staging were told by defendant's agent that they could use any rope they could find. They used one obviously unfit, and the staging fell and hurt a painter. No evidence of negligence on the part of the defendant, as he did not designate the unfit rope. The fact that it did not furnish rope did not make it liable for one used. *Nugent v. Atlas S. Co.*, 51 Hun, 306, rev'g judg't for pl'ff.

Sufficient proper material had been furnished for a scaffold. Master was not liable for injury through a defective timber. *McCone v. Gallagher*, 16 App. Div. 272.

Proper selection of the materials furnished is not master's duty. *Stonebridge v. Brooklyn C. R. Co.*, 9 App. Div. 129; *Byrne v. Eastman's Co.*, 27 id. 270.

Plaintiff, employed by defendant in erecting a station, was injured by the fall of a staging on which he was at work, caused by a defect in one of the tie beams furnished by the defendant. The beam was cut and fitted by the foreman and another servant, and the plaintiff helped to put it in place. The evidence tended to show that it was an ordinary thing for the carpenters to reject imperfect material, and that the foreman was also a carpenter and assisted in the work. Held, that it was not negligence to send the imperfect beam to the building, and that if there was negligence in using it, it was that of a fellow-servant, for which the defendant was not liable. *Griffiths v. The New Jersey & New York Railroad Co.*, 8 Misc. 3.

By delegating the duty of selecting material for the construction of a scaffold, the master makes his servant a vice-principal. *Kansas City &c. Co. v. Sawyer*, 7 Kan. App. 146.

Carpenters using their own method of removing a scaffold are fellow servants. *Perigo v. Indianapolis Brew. Co.*, 21 Ind. App. 338.

A mason did not recover for injuries sustained by falling from a staging, where the only negligence shown was that of a fellow servant in erecting the staging upon some rubbish. *O'Connor v. Neal*, 153 Mass. 281.

McGriffin v. Iron Co., 10 Q. B. Div. 5; *Ashley v. Hart*, 147 Mass. 573.

A master was not liable to a servant for injury from the falling of an insecurely fastened platform upon which his fellow servant had set him to work. *Howard v. Hood*, 155 Mass. 391.

Master is not chargeable with the negligence of a superintendent in selecting, for cleaning a tank, naphtha, which was designed for cleaning other things. *Meehan v. Spiers Man. Co.*, 172 Mass. 375.

Where master furnished proper appliances he was not responsible for selection of faulty one by servant, whereby another servant was injured. *Kehoe v. Allen*, 92 Mich. 464.

A master is liable for his foreman's selecting a defective rope from an abundance thereof though he is not liable for the use he makes of it. *Thomas v. Ann Arbor R. Co.*, 114 Mich. 59.

Erickson v. Victoria Copper Min. Co., (Mich.) 90 N. W. Rep. 291.

Master is not liable for defective instruments substituted by fellow servants for the safe ones furnished by the master. *Campbell v. New Jersey &c. T. Co.*, 61 N. J. L. 382.

Negligence of a fellow servant in putting up a scaffold from the falling of which a carpenter sustained injury did not defeat recovery from the employer where employer was negligent in having provided insufficient material. *Davies v. Griffith*, 27 Weekly L. Bull. (Ohio) 180.

Master was not liable where the place became unsafe by the manner in which the boss of plaintiff's gang did his work. *Richmond &c. Works v. Ford*, 94 Va. 627.

Transitory dangers in course of work:

The necessary coupling and braking of cars upon a steam railroad are mere details of work which must be intrusted to the servants of the railroad company, and an error or omission in the performance thereof does not establish negligence on the part of the master. *Kudik v. Lehigh Valley R. Co.*, 78 Hun, 492.

Mending belt frequently broken in course of work is servant's duty. *Rozelle v. Rose*, 3 App. Div. 132.

So as to repairing a steam chest where engineer had ample facilities to do it. *Keegan v. New York &c. R. Co.*, 45 App. Div. 629.

Manning v. Genesee River &c. Steamboat Co., 66 App. Div. 314.

Master not liable for act of servant assuming to fill a superior place in

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his absence, which was not within scope of the latter's duties. *Kennedy v. Allentown &c. Works*, 49 App. Div. 78.

Plaintiff was injured, while carrying building material into a cellar, by falling from a runway composed of a wooden horse and planks, which was shifted by the fellow-servants of plaintiff as the work progressed. Just previous to the accident, the servants of an independent contractor undertook, without permission, to carry a heavy timber over the runway, the weight of which caused the legs of the horse to sink in the ground, thereby tilting the horse and causing plaintiff's fall. The timber fell upon him, breaking his ribs. Held, that the failure to place a board under the legs of the horse, if negligence, was that of plaintiff's fellow servants, and was a patent defect of which he took the risk, and that his master was not liable for the injuries caused by the fall of the timber. *Reilley v. Parker*, 11 Misc. 68. (New York Superior Court.)

If the negligence of the co-servant would not have happened if the machinery had been properly furnished by the master, the latter is liable.

Master not liable for failure of mate of steamboat to have a fender for landing. *Kelly v. New Haven Steamboat Co.*, 74 Conn. 343.

Nor for negligence of servant in failing to place temporary uprights to keep sleepers on a car. *Rounds v. Carter*, 94 Me. 535.

Nor for failure to replace a plank removed. *Stewart v. International Paper Co.*, 96 Me. 30.

But putting, shafting on a ceiling is not, as matter of law, the act of a fellow servant. *Copithorne v. Hardy*, 173 Mass. 400.

Master was not liable for the fall of stones improperly piled. *Reagan v. Southward*, (Mass.) 63 N. E. Rep. 895.

Duty to light head-light is that of fellow-servant, where trackman was injured. *Collins v. St. Paul &c. R. Co.*, 30 Minn. 31.

Master not liable for slip of a stone from crowbar while being moved by servants, though he was superintending the job. *Reusch v. Groet-zinger*, 16 Lanc. L. Rev. 13.

Track crew violated rules in failing to drain ground before going to work. Master was not liable for fall of earth. *Slavens v. Northern P. R.*, 97 Fed. Rep. 255.

Master not liable for failure of foreman to tell men unloading rails when to let go. *Anderson v. Oregon &c. R. Co.*, (Wash.) 68 Pac. Rep. 863.

See, also, *O'Connor v. Thompson-Starrett Co.*, 76 N. Y. Supp. 296.

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A servant, having the exclusive control of other servants under a common master, including the hiring and discharging, is in the exercise of those powers, the

representative of the master and not a mere fellow servant. The mere fact that one has power to control and direct will not render such person the representative of the master and not a co-servant; if the act might as well have happened if the servant had not superior authority, they are co-servants; but when the negligent act arises out of, and is the direct result of the exercise of authority, he represents the master and his commands are those of the master. *Chicago &c. R. Co. v. May*, 108 Ill. 288; but if the superior servant is doing the work of a common servant, he is a fellow servant. *Fanter v. Clark*, 15 Ill. App. 470; *Fitzgerald v. Honkomp*, 44 id. 365.

By vesting an employé with control over a particular class of workmen, an employer makes him its direct representative for whose acts it is responsible. *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447.

It may be temporary so long as it is full authority. *Fraser v. Schroeder*, 163 Ill. 459.

That on previous occasions a dirt scratcher in a mine had been directed by the foreman to assist a timberman, did not vest the latter with the authority of a vice-principal in requesting the former's assistance on another occasion. *The Kellyville Coal Co. v. Humble*, 87 Ill. App. 437.

One in charge of a lumber yard, employing and discharging men represents the master. *Baldwin v. St. Louis &c. R. Co.*, 75 Iowa, 297.

Rank held not to make a servant a vice-principal in matters which it is not the duty of the employer to attend to. *Newbury v. Getchell Lumber &c. Co.*, 100 Iowa, 441.

If offending party has general management of some portion of the master's business and of the injured servant he is not a fellow servant. *Atchison &c. R. Co. v. McKee*, 37 Kas. 592.

A father was chargeable where his son was actually directed to give an order for him and the servant was instructed to receive it. *La Fortune v. Jolly*, 167 Mass. 170.

The power of control and not the power to employ and discharge determines a servant's character as vice-principal. *Union P. R. Co. v. Doyle*, 50 Neb. 555.

See, also, *Mason v. Railroad Co.*, 97 N. C. 16; *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387.

Instruction or teaching by a servant with superior knowledge of the performance of the work must be distinguished from authority from the master to command. *Toomey v. Avery Stamping Co.*, 20 Oh. C. C. 183.

Employés of the company and of contractors engaged to do the same work are fellow servants, where no relation of subordination or subjection exists between them. *McCafferty v. Dock Co.*, 11 Oh. C. C. 457.

Company's representative who employed plaintiff and who alone gave him directions was not his fellow servant. *Sias v. Consolidated L. Co.*, 73 Vt. 35.

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Superiority is no test of the relation of fellow servant, unless in regard to a matter pertaining to the master's duties. *Richmond &c. Works v. Ford*, 94 Va. 627.

When servant is such a superior:

President.—The president of a corporation represents master and renders it liable to workmen employed in blasting for neglect to give proper instructions. *Smith v. Iron Co.*, 42 N. J. L. 467.

Ardesco Oil Co. v. Gilson, 63 Pa. St. 146.

Superintendent.—The superintendent and employes under him are not fellow servants. *Chapman v. Erie R. Co.*, 56 N. Y. 583; *Sheehan v. Railroad Co.*, 91 N. Y. 332.

Superintendent of repairs represents master. *Stevenson v. Jewett*, 16 Hun, 210.

Trench made to reach defendant's gas pipe, being two feet out of the way, was dug under in the direction of the pipe, by order of defendant's superintendent, whereby a bank fell in and injured defendant's employe who was examining the pipe. For jury to say whether superintendent was defendant's *alter ego* and a competent man. *Devine v. Tarrytown &c. Gas Light Co.*, 22 Hun, 26, rev'g judg't of nonsuit.

Plaintiff's intestate and another man, who were stage cleaners in the defendant's employ, were directed by the superintendent in charge of the stables to open a heavy door to admit a stage. The door was defective, of which fact the superintendent had previously informed the company's officers, but the defect was only discoverable by inspection, and it was not shown that intestate knew of it. In opening the door they used a wooden pole, which was kept for the purpose, as a pry. While engaged in that work the door fell upon the intestate, severely injuring him, and he shortly afterward died at the hospital. Held, that the superintendent was the *alter ego* of the defendant, for whose negligence in placing the intestate at dangerous work, for which he was not employed, without proper instructions, the latter was liable. *Rettig v. Fifth Ave. Trans. Co.*, 6 Misc. 328, aff'g judg't for pl'ff.

From opinion.—"The master must furnish suitable machinery, tools and appliances, and he must provide a safe place for his servant to work. *Hough v. R. R. Co.*, 100 U. S. 213; *Wabash R. Co. v. McDaniels*, 107 id. 454; *Rice v. King Philip Mills*, 144 Mass. 229; *Hannibal & St. Joseph R. Co. v. Fox*, 31 Kan. 586; *Mitchell v. Robinson*, 80 Ind. 281. That it is the law in this state the master cannot relieve himself from this obligation by delegation will be seen by reference to the authorities. *Pantzar v. Tilly Foster I. M. Co.*, 99 N. Y. 368; *Benzing v. Steinway*, 101 id. 547; *Cullen v. Norton*, 126 id. 1; *Ellis v. R. R. Co.*, 95 id. 546; *Slater v. Jewett*, 85 id. 61; *Wood Mast. & Serv. sec. 438*. The same rule has been adopted in other states. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Killea*

v. Faxon, 125 Mass. 485; *Brabbitts v. R. R. Co.*, 38 Wis. 289. While the servant assumes the ordinary risk of his employment, and, as a general rule, such extraordinary risks as he may knowingly and voluntarily see fit to encounter, he does not stand on the same footing as the master as respects the matter of care in inspecting and investigating the risks to which he may be exposed. He has the right to presume that the master will do his duty in that respect, so that when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders without being chargeable with contributory negligence or with the assumption of risk in so doing. *Cook v. R. R. Co.*, 34 Minn. 45; see, also, 14 Am. & Eng. Ency. of Law, 843; *Chicago &c. R. Co. v. Ross*, 112 U. S. 377; *Cone v. R. R. Co.*, 81 N. Y. 206; *Connolly v. Poillon*, 41 Barb. 366; *Miller v. R. R. Co.*, 12 Fed. Rep. 600; *Stephens v. R. R. Co.*, 86 Mo. 221; *McDermott v. R. R. Co.*, 87 id. 285."

An engineer of a refrigerating apparatus having the authority of the superintendent in the latter's absence is not a fellow servant in directing one to engage in a dangerous service. *Ryan v. Los Angeles Ice &c. Co.*, 112 Cal. 244.

It is the duty of master to supply a competent person to superintend dangerous work when required, and he represents him. *McElligott v. Randolph*, 61 Conn. 157.

Where the superintendent had charge of and directed the piling of the timbers in question which he knew were liable, if improperly piled, to fall, and injure the laborers, he was not fellow servant. *Brennan v. Berlin &c. Build. Co.*, 74 Conn. 382.

"The petition alleged that the servant was employed as an ordinary workman in the construction of a building and undertook to furnish a prudent and skillful superintendent to direct the work, but employed 'a careless and negligent superintendent,' whereby injury arose. Upon demurrer the court said: 'One of these servants employed in this work is called superintendent, and is alleged to have been at the head of the management of the derrick, etc., but we do not see that he was such a general superintendent for this corporation as to make it liable as acting through him; on the contrary, the averment only makes him the head of a little job to do that job; and to all intents and purposes a fellow servant.'" *McDonald v. Eagle & Phenix Man. Co.*, 68 Ga. 840.

The doctrine that a master is not liable for the negligence of an employé by which a co-employé is hurt, is of force in this state; and where the evidence of the plaintiff showed that he was an employé in a factory, and was injured by the negligence of a co-employé, for which suit was brought against the master, a nonsuit was properly granted.

A workman engaged in working in the picker room of a factory with two others, and having the direction of the work therein as foreman, is not a general superintendent of the corporation operating the factory, so as to render it liable for his negligence in starting a machine, which he

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and one of the others were engaged in cleaning, whereby such other employé was injured. *McGovern v. Columbus Man. Co.*, 80 Ga. 227.

An agent having charge of a particular branch of the business with power to employ and control those under him, acts as a quasi-master and not a fellow servant. *Taylor v. Georgia Marble Co.*, 99 Ga. 512.

See, also, *Woodsen v. Johnson & Co.*, (Ga.) 34 S. E. Rep. 587.

Superintendent is not fellow servant of conductor. *Chicago &c. R. Co. v. McLallen*, 84 Ill. 116.

Cumberland &c. Co. v. State, Moran, 44 Md. 283.

Laborers unloading stone by order of superintendent are not the latter's fellow servants.

Hoosier Stone Co. v. McCain, 133 Ind. 231; *Indiana Car Co. v. Parker*, 100 id. 181; *Taylor v. Evansville R. Co.*, 121 id. 124 (servant was ordered to do an act, injuring another servant—not fellow servants); *State v. Malster*, 37 Md. 287 (superintendent had full supervision, direction, selection of laborers and material).

A division superintendent having general charge and supervision of the company's entire business including the operation of the road itself over each division, is a vice-principal. *Louisville &c. R. Co. v. Heck*, 151 Ind. 292.

Where the inspector of the water works of a city owning its own plant, was vested with the direction of the work of excavating a trench he acted as vice-principal. *Ft. Wayne v. Christie*, 156 Ind. 172.

Whether the negligence of superintendent of a repair shop was the negligence of the master was a mixed question of law and fact to be determined by the jury under instructions from the court. Rule of superior and subordinate does not prevail. *Potter v. R. Co.*, 46 Iowa, 399.

Superintendent and manager of company is fellow servant of employé under him. *Baltimore &c. Co. v. Neal*, 65 Md. 438.

Where superintendent had not complete charge of the work with power to employ and discharge, he was only a fellow servant. *Maryland Clay Co. v. Goodnow*, (Md.) 51 Atl. Rep. 292.

The acts of a servant exercising superintendence and control are those of the master; so as to conductors, foremen generally, section boss, etc. *Miller v. Railroad Co.*, 109 Mo. 350; *Dayharsh v. Railroad Co.*, 103 id. 570.

One who had complete charge of the development of a mine and of the property thereof including the authority to employ and discharge assistants, supply material and appliances, was vice-principal in the absence-

of any superior officer. *Kelley v. Fourth of July Min. Co.*, 16 Mont. 484.

See, also, *Hathaway v. Des Moines*, 97 Iowa, 333.

Superintendent or foreman charged with the construction of a building, with power to dismiss common laborers, was not their fellow servant. *Johnson v. National Bank*, 79 Wis. 414.

The doctrine of the Ross case (112 U. S. 377) is followed, and also the department rule obtains, so that a servant with general management of master's business, or a particular department, or on detached service in charge of a train, or laborers, represents the master. *Mason v. Railroad Co.*, 111 N. C. 377.

Superintendent is not fellow servant of trainmen. *Railroad Co. v. Henderson*, 37 Oh. St. 549.

Nor of brakeman. *Frazier v. Penn. R. Co.*, 38 Pa. St. 104.

Patterson v. Pittsburg R. Co., 76 Pa. St. 389; *Huntington &c. R. Co. v. Decker*, 84 id. 419; *Cook v. Hannibal &c. R. Co.*, 63 Mo. 397; see, however, *Whalen v. Centenary Ch.*, 62 Mo. 326; *Washburn v. Nashville R. Co.*, 3 Head. 638.

One who was employed to direct the performance of the work generally, and not vested with the superintendence of any distinct department of the business or control thereof, was not a vice-principal. *Coulson v. Leonard*, 77 Fed. Rep. 538.

Foreman.—Foreman directed his men to work under another foreman. Latter was their foreman for the time. *Maltby v. Belden*, 45 App. Div. 384.

Foreman of servants driving piles for trestle on railway, and having charge of workmen and trainmen, actually co-operating with work, represents the master. *Bloyd v. St. Louis &c. R. Co.*, 58 Ark. 66.

A chain gang boss is not a fellow servant of a prisoner in the gang. *Boswell v. Barnhart*, 96 Ga. 521.

Where a foreman or boss has full control of the operations and full authority to order and direct the work as a superior taking no part in the active work thereof, and with authority to suspend or discharge, though subject to the final action of the one above him, he is a vice-principal. *Augusta v. Owens*, 111 Ga. 464.

Foreman in mine, hiring and discharging laborers, is not a fellow servant of those under him. *Chicago &c. Co. v. Sobkowiak*, 34 Ill. App. 312.

Foreman of a gang held not a fellow servant in giving orders regarding the work. *Leiter v. Kinnare*, 68 Ill. App. 558.

See, also, *Kansas City Car &c. Co. v. Sechrist*, 59 Kan. 778.

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Foreman in charge of repair work on cars acted as vice-principal in leaving open a switch leading to the track on which such cars were standing. *Stucke v. Orleans R. Co.*, 50 La. Ann. 188.

Foreman was vice-principal where he was in complete charge of the gang under him. *Vicars v. Cumberland Teleph. &c. Co.*, 52 La. Ann. 2153.

Foreman in charge of a crew operating the grinders of a mill was simply a member of the crew. *Cowan v. Umbagog Pump Co.*, 91 Me. 26.

So as to any general manager, foreman or superintendent intrusted with employment or retention of servants. *Quincy &c. Co. v. Kitts*, 42 Mich. 34.

Where servant has full charge of the whole work and the employes thereon, and power and direction over it, he is vice-principal. *Slater v. Chapman*, 67 Mich. 523.

Foreman of railway company in exclusive control of men, and with full authority to direct work, is not fellow servant. *Nall v. Louisville &c. R. Co.*, 129 Ind. 260.

Ayres v. Richmond &c. R. Co., 84 Va. 679.

One having entire charge and selection of materials and construction of a runway for coal is a vice-principal as to men whom he employs and directs. *Brown v. Gilchrist*, 80 Mich. 56.

Mill foreman to keep machinery in repair is not fellow servant with those using it. *Roux v. Lumber Co.*, 94 Mich. 607.

Foreman with entire charge of details and directions of the work with power to discharge, acted as vice-principal in ordering a laborer to remove loose rock with a pick about an unexploded charge of dynamite. *Stahl v. Duluth*, 71 Minn. 341.

Foreman furnishing one under him a defective lever to propel car was not a fellow servant. *Banks v. R. Co.*, 40 Mo. App. 458.

Foreman of a wrecking train and bridge carpenter are not fellow servants. *Tabler v. Railroad Co.*, 93 Mo. 79.

Bridge carpenter with control of and power to employ and discharge is a fellow servant. *Texas &c. R. Co. v. Whitmore*, 58 Tex. 276.

Foreman moved engine upon a servant whom he had sent into a pit under the track. They were not fellow servants. *Dayharsh v. Railroad Co.*, 103 Mo. 570.

Master's duty is one of supervision; conductors, and foremen generally, represent him. Their negligence renders the master liable for injury to member of crew under them. *Miller v. Railroad Co.*, 109 Mo. 350.

The foreman of a company of men engaged in the business of repairing bridges, water tanks, and telegraph lines on a railway, with power

to control and direct movements of men, will render company liable for his negligence, whereby one of the men under him is injured, while going to his work on a hand car. A hand car was in tow of a freight train, when foreman ordered his men to let go and applied brake so suddenly that plaintiff, who claimed that he did not hear the order, lost his balance and was thrown from the car. *Sioux City &c. R. Co. v. Smith*, 22 Neb. 775.

Citing *C. &c. R. Co. v. Lundstrom*, 16 Neb. 254; *B. &c. R. Co. v. Crockett*, 19 id. 138; and, on proposition that while going on hand car plaintiff was under the control of the foreman. *Manville v. Cleveland &c. R. Co.*, 11 Oh. St. 417; *Broderrick v. Detroit Union R. Co.*, 22 N. W. R. 802; *Pittsburg &c. R. Co. v. Kirke*, 1 N. E. R. 849.

Head hostler and "wiper or fire puller" in a roundhouse, both under a foreman in full charge with power to employ and discharge, were fellow servants. *Smith v. St. Louis &c. R. Co.*, 151 Mo. 391.

Foreman of a gravel train having the control and direction of section hands, though no power to employ and discharge them, was a vice-principal as to orders concerning the work. *Union P. R. Co. v. Doyle*, 50 Neb. 555.

That a foreman is vice-principal of his own switch crew does not make him such of another over which he has no control or authority. *Missouri P. R. Co. v. Lyons*, 54 Neb. 633.

Where a superintendent has charge of the whole mining operations, a pit boss is a fellow servant of one whom he directs to go with him into a dangerous place. *Deserant v. Cerrillos Coal R. Co.*, 9 N. M. 495.

Servant's duty was to obey, although he knew it to be dangerous. *Mason v. Rich &c. R. Co.*, 111 N. C. 482; *Chicago &c. R. Co. v. Gross*, 35 Ill. App. 178; *Id.* 133 Ill. 37, not fellow servants. (Foreman neglected to warn his men against train).

Where one receives his instructions from no higher source than a foreman, he is justified in regarding him as a vice-principal. *Turner v. Goldsboro Lumber Co.*, 119 N. C. 387.

Foreman repairing freight cars is not a fellow servant with subordinate in the work. *Lake Shore &c. R. Co. v. Lavalley*, 36 Oh. St. 221.

Car repairer was not a fellow servant with a foreman neglecting to put out signal flag. *Moore v. Railroad Co.*, 85 Mo. 588.

Foreman and injured car repairer are not fellow servants. *Mo. &c. R. Co. v. Williams*, 75 Tex. 4; *Kinney v. Corbin*, 132 Pa. St. 341, fellow servants.

Mining boss and miner injured are fellow servants. *Haley v. Kein*, 151 Pa. St. 117.

"Boss wiper" with power to direct place of work but without power

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A foreman working with his men without power to discharge was a fellow servant. *Riley v. Galveston City R. Co.*, 13 Tex. Civ. App. 247.

That power held essential. *Maughmer v. Bering*, 19 Tex. Civ. App. 299.

Foreman managing certain machinery was vice-principal to plaintiff, though the latter was called upon to assist him in starting it. *Waxahachie v. Cotton Oil Co.*, (Tex. Civ. App.) 66 S. W. Rep. 226.

Foreman of a drill crew working them with a specific duty in regard to the work assigned by the yard master, was simply a fellow servant with his gang. *Central R. Co. v. Keegan*, 160 U. S. 259.

So was a boss of a small gang engaged to assist the regular section gang. *Northern P. R. Co. v. Peterson*, 162 U. S. 346.

Where the foreman of railroad shops has no superintending powers but is under the control of a master mechanic who has such power, together with the sole power to discharge, his act in directing another to enter a smokebox of a locomotive is that of a fellow servant. *Gaynon v. Durkee*, 87 Fed. Rep. 302.

See, also, *Alaska &c. Min. Co. v. Whelan*, 168 U. S. 86; *Kelly v. Jutte &c. Co.*, 98 Fed. 380; *Richmond &c. R. Co. v. Ford*, 94 Va. 627.

Foreman who employs and discharges his men and has entire direction of the operations in his mine is a vice-principal, though he has a superintendent over him in general charge of the different mines. *Alaska &c. Min. Co. v. Muset*, 114 Fed. Rep. 66.

See, also, *McDonough v. Great Northern R. Co.*, 15 Wash. 244.

Foreman became a fellow servant by assisting another servant in the line of the latter's duties and outside his own. *Hartford v. Northern P. R. Co.*, 91 Wis. 374.

Section foreman.—Section foreman is only a fellow servant with a section hand. *Chicago &c. R. Co. v. Goltz*, 71 Ill. App. 414.

Gavigan v. Lake Shore &c. R. Co., 110 Mich. 71; *Kansas &c. R. Co. v. Waters*, 70 Fed. Rep. 28.

Foreman with authority to employ and discharge, but without authority to control work except in transmitting orders of a superior, held not a vice-principal. *Morch v. Toledo &c. R. Co.*, 113 Mich. 154.

Lochbaum v. Oregon R. &c. Co., 104 Fed. Rep. 852.

Foreman of an extra gang of section hands held not a vice-principal. *Goodwell v. Montana C. R. Co.*, 18 Mont. 293.

A section master is a vice-principal, having the authority to employ and discharge men under him. *Johnson v. Southern R. Co.*, 122 N. C. 955.

Louisville &c. R. Co. v. Bowler, 9 Heisk. (Tenn.) 866; *Nashville R. Co. v. Jones*, id. 27; *Chattanooga Electric R. Co. v. Lawson*, 101 Tenn. 406.

Conductor.—A servant in control of a distinct department, with duty entirely of direction and superintendence, like the conductor of train, is vice-principal. *Colorado R. Co. v. Naylor*, 17 Col. 501.

A conductor is not ordinarily a fellow servant of an engineer fireman or brakeman, acting under his orders. *Spencer v. Brooks*, 97 Ga. 681.

Hallom v. Southern R. Co., 127 N. C. 255.

But a vice-principal. *Walker v. Gillett*, 59 Kan. 214.

But where each receives the same orders from a train dispatcher, they are. *Edmonson v. Kentucky C. R. Co.*, (Ky.) 49 S. W. Rep. 200; rev'g s. c., 46 id. 679.

Conductor held to be a vice-principal to brakeman of a freight train. *Clark v. Hughes*, 51 Neb. 780.

Or other independent train. *Purcell v. Southern R. Co.*, 119 N. C. 728.

Conductor and brakeman held not fellow servants. *Galveston &c. R. Co. v. Robinett*, (Tex. Civ. App.) 54 S. W. Rep. 263.

Unless special and unusual powers have been conferred upon the former. *New England R. Co. v. Conroy*, 175 U. S. 323.

Conductor held not a superior to a car repairer in the same yard. *Johnson v. Cleveland &c. R. Co.*, 11 Oh. C. C. 553.

Conductor of a freight held not vice-principal to brakeman in providing a place to work. *Ott v. Lake Shore &c. R. Co.*, 18 Oh. C. C. 395.

Conductor and engineer, in charge of a train, are not fellow servants of brakeman injured. *East Tenn. &c. R. Co. v. Collins*, 85 Tenn. 227.

Conductor is not a fellow servant of trainmen, including engineer (*Ayres v. Richmond &c. Co.*, 84 Va. 679; *Chicago &c. R. Co. v. Ross*, 112 U. S. 377); but the authority of the last case is diminished or destroyed by *Baltimore &c. R. Co. v. Baugh*, 149 U. S. 368.

The two decisions of this court enable the advocate of either the New York or Ohio rule to invoke the authority of the highest federal tribunal. *Chicago, Milwaukee & St. Paul R. Co. v. Ross*, 112 U. S. 377, was decided in 1884, and affirmed the recovery against the master of a locomotive engineer injured by the negligence of the conductor of the same train. The court distinctly held that the servants were not fellow servants in such a sense as to relieve the master from liability, but that the conductor had such dominion over the engineer that he represented

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the master for the purpose of operating the train. This opinion cites to substantiate the holding, *Little Miami R. Co. v. Stevens*, 20 Ohio St. 415; *Railway Co. v. Keary*, 3 id. 201; *Louisville &c. R. Co. v. Collins*, 2 Duvall 114.

In seeming contradiction to this decision is *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 367.

Baugh, employed as a fireman on a locomotive, was injured through the negligence of the engineer, acting also as conductor of the engine; the engine was running alone without a train. The court held that the engineer and fireman were fellow servants, and the judgment allowing a recovery was reversed. The opinion was written by Mr. Justice Brewer, and the dissenting opinion by Mr. Justice Field, who wrote the opinion in the *Ross* case.

The following extracts from the opinions will illustrate the attitude of the court toward the question of fellow servants:

Baltimore & Ohio R. Co. v. Baugh, 149 U. S. 367 (379-389.)

From opinion.—"What was the *Ross* case, 112 U. S. 377, and what was decided therein? The instruction given on the trial in the circuit court, which was made the principal ground of challenge, was in these words: 'It is very clear, I think, that if the company sees fit to place one of its employés under the control and direction of another, that then the two are not fellow servants engaged in the same common employment, within the meaning of the rule of law of which I am speaking.' The language of that instruction, it will be perceived, is very like that of the one here complained of, and if this court had approved that instruction as a general rule of law, it might well be said that that was sufficient authority for sustaining this and affirming the judgment. But though the question was fairly before the court, it did not attempt to approve the instruction generally, but simply held that it was not erroneous as applied to the facts of that case. This is evident from this language, found in the latter part of the opinion, and which is used in summing up the conclusions of the court: 'We agree with them in holding—and—the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and, therefore, that for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner. If, now, we apply these views of the relation of the conductor of a railway train to the company, and to the subordinates under him on the train, the objections urged to the charge of the court will be readily disposed of. Its language in some sentences may be open to verbal criticism, but its purport touching the liability of the company is, that the conductor and engineer, though both employés, were not fellow servants in the sense in which that term is used in the decisions.' It is also clear from an examination of the reasoning running through the opinion, for there is nowhere an argument to show that the mere fact that one servant is given control over another destroys the relation of fellow servants. After stating the

general rule, that a servant entering into service assumes the ordinary risks of such employment, and, among them, the risk of injuries caused through the negligence of a fellow servant, and after referring to some cases on the general question and saying that it was unnecessary to lay down any rule which would determine in all cases what is to be deemed a common employment, it turns to that which was recognized as the controlling fact in the case, to wit, the single and absolute control which the conductor has over the management of a train, as a separate branch of the company's business, and says: 'There is, in our judgment, a clear distinction to be made in their relation to their common principle, between the servants of a corporation exercising no supervision over others engaged with them in the same employment, and agents of the corporation clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. * * * We know from the manner in which railways are operated that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the term is he a fellow servant with the fireman, the brakeman, the porters and the engineer. The latter are fellow servants in the running of the train under his direction; as to them and the train, he stands in the place of and represents the corporation.' And quotes from Wharton's Law of Negligence, sec. 232a; 'The true view is, that as corporations can act only through superintending officers, the negligence of those officers, with respect to other servants, are the negligences of the corporation.' And also from *Malone v. Hathaway*, 64 N. Y. 5, 12; 'Corporations necessarily acting by and through agents, those having the superintendence of various departments, with delegated authority to employ and discharge laborers and employes, provide material and machinery for the service of the corporation, and generally direct and control under general powers and instructions from the directors, may well be regarded as the representatives of the corporation, charged with the performance of its duty, exercising the discretion ordinarily exercised by the principals, and, within the limits of the delegated authority, the acting principal.'

The court, therefore, did not hold that it was universally true that, when one servant has control over another, they cease to be fellow servants within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was not erroneous when applied to the case of a conductor having exclusive control of a train in relation to other employes of a company acting under him on the same train. The conductor was, in the language of the opinion, 'clothed with the control and management of a distinct department;' he was 'a superintending officer,' as described by Mr. Wharton; he had 'the superintendence of a department,' as suggested by the New York Court of Appeals.

And this rule is the one frequently recognized. Indeed, where the master is a corporation, there can be no negligence on the part of the master except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So when they place the entire management of the corporation in the hands of a general super-

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intendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation, the master, and his negligence as that of the master. And it is only carrying the same principle a little further and with reasonable application, when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employes under them, vice-principals, representatives of the master, as fully and as completely as if the entire business of the master was by him placed under charge of one superintendent. It was this proposition which the court applied in the Ross case, 112 U. S. 377, holding that the conductor of a train has the control and management of a distinct department. But this rule can only be fairly applied when the different branches or departments of service are in and of themselves separate and distinct. Thus, between the law department of a railway corporation and the operating department, there is a natural and distinct separation, one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So, oftentimes there is in the affairs of such corporation what may be called a manufacturing or repair department, and another strictly operating department; these two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation. And from this natural separation flows the rule that he who is placed in charge of such separate branch of the service, who alone superintends and has the control of it, is as to it in the place of the master. But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice-principal or representative of the master. Even the conclusion announced in the Ross case was not reached by a unanimous court, four of its members being of opinion that it was carrying the thought of a distinct department too far to hold it applicable to the management of a single train. The truth is, the various employes of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters and not fellow servants, and not only those on the same steps fellow servants, because not subject to any control by one over the other. *Prima facie*, all who enter into the employ of a single master are engaged in common service, and are fellow servants, and some other line of demarcation than *that of control must* exist to destroy the relation of fellow servants. All enter into the service of the same master, to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employes, and that risk, which he knows exists, he assumes in entering into the employment. Thus, in the opinion in the Ross case, 112 U. S. 382, it was said: 'Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident there to. As a consequence, if he suffers by exposure to them he cannot recover compensation from his employer. The obvious reason for this exemption is that he has, or, in law, is supposed to have them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid.'

But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply co-workers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for one, he is paid for the other; if he assumes the one, he assumes the other. Therefore, so far as the matter of the master's exemption from liability depends upon whether the negligence is one of the ordinary risks of the employment, and, thus assumed by the employé, it includes all co-workers to the same end, whether in control or not. But if the fact that the risk is or is not obvious does not control, what test or rule is there which determines? Rightfully this, there must be *some personal wrong on the part of the master, some breach of positive duty on his part. If he discharges all that may be called positive duty, and is himself guilty of no neglect, it would seem as though he was absolved from all responsibility*, and that the party who caused the injury should be himself alone responsible. It may be said that this is only passing from one difficulty to another, as it leaves still to be settled what is positive duty and what is personal neglect; and yet, if we analyze these matters a little, there will appear less difficulty in the question. Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, what is the positive duty of the master? He certainly owes the duty of taking fair and reasonable precautions to surround his employé with fit and careful co-workers, and the employé has the right to rely upon his discharge of this duty. If the master is careless in the matter of employing a servant, it is his personal neglect; and if without proper care in inquiring as to his competency he does employ an incompetent person the fact that he has an incompetent, and, therefore, an improper, employé is a matter of his personal wrong, and owing to his personal neglect. And if the negligence of this incompetent servant works injury to a co-servant, is it not obvious that the master's omission of duty enters directly and properly into the question of responsibility? If, on the other hand, the master has taken all reasonable precautions to inquire into the competency of one proposing to enter into his service, and as a result of such reasonable inquiry is satisfied that the employé is fit and competent, can it be said that the master has neglected any thing, that he has omitted any personal duty; and this, notwithstanding that after the servant has been employed it shall be disclosed that he was incompetent and unfit? If he has done all that reasonable care requires to inquire into the competency of his servant, is any neglect imputable to him? No human inquiry, no possible precaution, is sufficient to absolutely determine in advance whether a party under certain exigencies will or will not do a negligent act. So it is not possible for the master, take whatsoever pains he may, to secure employés who will never be guilty of any negligence. Indeed, is there any man who does not sometimes do a negligent act? Neither is it possible for the master, with any ordinary and reasonable care, always to secure competent and fit servants. He may be mistaken, notwithstanding the reasonable precautions he has taken. Therefore, that a servant proves to be unfit and incompetent, or that in any given exigency he is guilty of a negligent act resulting in injury to a fellow servant, does not of itself prove any omission of care on the part of the master in his employment; and it is only when there is such omission of care, that the master can be said to be guilty of personal wrong in placing or continuing such servant in his employ, or has done or omitted aught justifying the placing upon him of responsibility for such employé's negligence.

Again, a master employing a servant impliedly engaged with him that the place in which he is to work and the tools or machinery with which he is to work, or

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by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place with tools, and the machinery owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employés to each other. *If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor.* But, it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged, when reasonable precautions have been taken to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution.

In the case of *Atchison, T. & S. F. R. Co. v. Moore*, 29 Kas. 632, 644, M. Justice Valentine, speaking for the court, thus succinctly summed up the law in these respects: 'A master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him, and when the master has properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and co-employés. And at common law, whenever the master delegates to any officer, servant, agent, or employé, high or low, *the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employé stands in the place of the master*, and becomes a substitute for the master, a vice-principal, and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence. But at common law, where the master himself has performed his duty, the master is not liable to any one of his servants for the acts or negligence of any mere fellow servant or co-employé of such servant, where the

fellow servant or co-employé does not sustain his representative relation to the master.'

It would be easy to accumulate authorities on these propositions, for questions of this kind are constantly arising in the courts. It is enough, however, to refer to those in this court. In the cases of *Hough v. The Texas & P. R. Co.*, 100 U. S. 213, and *Northern Pac. R. Co. v. Herbert*, 116 id. 642, this court, recognized the master's obligation to provide reasonably suitable place and machinery, and that a failure to discharge this duty exposed him to liability for injury caused thereby to the servant, and that it was immaterial how or by whom the master discharged that duty. The liability was not made to depend in any manner upon the grade of service of a co-employé, but *upon the character of the act itself, and a breach of the positive obligation of the master*. In both of them the general doctrine of the master's exemption from liability for injury to one servant through the negligence of a co-employé was recognized, and it was affirmed that the servant assumed all the risks ordinarily incident to his employment. In *Union Pac. R. Co. v. Fort*, 84 U. S. (17 Wall.) 553, where a boy was injured through dangerous machinery in doing an act which was not within the scope of his duty and employment, though done at the command of his immediate superior, this court, while sustaining the liability of the master, did so on the ground that the risk was not within the contract of services, and that the servant had no reason to believe that he would have to encounter such a danger, and declared that the general rule was that the employé takes upon himself the risks incident to the undertaking, among which were to be counted the negligence of fellow servants in the same employment. In the cases of *Randell v. Baltimore & O. R. Co.*, 109 U. S. 478, and *Quebec S. S. Co. v. Merchant*, 133 id. 375, the persons whose negligence caused the injury were adjudged to be fellow servants with the parties injured, so as to exempt the master from liability; and while the question in this case was not there presented, yet in neither cases were the two servants doing the same work, although it is also true that in each of them there was no control by one over the other. It may safely be said that this court has never recognized the proposition that the mere control of one servant over another in doing a particular piece of work destroys the relation of fellow servants, and puts an end to the master's liability. On the contrary, all the cases proceed on the ground of some breach of positive duty resting upon the master, or upon the idea of superintendence or control of a department. It has ever been affirmed that the employé assumes the ordinary risks incident to the service; and, as we have seen, it is as obvious that there is risk from the negligence of one in immediate control as from one simply a co-worker. That the running of an engine by itself is not a separate branch of service, seems perfectly clear. The fact is, all the locomotive engines of a railroad company are in one department, the operating department; and those employed in running them, whether as engineers or firemen, are engaged in a common employment and are fellow servants. It might as well be said that, where a liveryman has a dozen carriages, the driver of each has charge of a separate branch or department of service, and that if one drives his carriage negligently against another employé the master is exempt from liability."

From the dissenting opinion of Mr. Justice Field.—"It only remains to notice the observations made upon the decision in the *Ross* case, which seems to me to greatly narrow its effects and destroy its usefulness as a protection to employés in the service of large corporations, under the direction and control of supervising agents. That was an action brought by a locomotive engineer in the

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The opinion of the majority not only limits and narrows the doctrine of the Ross case, *supra*, but, in effect, denies, even with the limitations placed by them upon it, the correctness of its general doctrine, and asserts that the risks which an employe of a company assumes from the service which he undertakes is from the negligence of one in immediate control, as well as from a co-worker, and there is no superintending agency for which a corporation is liable, unless it extends to an entire department of service.

A conclusion is thus reached that the company is not responsible in the present case for injuries received by the fireman from the negligent acts of the conductor of the engine.

There is a marked distinction in the decisions of different courts upon the extent of liability of a corporation for injuries to its servants from persons in their employ. One course of decisions would exempt the corporation from all responsibility for the negligence of its employes, of every grade, whether exercising supervising authority and control over other employes of the company or otherwise. Another course of decisions would hold a corporation responsible for all negligent acts of its agents, subordinate to itself, when exercising authority and supervision over other employes. The latter course of decisions seems to me most in accordance with justice and humanity to the servants of a corporation.

I regret that the tendency of the decision of the majority of the court in this case is in favor of the largest exemptions of corporations from liability. The principle in the Ross case, 112 U. S. 277, covers this case, and requires, in my opinion, a judgment of affirmance."

The foregoing leading opinion sufficiently states the holding in *Hough v. R. Co.*, 100 U. S. 213; *Northern Pacific R. Co. v. Herbert*, 116 U. S. 642, and certain other cases.

Engineer discharging conductor's duties in his absence, held fellow servant with other subordinates. *Stephani v. Southern P. R. Co.*, 19 Utah, 196.

Superior authority in the work of operating the train did not change the conductor's relationship as a fellow servant. *Norfolk & C. R. Co. v. Houchine*, 95 Va. 398.

Rule of a superior and subordinate prevails when the injured servant is under the control of another, whether the latter has or has not the power to hire or dismiss servants.

So that conductor, as to an injured brakeman under him, represents the master. *Daniel's Adm'r v. Railroad Co.*, 36 W. Va. 397.

Engineer.—Engineer and superior assigning him work, held not fellow servants. *Blackman v. Thompson & Co.*, 102 Ga. 64.

Engineer was fellow servant with fireman though former outranked the latter. *Illinois C. R. Co. v. Swisher*, 61 Ill. App. 611.

Engineer held a vice-principal as to an employe working under his orders about a steam shovel. *Alton Paving & Co. v. Hudson*, 74 Ill. App. 612; s. c. aff'd, 176 Ill. 270.

Engineer and brakeman on same train held to be fellow servants. *Dysart v. Kansas City & C. R. Co.*, 145 Mo. 83.

Engineer and fireman coupling cars in switching operations under his direction, held not fellow servants. *Pennsylvania Co. v. Hickley*, 20 Oh. C. C. 668.

Engineer and brakeman on same train are fellow servants; but if brakeman is injured while under orders of engineer, master is liable. *Nashville & C. R. Co. v. Wheless*, 10 Lea, 741.

Engineer of a "wild engine" was only a fellow servant to a brakeman

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on another train with which he had no connection. *Healey v. New York &c. R. Co.*, 20 R. I. 136.

Engineer and head brakeman were co-servants where they were both under the control and direction of the conductor. *International &c. R. Co. v. Moore*, 16 Tex. Civ. App. 51.

Duty of an engineer to report defects is sufficient to charge his master with his promise to trainmen to repair a defect. *Texas &c. R. Co. v. Bingle*, 16 Tex. Civ. App. 653.

Fireman.—Fireman having no control or authority over a brakeman is only a fellow servant. *Sanner v. Atchison &c. R. Co.*, 17 Tex. Civ. App. 337.

Yardmasters.—Yardmaster, charged with duty of seeing that cars are not run upon a repair track where car repairer is at his work, is not a fellow servant of the latter. *St. Louis &c. R. Co. v. Triplett*, 54 Ark. 289.

Yardmaster with power to employ and dismiss and assign and direct him is not a fellow servant with switchman. *Little v. Railroad Co.*, 84 Mich. 289.

Assistant roadmaster with power to direct work and dismiss men is not fellow servant as to them. *Palmer v. Railroad Co.*, 93 Mich. 363.

Yardmaster with power to hire and discharge switchmen, and having general charge was not fellow servant of switchman under him, who was injured. *Taylor v. Mo. Pac. R. Co.*, 16 S. W. Rep. 206.

Yardmaster, with power to employ and discharge but under control and direction of train dispatcher, held a fellow servant of a foreman of a switching gang in the same yard. *Thomas v. Cincinnati &c. R. Co.*, 97 Fed. Rep. 245.

Train dispatcher and telegraph operators.—A train dispatcher, in ordering the movements of trains, performs a duty resting upon the railroad company, and so as to his employes his acts are those of the company, although the dispatcher may have disobeyed rules properly made and promulgated. Two trains were behind schedule time, and their movements were controlled by special orders by one of defendant's train dispatchers, by whose negligence in giving such orders a collision occurred and a fireman was injured. Defendant was liable. *Hankins v. N. Y., L. E. & W. R. R. Co.*, 142 N. Y. 416, rev'g judg't of nonsuit. See 55 Hun, 51 (below).

From opinion.—"In *Slater v. Jewett* (85 N. Y. 73), it was assumed that the order of the train dispatcher was the act of the master, but it was held that the

order was in fact correct and the injury happened from the negligent performance of duty by subordinate servants who were co-employés of plaintiff's intestate (85 N. Y. at pages 66, 70 and 71). The same holds true in the case of *Sheehan v. R. R. Co.* (91 N. Y. 332 at 337), and Judge Danforth there says that no servant takes the risk of an injury by the very act of the master himself. In *Dana v. R. R. Co.* (92 N. Y. 639) a judgment of nonsuit in an action brought to recover damages for an injury received in the same accident in which *Sheehan* (91 N. Y. *supra*) was injured, was reversed in this court, and upon the same reasoning employed in the *Sheehan* case. And in *Sutherland v. The Troy & Boston R. R. Co.* (125 N. Y. 737, more fully in 35 N. Y. St. Repr. 853) this court assumes in the opinion there delivered that if the accident occurred from the omission of the train dispatcher at Troy to exercise proper care to notify the train, a case was made out on the question of defendant's negligence."

The negligence of a train dispatcher to observe the proper rules for the guidance of employés, whereby a collision occurred was held to be a co-employé and a recovery was not permitted. *Hankins v. N. Y., L. E. & W. R. Co.*, 55 Hun, 51, rev'g judg't for pl'ff. (Overruled above.)

The dispatcher of trains and operatives on trains are not fellow servants. *McChesney v. Railroad Co.*, 66 Hun, 627.

Hankins v. Railroad Co., 142 N. Y. 416.

Train dispatcher, employing and discharging men and directing trains, sent out an extra and injured laborer on hand car, he was not a fellow servant. *McKune v. Cal. So. R. Co.*, 66 Cal. 302.

A train dispatcher having charge of the movements of trains held a vice-principal and not a fellow servant though he issues his orders in the name of the trainmaster. *Louisville &c. R. Co. v. Heck*, 151 Ind. 292.

Train dispatcher, with absolute control of running trains, is not a fellow servant of trainmen. *Hunn v. Mich. &c. R. Co.*, 78 Mich. 513.

Nor of conductor of passenger train. *Chicago &c. R. Co. v. McLallen*, 84 Ill. 109.

Dobbin v. R. Co., 81 N. C. 446; *R. Co. v. Henderson*, 37 Oh. St. 552; *Lewis v. Seifert*, 116 Pa. St. 628.

To constitute fellow servants within the rule, employés need not be at the same time engaged in the same particular work, provided they are in the employment of the same master, engaged in the same common work, and performing duties and service for the same general purpose; and this, though one injured may be inferior in grade and subject to the direction and control of a superior whose act has caused the injury.

But there are duties which a master owes to a servant, from which he cannot relieve himself except by performance; and when these duties are delegated to an agent, such agent stands in the place of the principal, and the latter is responsible for his acts.

When the master or superior places the entire charge of his business,

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or a distinct branch of it, in the hands of an agent or subordinate, exercising no discretion or oversight of his own, the master is liable for the negligence of such agent or subordinate.

A train dispatcher wielding the power and authority of a railroad company in the moving of trains, in the changing of schedules or the making of new ones as exigencies require, is not a fellow servant with a train employé, and for his negligence, which is the proximate cause of an injury to such employé, the company is liable in damages. *Lewis v. Seifert*, 116 Pa. St. 628.

Train dispatchers and telegraph operators giving orders for the movement of trains are not fellow servants of a locomotive engineer. *Hogan v. Missouri &c. R. Co.*, 88 Tex. 679.

See, also, *Houston &c. R. Co. v. Stuart*, (Tex. Civ. App.) 48 S. W. Rep. 799; *Clyde v. Richmond & D. R. Co.*, 69 Fed. Rep. 673; *Missouri &c. R. Co. v. Elliot*, 102 id. 96; *Felton v. Harbeson*, 104 id. 737.

Telegraph operator, charged with duty of notifying an engineer of a change of schedule, is not his fellow servant. *Frost v. Oregon &c. R. Co.*, 69 Fed. Rep. 936.

Captain, mate.—A mate or captain and an ordinary seaman are not fellow servants. *Keating v. Pacific &c. Whaling Co.*, 21 Wash. 415.

Mate was vice-principal where he had power to employ and discharge deck hands and direct their work. *Nelson v. Willey &c. Nav. Co.*, 26 Wash. 548.

Miscellaneous instances.—The plaintiff, an engineer, was injured by the derailment of his train on account of the improper elevation of the track at a curve, and a recovery was sustained. The negligence was that of the roadmaster and general manager. The attitude of the court towards the question of fellow servants is illustrated by the following extract from the opinion. *Krogg v. Atlanta &c. R. Co.*, 77 Ga. 202 (214):

From opinion.—"The decisions of this court have been uniform, that a fellow-servant is one employed about the same work with the servant injured, and whose negligence caused the injury to the servant complaining. See 30 Ga. 146, 150, in which Judge Stephens takes a philosophical view of this question, and ruled as this court did in *Bain v. Athens Foundry*, decided two terms ago, 75 Ga. 718; but the case cited in 100 U. S. (Hough Case), is a learned and able opinion and is absolutely decisive of this question. If any doubt formerly existed as to who were fellow servants, that decision resolves the doubt."

Master was liable for the selection of an incompetent assistant by one whom his foreman directed to make the selection. *Frazer v. Schroeder*, 60 Ill. App. 519.

Master mechanic in railway shops with full authority is not a fellow servant with those under him. *Taylor v. Railroad Co.*, 121 Ind. 124.

That a sawyer in a mill could have a deck hand discharged by speaking to the foreman who had charge over both did not make him other than a fellow servant of the deck hand. *Hawk v. McLeod Lumber Co.*, 166 Mo. 121.

Track foreman was a vice-principal. *Allison v. Southern R. Co.*, 129 N. C. 336.

View that superior cannot become fellow servant, whatever the character of his acts.—“Ohio rule.”

As to the decisions in other states, it should be kept in mind that it would be held in all instances that a servant doing a master's duty and injuring another servant, would thereby make the master liable; but it might, and in some cases would surely be held that such would not be the limit of the master's liability.

At the outstart there is a difference of opinion as to what is the master's duty, and the decision of that question is always primary. In Ohio and states similarly holding, it is regarded as the master's duty not only to perform the acts enumerated in the New York rule, but also to exercise a detailed supervision of its servants; hence, wherever there is supervision in minor subdivisions of the employment, as in the case of a conductor of a train, the foreman of section men, the foreman of railway yards, &c., the servant exercising the supervision represents the master in the performance of a master's duty, and hence, by his negligence the master may become liable. Thus far the manner of testing the master's liability is the same as in New York, viz., by ascertaining whether the offending servant was performing a master's duty; and the difference in holding would simply relate to the fact that such detailed supervision is not regarded as a master's duty by the courts of New York. But there is one characteristic of the Ohio doctrine that does not exist at all in New York, viz., that a superior servant cannot, by any act done in the course of the employment, lay aside the character of a superior, and by doing the act of a subordinate become a subordinate. Thus, if the foreman of section men should take a pick-axe, and placing himself amongst his workmen, do the common work of his men, and by a negligent blow of his axe injure one of such men, the foreman would be regarded as having done the injurious act in his capacity of a superior, and hence while in the performance of a master's duty. This holding is sought to be justified by the consideration that the superior cannot possess a dual capacity; that he cannot at once be a governing power and one of the governed; and although he may cross over into the ranks of his workmen, his general employment is not com-

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mon to both him, and them, and that by his option to put or withhold his hands from the work he cannot change his real character, which is that of a person generally empowered to do the master's duty.

The decisions in Ohio sustaining its doctrine are as follows: *Little Miami R. Co. v. Stevens*, 20 Ohio St. 415; *Berea Stone Co. v. Kraft*, 31 id. 291; *Whaalan v. Mad River &c. R. Co.*, 8 id. 249; *Pittsburg &c. R. Co. v. De Vinney*, 17 id. 197.

In Illinois and some other states it is considered with apparent wisdom, that the master is not liable for the act of a superior, unless such superiority in some degree influenced the tortious act or contributed in fact to the injury. In such case, if a foreman were invested with the duty of governing his men, and also with working with them, when practicable, a negligent use of a tool, which he was handling simply as a workman, would not attach any liability to the master.

That a superintendent also assisted in construction did not prevent his remaining a vice-principal. *Brennan v. Berlin Iron B. Co.*, 74 Conn. 382.

That foreman's duties required him to assist in the work did not prevent his being a vice-principal. *Terre Haute &c. R. Co. v. Tittenhouse*, (Ind. App.) 62 N. E. Rep. 295.

Rhoades v. Varney, 91 Me. 222; *Texas &c. R. Co. v. Reed*, (Tex. Civ. App.) 32 S. W. Rep. 118.

Where a foreman has absolute control and authority over his workmen without restraint by any immediate supervision over him, he is a vice-principal, though he be at the time engaged in assisting them. *Consolidated &c. R. Co. v. Peterson*, 8 Kan. App. 316.

Swift & Co. v. Bleise, (Neb.) 89 N. W. Rep. 310.

A similar rule to that in Ohio prevails in Kentucky, but the degree of care required is somewhat different, so that a master is liable for injury to one servant subordinate to another, by the latter's gross negligence in performing a duty *delegated to him* by the master, and if the servants be in different departments, not connected with the running or operation of a railroad, the master is liable for the ordinary negligence of the offending servant. *Louisville R. Co. v. Collins*, 2 Duv. 117.

It also seems that the master is liable for the extraordinary or gross negligence of a servant whereby another of the same rank is injured.

By this is meant intentional wrong or such recklessness as is equivalent thereto. *Louisville R. Co. v. Cavens*, 9 Bush. 566; *Louisville R. Co. v. Murphy*, id. 531.

Eastern K. R. Co. v. Powell, 33 S. W. Rep. 629.

That the conductor was, at the time, acting as brakeman, did not put

the engineer above him. *Linck v. Louisville &c. R. Co.*, (Ky.) 54 S. W. Rep. 184.

A yard master was the superior though working with the man under him. *Illinois Cent. R. Co. v. Coleman*, (Ky.) 59 S. W. Rep. 13.

One engaged to inspect machinery and superintend its repair for one company, held to be a fellow servant to one working about it for another company. *McCafferty v. Dock Co.*, 11 Oh. C. C. 457.

Cuddy v. Sezpansky, 19 Oh. C. C. 356.

South Carolina follows Ohio doctrine, so that when master delegates any duty which he owes to a servant, such servant, whatever his usual grade, or whatever his title, represents the master as conductor of a train is regarded as a vice-principal as to the engineer and brakeman. *Boatwright v. Railroad Co.*, 25 S. C. 128.

Coleman v. Railroad Co., 25 S. C., 446; *Calvo v. Railroad Co.*, 23 id. 528; *Couch v. Railroad Co.*, 22 id. 557.

Vice-principal did not become a fellow servant while giving orders in respect to loading a vessel. *Young v. Hahn*, (Tex. Civ. App.) 69 S. W. Rep. 203.

View that the superior becomes fellow servant while engaged in an act of that character.—“New York Rule.”

Where one servant is injured by the negligence of a servant employed by the same master, the liability of the master is determined solely by the question, whether the offending servant was negligent respecting a duty pertaining to an operative, or respecting a duty owing from the master to the injured servant. If it pertained to the master's duty, then the master was liable, if he or the servant to whom he delegated the duty failed to use the requisite care; that is, ordinary and reasonable care to provide against the injurious cause. *Crispin v. Babbitt*, 81 N. Y. 522.

McCoster v. R. Co., 84 N. Y. 81; *Loughlin v. State*, 105 id. 159; *Slater v. Jewett*, 85 id. 74; *Filbert v. D. & H. Canal Co.*, 121 id. 207.

The rule is similar, except as modified by statute, in

ALABAMA. *Lyson v. R. Co.*, 61 Ala. 554; *Smoot v. R. Co.*, 67 id. 13.

CALIFORNIA. *McLean v. Blue Point &c. R. Co.*, 51 Cal. 258.

INDIANA. *Penn. Co. v. Whitcomb*, 111 Ind. 212.

MAINE. *Doughty v. Penobscot R. Co.*, 76 Me. 145.

MASSACHUSETTS. *Moynehan v. Hiltz Co.*, 146 Mass. 586.

MICHIGAN. *Adams v. Iron Cliffs Co.*, 78 Mich. 288.

MINNESOTA. *Lindwell v. Woods*, 41 Minn. 212.

MISSISSIPPI. *New Orleans R. Co. v. Hughes*, 49 Miss. 258.

NEW HAMPSHIRE. *Jacques v. Mfg. Co.*, 22 Atl. (N. H.) 552.

NORTH DAKOTA. *Ell v. North. Pac. R. Co.*, 1 N. D. 336.

TEXAS. *International Nav. Co. v. Ryan*, 82 Tex. 565.

WASHINGTON. *Zintek v. Stimson Mill Co.*, 7 Wash. 178. But servants are not

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fellow servants unless they are in the same department. *Sayward v. Carlson*, 1 Wash. St. 29.

WISCONSIN. *Dwyer v. Am. Ex. Co.*, 82 Wis. 307.

For statutory modifications, see *post*, p. 1773.

The New York doctrine is that the master is only liable for injuries to one servant arising from the negligence of another servant, where the act or omission from which the injury arose was one pertaining to the duty of the master supplying and keeping in repair machinery, appliances, place to work, giving instruction to servants, furnishing competent and sufficient servants and promulgating and enforcing proper rules and regulations for the conduct of its work, to which may be added that of a proper general supervision of the work, although that duty may be involved in the others. It must also appear that the injured servant was not engaged in the performance of a duty pertaining to the master, but must have been engaged in the work of an operative. By the New York rule the rank or position of the offending servant is immaterial. If he be a superintendent he may, by doing the act of an operative, become an operative, and his negligence in doing it is not the negligence of the master, but that of a fellow-servant. It is a characteristic of the New York doctrine that the work of supervision or direction, unless it be of a general character like that of a general manager, superintendent, &c., does not pertain to the duty of a master, so that one in the supervision of the details of work is not from the fact of his authority representing the master, for he can only represent the master by doing the master's duty, and if he be actually doing the master's duty, it is of no consequence whether he have or have not rank, title, superiority or governing power. See *Wooden v. Western &c. R. Co.*, 147 N. Y. 508.

A servant was injured by the negligence of a superior agent in the same general business, to whose control he was subject and against whose negligence he could not guard; he cannot recover against the master. A brakeman could not recover for the culpable speed of a train. *Sherman v. Syracuse & Rochester R. Co.*, 17 N. Y. 153, sustaining demurrer to complaint.

The nature of the act, and not the grade of the negligent employé, determines the liability of the master to another servant injured. If the act pertain to a duty the master owes, the master is liable; if it pertain only to the duty of an operative, the employé performing it, whatever his rank, is a co-employé.

Plaintiff was at work near an engine, when "B." carelessly let on steam and plaintiff was injured. The court charged that, although "B.," as agent or superintendent, represented and stood in the place of defendant, he did so only in respect to those duties which defendant had con-

fided to him as such. Defendant's counsel then requested the further charge, that as to any other acts or duties performed by "B.," in and about defendant's works or business, he was not to be regarded as defendant's representative, but as a fellow servant with plaintiff. This the court refused to charge, but left it as a question of fact for the jury. Held (Earl, Danforth and Finch, JJ., dissenting), error; that it was a question of law, and the court should have charged as requested.

The court was also requested, and refused, to charge that in letting on the steam "B." was not acting in defendant's place. Held (Earl, Danforth and Finch, JJ., dissenting) error. The defendant was not liable. *Crispin v. Babbitt*, 81 N. Y. 516, rev'g judg't for pl'ff.

This case was retried upon the theory that the machinery was defective, and the master was held liable. 109 N. Y. 653.

Where the injuries of a servant were caused by the carelessness or negligence of a co-servant the case of *Crispin v. Babbitt*, 81 N. Y. 516, controls. *Neubauer v. N. Y., L. I. & N. R. Co.*, 101 id. 607, aff'g judg't for def't.

Plaintiff, an employé in defendant's factory, was called from his work to assist in putting up girders to support a roof in another part of the factory. This was not in the line of his general employment, and he had no previous knowledge of the appliances used in the prosecution of the work. He was ordered by the foreman to get upon a platform; he asked the foreman if it was safe, and was assured by him that it was. Plaintiff went upon the platform, one of the boards composing it, which was defective, broke, and he fell and was injured; he had no opportunity to examine the platform, and the evidence left it in doubt whether, upon an examination, the defect could have been discovered. In an action to recover damages for the injury, the complaint was dismissed on the ground that the neglect, if any, was that of a co-servant, for which the master was not liable. Held, error. *Benzing v. Steinway & Sons*, 101 N. Y. 547, rev'g judg't for def'ts.

If a co-servant, whose negligence caused the injury, is doing a master's duty, the master is liable; if the duty were that of a servant, the master is not liable and it is immaterial that there was a difference of grade between the servants or that the injured man was subject to the control of the other servant.

Plaintiff, an employé of the state, was engaged under the direction of "W.," the captain of the state boat, in digging clay from a bank and loading it on to the boat. While digging under the bank the overhanging earth, which had been loosened by "W.," fell upon and injured him. Held, that the injury was caused by the negligence of a co-servant, and

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the state was not liable. *Loughlin v. State*, 105 N. Y. 159, rev'g verdict for pl'ff.

Disapproving *C. M. & St. P. R. Co. v. Ross*, 112 U. S. 377; citing *Slater v. Jewett*, 85 N. Y. 61; *Wilson v. Merry*, L. R. 1 H. L. Cas. 326; *Farwell v. B. & W. R. Co.*, 4 Met. 49.

See *Kranz v. L. I. R. Co.*, 123 N. Y. 1, where master was not liable for place made dangerous by negligence of fellow-servants, nor for the negligent use of tools by fellow servant.

Plaintiff, while constructing a scaffold, was injured by the falling of the same, through the negligence of co-employé. Master not liable. *Judson v. Village of Olean*, 116 N. Y. 655.

Performance of a detail of the work is a servant's duty, regardless of grade of party performing it. *Kimmer v. Webber*, 151 N. Y. 417.

Moore v. McNeill, 35 App. Div. 323; *Bagley v. Consolidated Gas Co.*, 5rid. 432; *Meeker v. C. R. Remington &c. Co.*, 53 id. 592; *Capasso v. Woolfolk*, 163 N. Y. 472; rev'g. s. c., 25 App. Div. 234; *Ludlow v. Croton Bridge Co.*, 71 N. Y. St. Rep. 510; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417; *Callan v. Bull*, 113 Cal. 593; *Woodson v. Wm. Johnson & Co.*, (Ga.) 34 S. E. Rep. 587; *Meehan v. Spiers Man. Co.*, 172 Mass. 375.

Failure of superintendent to prevent negligent performance of work did not affect his relationship as fellow servant. *O'Brien v. Buffalo Furnace Co.*, 68 App. Div. 451.

It is not the grade but the nature of the duty that determines master's liability. Foreman, assistant superintendent or superintendent, performing *other* duties, are fellow servants of employés, although having power to hire and discharge workmen, or direct the control of them. *Mobile &c. R. Co. v. Smith*, 59 Ala. 245; *Tyson v. Railroad Co.*, 61 id. 554.

That one is a vice-principal in one respect does not prevent his being a fellow servant in another. *National Fertilizer Co. v. Travis*, 102 Tenn. 16.

One servant of a corporation, to whom is delegated the power of hiring and discharging other servants, and in whom the corporation vests the sole control and direction of such other servants in and about the work which they may be ordinarily required to do, is as to such servants whom he so hires, discharges and controls, the representative of the master when exercising such power or control, and is not a fellow servant, nor is he in the same line of employment as the servant he so controls.

The mere fact that one of a number of servants who are in the habit of working together in the same line of employment for a common master, has power to control and direct the actions of the others with respect to such employment, will not of itself render the master liable for the negligence of the governing servant, resulting in an injury to

one of the others, without regard to other circumstances. Each case must depend upon its own circumstances.

If the negligence complained of consists of some act done or omitted by the servant having such authority, which relates to his duty as a co-laborer with those under his control, and which might as readily happen with one of them having no such authority, the common master will be liable.

But where the negligent act arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. In such case the governing servant is not the fellow-servant of those under his charge with respect to the exercise of such powers.

Where a corporation confers authority upon one of its employes to take charge and control of a gang of men in carrying on some particular branch of its business, such employé, in governing and directing the movements of the men under his charge with respect to that branch of the business, is the direct representative of the corporation itself, and all commands given by him within the scope of his authority are in law the commands of the corporation; and the fact that he may have an immediate superior between him and the company makes no difference in this respect. *Chicago & Alton R. Co. v. May*, 108 Ill. 288.

Whether a pit boss is a fellow servant of an employé under him depends upon the circumstances. *Westville Coal Co. v. Schwartz*, 177 Ill. 272; aff'g s. c., 75 Ill. App. 468.

The test is the nature of the duty to be performed and not the relative ranks which the servants occupy. *Small v. Allington &c. Man. Co.*, 94 Me. 551.

Miller v. Railroad Co., 109 Mo. 350; *Parker v. Railroad Co.*, id. 362; *Mast v. Kern*, 34 Or. 247; *Jackson v. Norfolk &c. R. Co.*, 43 W. Va. 380.

A foreman was not a vice-principal, but a fellow servant only, as to work which he did in the common employment with others. *Olsen v. Nixon*, 61 N. J. L. 671.

The superior servant rule does not affect the master's exemption from liability where the acts are done in pursuance of a servant's duty towards his master. *Kuntter v. New York &c. T. Co.*, (N. J. L.) 52 Atl. Rep. 565.

See, also, *Giordan v. Brandywine Granite Co.*, (Del.) 52 Atl. Rep. 332; *Nashville &c. R. Co. v. Gann*, 101 Tenn. 380.

Weeks v. Scharer, 111 Fed. Rep. 330; *Canney v. Walkenie*, 113 id. 66.

If servant is charged with discretionary exercise of powers and duties of master, he represents master as to those under him. *Moon v. Railroad Co.*, 78 Va. 745.

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Norfolk &c. R. Co. v. Donnelly, 88 Va. 853; Richmond &c. Co. v. Williams, 86 id. 165.

Where a foreman's duties required his passage on the logging train he was a co-servant and not a passenger. *Sanderson v. Panther Lumber Co.*, 50 W. Va. 42.

Engaging in same work with subordinate.—Foreman was a fellow servant where he was actively engaged with the plaintiff in carrying out the directions of the engineer of their employer's employer. *Brown v. Terry*, 67 App. Div. 223.

Swain v. Brooklyn &c. Co., 57 App. Div. 56.

Foreman performing duty of a servant, and not that of a master, is a fellow servant of those under him. *Chicago &c. R. Co. v. Moranda*, 108 Ill. 576.

Fitzgerald v. Honkomp, 44 Ill. App. 365.

A master is liable for an accident happening in consequence of an improper and inconsiderate order, such as no one exercising ordinary care would have given, when such order is given by a foreman or superintendent having authority not only to give orders as to work but to discharge the person to whom it is given; but if an accident happened from some negligence of the foreman, which negligence related to the foreman's duties as a co-laborer with the person injured, and which might just as readily have happened with one having no such authority, the master is not liable. *Fitzgerald v. Honkomp*, 44 Ill. App. 365.

Citing C. & A. R. Co. v. May, 108 Ill. 288.

Foreman of section men and men under him are fellow servants (injured while riding home on hand car). *Justice v. Penn. Co.*, 130 Ind. 321; *Olson v. R. Co.*, 38 Minn. 117.

Foreman, while assisting in work he has direction of, held a fellow servant. *Gall v. Beckstein*, 173 Ill. 187; aff'g s. c., 69 Ill. App. 616.

Kiffin v. Wendt, 39 App. Div. 229; *Wiskie v. Mintello Granite Co.*, 111 Wis. 443; *Chicago Architectural Iron Works v. Nagel*, 80 Ill. App. 492; *Deep Min. & D. Co. v. Fitzgerald*, 21 Colo. 533; *New Pittsburg Coal &c. Co. v. Peterson*, 14 Ind. App. 634; *Neilkolajczak v. North American China Co.*, (Mich.) 88 N. W. Rep. 75; *Stevens v. Chamberlain*, 100 Fed. Rep. 378; *Russell Creek Coal Co. v. Wells*, 96 Va. 416.

So, where a conductor assists a brakeman in unloading a freight train. *Louisville &c. R. Co. v. Southwick*, 16 Ind. App. 486.

So, where a bridge foreman assists a carpenter to set up a jack screw and agrees to watch it. *Peirce v. Oliver*, 18 Ind. App. 87.

So where foreman started to do the act, moving a column, himself. *Barnicle v. Connor*, (Iowa) 81 N. W. Rep. 452.

So, where such a superintendent and vice-principal assists in applying the appliances and materials in performance of the work himself. *Small v. Allington &c. Man. Co.*, 94 Me. 551.

So, as to factory foreman joining the laborers in the performance of their work. *Findlay v. Russel Wheel & F. Co.*, 108 Mich. 286.

Foreman doing more or less work with the rest is a fellow servant, though he had general superintendence with power to employ and discharge. *Lipan v. Hall*, (Mich.) 87 N. W. Rep. 619.

A foreman is a fellow servant only, where his only superiority consists in directing how the work to be done by both shall be performed. *Andre v. Winslow &c. El. Co.*, 117 Mich. 560.

So, as to foreman of a car repairing gang assisting in their work. *Holtz v. Great Northern R. Co.*, 69 Minn. 524.

So, as to a section foreman assisting the engineer of a locomotive and fellow workman on the track. *Hastings v. Montana U. R. Co.*, 18 Mont. 493.

Master will not be liable to a servant in his employ for injuries occasioned by negligence of superior servant, who is also employed as a boss foreman of other workmen, with whom he labors, in the execution of work designated or directed by the master or his vice-principal. *O'Brien v. Am. &c. Co.*, 53 N. J. L. 291.

Reviewing *Smith v. Oxford Iron Co.*, 13 Vroom. 467.

From opinion.—"Superiority of grade is not a conclusive test in determining the liability of the master. That liability will arise when the negligent employé has been put in the place the master would otherwise occupy, but it will not arise when the negligent employé is a mere boss or foreman in the prosecution of the master's work, such as the master, if controlling or managing his own business, would necessarily employ, and such as a contracting workman would contemplate being employed."

So, as to a foreman of a gang, engaged in erecting a stone wall, taking the place of one of its members charged with the duty of hooking tongs into the stone to be transported from a car by means of a derrick. *Ricks v. Flynn*, 196 Pa. St. 263.

So, as to a foreman dropping an implement which he was using to assist those under him. *Frawley v. Sheldon*, 20 R. I. 258.

So, as to a foreman and vice-principal while engaged in running an engine which runs α shafting on the pulleys on which one under him is putting belts. *National Fertilizer Co. v. Travis*, 102 Tenn. 16.

So, where a section foreman or boss is engaged in running a hand car carrying his men. *Northern P. R. Co. v. Charless*, 162 U. S. 353.

So, as to a track foreman assisting in working a jack to raise the track. *Deavers v. Spencer*, 70 Fed. Rep. 480.

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So, as to foreman of a wrecking car assisting in arranging the blocks to the wheels thereof. *Flippin v. Kimball*, 87 Fed. Rep. 258.

So, as to the foreman of a stevedore gang stopping a draft of loaded bags to have them tightened to prevent slipping. *The Kensington*, 91 Fed. Rep. 681.

So, as to the mate of a pilot boat managing a yawl which is proceeding to take a pilot from an outgoing vessel. *Carlson v. United &c. P. Asso.*, 93 Fed. Rep. 468.

So, as to master of a vessel leaving the hatch cover off. *Olson v. Oregon Coal & Nav. Co.*, 96 Fed. Rep. 109.

So, as to foreman of a quarry gang, though doing the same work at the same price as the others. *Moore Lime Co. v. Richardson*, 95 Va. 326.

See, also, *Reedy v. Stockmeyer*, 74 Fed. Rep. 186.

Conductor is a fellow servant with engineer or fireman while performing the duties of a brakeman. *Eckles v. Norfolk &c. R. Co.*, 96 Va. 69.

That one has the power of a foreman does not prevent his being a fellow servant where he is acting in the latter capacity at the time. *South-ern R. Co. v. Mauzy*, 98 Va. 692.

Giving orders in execution of details of work.—Foreman and men under him are fellow servants. *Sherman v. Railroad Co.*, 17 N. Y. 153; *Malone v. Hathaway*, 64 id. 5.

Where there is nothing extraordinary about a train, a conductor's judgment as to the necessity of extra brakemen in descending a grade is that of a fellow servant. *Wooden v. Western N. Y. &c. R. Co.*, 147 N. Y. 508.

Negligent section boss and injured employé under him were fellow servants. *Barringer v. D. & H. C. Co.*, 19 Hun, 216.

Citing *Malone v. Hathaway*, 64 N. Y. 5, where it was held that the master is not responsible to an employé for the negligent act of competent and proper foreman to whom there is no delegation of power and control of the business, or a branch thereof, who was simply charged with duties to be performed under direction of the master, the latter retaining general control and supervision.

Smith, superintendent of removal of wrecks under the person in charge of shops and yards, gave a negligent order in replacing a derailed car on the track, whereby plaintiff's intestate was killed. Negligence of co-servant. No recovery. *Beilfus v. N. Y., L. E. & W. R. Co.*, 29 Hun, 556, aff'g nonsuit.

Plaintiff, defendant's servant, was injured by the defendant's foreman ordering the boom of a derrick to be lowered when the plaintiff was passing under it. Negligence of co-employe. No liability. *Scott v. Sweeney*, 34 Hun, 292, rev'g judg't for pl'ff.

Experienced servant authorized to direct others at the same task was not a superior. *Rozelle v. Rose*, 3 App. Div. 132.

Plaintiff was injured by a blast set off without proper warning. It was the negligence of a fellow servant for which defendant was not liable. *Ward v. Naughton*, 77 N. Y. St. Rep. 344.

See *Mallwood v. Bedford Quarries Co.*, (Ind. App.) 63 N. E. Rep. 869. *Wells Fargo Express Co. v. Page*, (Tex. Civ. App.) 68 S. W. Rep. 528.

Negligence of an assistant foreman was that of a fellow servant. *Murray v. Crimmins*, 14 Misc. 466.

Those doing the actual details of work of repair are fellow servants as to each other. *Wells v. Coe*, 9 Col. 159.

Simple direction of the work does not make one who assists in the job, a vice-principal. *Cates v. Itner*, 104 Ga. 679.

Postal Teleg. Cable Co. v. Hulsey, 115 Ala. 193.

That one employé has the right to direct the work of another does not prevent his being a fellow servant where both are subject to the orders of a third. *Hamby v. Union Paper Mills Co.*, 110 Ga. 1; *Gunn v. Willingham*, 111 Ga. 427.

Foreman, not performing master's duty, and those under his control were held to be fellow servants. *Boyce v. Fitzpatrick*, 80 Ind. 526; *Drinkout v. Eagle Machine Works*, 90 id. 423; *Capper v. Railroad Co.*, 103 id. 305; *Blake v. Railroad Co.*, 70 Me. 60; *Northcote v. Bachelder*, 111 Mass. 322; *Zeigler v. Day*, 123 id. 152; *Brown v. Railroad Co.*, 27 Minn. 162; *Lehigh Valley R. Co. v. Jones*, 86 Pa. St. 432; *Delaware &c. Co. v. Carroll*, 89 id. 374; *Keystone Bridge Co. v. Newberry*, 96 id. 246; *Johnson v. Ashland Water Co.*, 77 Wis. 51.

The act of a tunnel boss in causing a rock in the tunnel to fall on another was that of a fellow servant. *Ross v. Union Cement & Lime Co.*, 25 Ind. App. 463.

State, Hamelin v. Malster & Reaney, 57 Md. 287 (307).

From opinion.—"All the cases agree in holding that there is no obligation on the part of the master to give his own personal supervision to the execution of the work; but that he may delegate that power to a superintendent or foreman. And it is held by all the English cases, and by a decided preponderance of those of this country, that such superintendent or foreman is a fellow-servant within the rule, and that the omission or negligence of such superintendent or foreman is among the incidents of the service, and the risk of which the servant assumes upon himself, as between himself and the master, when he enters the employment. Consequently, for any injury to the servant, caused by the omission or neglect of the superintendent or foreman, the master is not liable to the servant, provided the master has not been negligent or careless in the selection of such foreman or superintendent. It is said by Judge Cooley, in his work on Torts, in treating of the subject, at page 544, 'that it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the busi-

OR REPRESENTS HIS MASTER IN A POSITION OF SUPERIOR AUTHORITY.

ness as the negligence of a servant of any other; and it seems impossible therefore to hold that the servant contracts to run the risks of negligent acts of omission on the part of one class of servants and not those of another class.' The cases in which it has been held that the superintendent or manager is a fellow servant within the rule which exonerates the master, are quite numerous, and it is not necessary that we should do more than give reference to some of them. *Wonder's Case*, 32 Md. 411; *Wigmore v. Jay*, 5 Exch. 354; *Wiggett v. Fox*, 11 id. 832; *Brown v. Acrington Cotton Co.*, 3 H. & Colt. 513; *Searle v. Lindsay*, 11 C. B. (N. S.) 429; *Lovegrove v. Railw. Co.*, and *Gallagher v. Piper*, 16 id. 669; *Murphy v. Smith*, 19 id. 361; *Feltham v. England*, L. R., 2 Q. B. 32; *Howell v. Steele Co.*, L. R., 10 Q. B. 62; *Warner v. Erie R. Co.*, 39 N. Y. 468; *Malone v. Hathaway*, 64 id. 5; *Lawler v. Railw. Co.*, 62 Me. 463; *Blake v. Railw. Co.*, 70 id. 60. To the general rule, however, there is this qualification, or exception that where the middleman or superintendent is intrusted with the discharge of the duties incumbent upon the master, as between the latter and the servant, there the master may be liable for the omissions or neglect of the manager or superintendent in respect to those duties. If the master relinquishes all supervision of the work, and entrusts not only the supervision and direction of the work, but the selection and employment of laborers, and the procuring of materials, machinery, and other instrumentalities necessary for the service, to the judgment and discretion of a manager or superintendent, in such case, the latter becomes a vice-principal, and for his omissions or negligence in the discharge of those duties, the principal will be liable. *Murphy v. Smith*, 19 C. B. (N. S.) 361; *Malone v. Hathaway*, 64 N. Y. 5; *Whart. on Neg.* (1st ed.) sec. 229."

Quarryman in general charge, negligently directing work and injuring one under him, while assisting in its performance, was fellow servant of latter. *Malcolm v. Fuller*, 152 Mass. 160.

Special authority and supervision as to a particular part of work does not make him vice-principal. *Quincy &c. Co. v. Kitts*, 42 Mich. 34.

Ryan v. Bagaley, 50 Mich. 179.

Foreman of roundhouse and truck packer, subject to his orders, are fellow servants. *Gonsior v. Railroad Co.*, 36 Minn. 385.

Citing *Brown v. Winona R. Co.*, 27 Minn. 162.

Foreman and laborers under him building a trestle are fellow servants. *Lindvall v. Woods*, 41 Minn. 212.

Two foremen of separate section gangs are fellow servants. *Shiren v. Railroad Co.*, 103 Mo. 378.

A foreman undertaking to raise a frame is a fellow servant of one whom he calls from his special work to assist him. *McLaughlin v. Camden Iron Works*, 60 N. J. L. 557.

The direction of a superintendent and manager of a quarry of one with whom he is at the time engaged in blasting, to place powder in a hole just exploded, is that of a fellow servant. *Mast v. Kern*, 34 Ore. 247.

One who assumed authority to dictate method of work was held a

fellow servant. *Johnson v. Portland Stone Co.*, (Ore.) 67 Pac. Rep. 1013.

Foreman of machine and repair shops and men under him are fellow servants. *Faber v. Man. Co.*, 126 Pa. St. 387.

Mine boss giving orders under the authority and control of a superintendent was fellow servant. *Velas v. Patton Coal Co.*, 197 Pa. St. 380.

Similarly as to a foreman of a gang in a factory. *Casey v. Pennsylvania Asphalt &c. Co.*, 198 Pa. St. 348.

See, also, *Cleveland &c. R. Co. v. Brown*, 73 Fed. Rep. 970; *Balch v. Haas*, 73 Fed. Rep. 974; *Coulson v. Leonard*, 77 Fed. Rep. 538.

Direction of a superintendent in charge of removing poles as to the details was that of a fellow servant. *Morgridge v. Providence Teleph. Co.*, 20 R. I. 386.

Foreman, although temporary, is not vice-principal unless he has full control, with power to hire and discharge. *St. Louis &c. R. Co. v. Lemon*, 83 Texas, 143.

Master is not liable unless offending foreman is in fact a vice-principal acting in the master's place and doing a master's duty. *Allen v. Goodwin*, 92 Tenn. 385.

Direction of a foreman to a section hand to try and save a hand car from a collision with a train, was that of a fellow servant. *Wright v. Southern R. Co.*, 80 Fed. Rep. 260.

The direction of an engineer to a fireman to oil a turntable, properly within the province of the former was that of a fellow servant. *Briegal v. Southern Pac. Co.*, 98 Fed. Rep. 958.

The fact that the injured servant was under the command or direction of the offending servant does not prevent his being a fellow servant. *Heine v. Chicago &c. R. Co.*, 58 Wis. 531.

Dwyer v. American Exp. Co., 82 Wis. 307.

The direction of a superintendent given while engaged in the common labor with those under him is that of a fellow servant only. *Klochinski v. Shores Lumber Co.*, 93 Wis. 417.

(b). MASTER LIABLE WHERE HIS OWN NEGLIGENCE CONCURS WITH THAT OF FELLOW SERVANT.

The servant was injured by the sudden starting of an engine, caused by a defect of which the defendant had notice, but which would have been obviated by care on the part of the engineer. *Cone v. D., L. & W. R. Co.*, 81 N. Y. 206, aff'd 15 Hun, 172, and judg't for pl'ff.

Citing *Wilds v. H. R. R. Co.*, 23 How. 492.

Where an injury to an employé of a railroad company is caused partly

MASTER LIABLE WHERE NEGLIGENCE CONCURS WITH THAT OF FELLOW SERVANT. by the negligence of another employé by failure of the company to provide proper and suitable apparatus, the negligence of the co-servant will not excuse the company from the consequences of its own default. *Ellis v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 546.

If a servant be injured by the concurring negligence of his master and a fellow-servant, the master is liable. *Coppins v. N. Y. C. & H. R. R. Co.*, 122 N. Y. 557, aff'g 48 Hun, 292, and judg't for pl'ff.

Stringham v. Stewart, 100 N. Y. 516, rev'g 27 Hun, 562, and judg't of nonsuit. See *ante*, p. 1067

Where a railroad company has, by its rules, done all that could be reasonably required of it for the safety of its employés, the execution of the rules is a matter of detail to be observed by the employés, and no liability of the company results, in favor of one of the employés, from the consequences of the fault of another employé in failing to obey such rules.

Although an accident and injury to an employé may be attributable to the negligence of an employé of a railroad corporation in not observing the rules of the company while running a train, if negligence on the part of the company to any material extent co-operates with that of such employé in producing the accident, the company may be chargeable in damages. *Bryant v. N. Y. C. & H. R. R. Co.*, 81 Hun, 164.

¹ Contributing negligence of fellow servant is no defense to the negligence of a master in respect to a duty owed by him. *Crowell v. Thomas*, 90 Hun, 193.

Hollingsworth v. Long Island R. Co., 91 Hun, 641; *Shields v. Robins*, 3 App. Div. 582; *Bennett v. Long Island R. Co.*, 21 App. Div. 25; *Strauss v. Halerman Man. Co.*, 25 App. Div. 623; *Auld v. Manhattan Life Ins. Co.*, 34 App. Div. 491; s. c., aff'd, 165 N. Y. 610; *Keast v. Santa Ysabel Golf Min. Co.*, (Cal.) 68 Pac. Rep. 771; *Denver &c. R. Co. v. Sipes*, (Colo.) 55 Pac. Rep. 1093; *Louisville &c. R. Co. v. Heck*, 151 Ind. 292; *Atchison &c. R. Co. v. Lannigan*, 56 Kan. 109; *Stucke v. Orleans R. Co.*, 50 La. Ann. 188.

Concurring negligence of master and servant, whereby another servant was injured, makes master liable. *Franklin v. R. Co.*, 37 Minn. 409.

Cole v. Warren Man. Co., (N. J. L.) 44 Atl. Rep. 647; *Hogue v. Sligo Furnace Co.*, 62 Mo. App. 491; *Irmer v. St. Louis Brew. Co.*, 69 Mo. App. 17; *International &c. R. Co. v. Williams*, (Tex. Civ. App.) 34 S. W. Rep. 161.

Or other act of negligence by the former. *Houston &c. R. Co. v. Kelly*, (Tex. Civ. App.) 35 S. W. Rep. 878.

Gulf &c. R. Co. v. Warner, (Tex. Civ. App.) 36 S. W. Rep. 118; *Galveston &c. R. Co. v. Sweeney*, 14 Tex. Civ. App. 216.

Defective coupling. *Galveston &c. R. Co. v. Sweeney*, 14 Tex. Civ. App. 216; *Sincere v. Union Compress & W. Co.*, (Tex. Civ. App.) 40 S. W. Rep. 326.

Unsafe place to work. *Missouri &c. R. Co. v. Rains*, (Tex. Civ. App.) 40 S. W. Rep. 635.

Incompetency. *Terrel v. Russel*, 16 Tex. Civ. App. 573; *Texas &c. R. Co. v. Eberhart*, (Tex. Civ. App.) 40 S. W. Rep. 1060.

Unsafe place to work. *Missouri &c. R. Co. v. Finch*, 18 Tex. Civ. App. 46; *Trinity &c. R. Co. v. Brown*, (Tex. Civ. App.) 46 S. W. Rep. 926.

Defective condition of tracks. *Trinity &c. R. Co. v. Brown*, (Tex. Civ. App.) 46 S. W. Rep. 926.

Negligence of one in representing master. *Louisiana Western Extension R. Co. v. Carstens*, 19 Tex. Civ. App. 190; *International &c. R. Co. v. Bonatz*, (Tex. Civ. App.) 48 S. W. Rep. 767; *Missouri &c. R. Co. v. Haning*, 20 Tex. Civ. App. 649; *American Cotton Co. v. Smith*, (Tex. Civ. App.) 69 S. W. Rep. 443; See *Norfolk &c. R. Co. v. Phillip*, (Va.) 41 S. E. Rep. 726; *Maupin v. Texas &c. R. Co.*, 99 Fed. Rep. 49; *The Anchoria*, 113 Fed. Rep. 982; *Jenkins v. Mammoth Min. Co.*, (Utah) 68 Pac. Rep. 845; *Wright v. Southern P. R. Co.*, 14 Utah, 383; *Handley v. Daly Min. Co.*, 15 Utah, 176; *Lago v. Walsh*, 98 Wis. 348.

So long as there is no contributory negligence on the part of the servant injured. *Houston &c. R. Co. v. White*, 23 Tex. Civ. App. 280.

Where the superintendent specifically ordered certain work to be done, master was liable though the immediate cause of injury was the negligence of the one charged with its performance. *Augusta v. Owens*, 111 Ga. 464.

Negligence of a gripman in prematurely starting a car did not prevent its recovery by conductor in falling against stones negligently piled by the track. *North Chicago St. R. Co. v. Dudgeon*, 83 Ill. App. 528.

Where the negligence of the master is the efficient cause, it matters not that that of a fellow servant also contributed. *Swift &c. Co. v. O'Neill*, 88 Ill. App. 162.

Chicago &c. R. Co. v. House, 172 Ill. 601; aff'g s. c., 71 Ill. App. 147; *Chicago &c. R. Co. v. Gillison*, 173 Ill. 264; aff'g s. c., 72 Ill. App. 207; *Swift v. Rutkowski*, 82 Ill. App. 108; *Illinois C. R. Co. v. Johnson*, 95 Ill. App. 54; *Maryland Clay Co. v. Goodnow*, (Md.) 51 Atl. Rep. 292; *Norris v. Illinois C. R. Co.*, 88 Ill. App. 614.

Negligence of a fellow servant in propping a piece of machinery did not prevent recovery where the peculiarity thereof needed special and unusual propping. *Goss Printing-Press Co. v. Lempke*, 90 Ill. App. 427.

Failure of a fellow servant to give warning could not be set up as negligence where defendant's foreman directed plaintiff to pass over the place in question. *Hayes v. Frederick Stearns & Co.*, (Mich.) 89 N. W. Rep. 947.

Where the enforcement of an unreasonable order caused plaintiff's injuries, the fact that a fellow servant, sent to warn other trains of the presence of gravel train on the main track, was negligent, will not defeat plaintiff's action. *R. Co. v. Henderson*, 37 Oh. St. 549.

See, also, *Quebec &c. Co. v. Merchant*, 133 U. S. 375; *Drommie v. Hogan*, 153 Mass. 29; *Kaiser v. Flaccus*, 138 Penn. St. 332.

Defendant was not chargeable on the ground of incompetency of a

IN ABSENCE OF KNOWLEDGE, SERVANT MAY RELY ON MASTER'S PERFORMANCE.
conductor where no act of his contributed to the injury, being solely the result of a car servant's negligence. *Central R. Co. v. Keegan*, 82 Fed. Rep. 174.

Contributory negligence of a fellow servant does not prevent recovery where that of the vice-principal was the proximate cause. *Felton v. Harbeson*, 104 Fed. Rep. 737.

Though the negligence of a fellow servant was the direct cause, master is liable if his negligence in any way contributed. *Pool v. Southern P. Co.*, 20 Utah, 210.

But where fellow servant's negligence was the proximate cause the fact that the coupling in question was defective was not sufficient to charge the master with liability. *Norfolk &c. R. Co. v. Brown*, 91 Va. 668.

VIII. Contributory Negligence.

Servant cannot recover where his own negligence contributes to his injury. *Alabama &c. R. Co. v. Rouch*, 110 Ala. 266; *Murphy v. Hughes*, 1. Penn. (Del.) 250; *Chicago & A. R. Co. v. Stevens*, 80 Ill. App. 671; *Baltimore &c R. Co. v. Ames*, 20 Ind. App. 378; *Morewood Co. v. Smith*, 25 Ind. App. 264; *Missouri &c. R. Co. v. Young*, 4 Kan. App. 219; *Louisville &c. R. Co. v. Fox*, (Ky.) 42 S. W. Rep. 922; *McCarthy v. Whitney Iron-Works Co.*, 48 La. Ann. 978; *Cunningham v. Bath Iron Works*, 92 Me. 501; *Murphy v. City Coal Co.*, 172 Mass. 324; *Mulligan v. Montana U. R. Co.*, 19 Mont. 135.

Provided it is the proximate cause thereof. *Southern R. Co. v. Mauzy*, 98 Va. 692.

(a). IN ABSENCE OF ACTUAL KNOWLEDGE TO CONTRARY, SERVANT MAY RELY ON MASTER'S PERFORMANCE OF HIS DUTY.

Servant may assume that there will be no unnecessary danger. *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447.

The same degree of care is not due from a servant to protect himself as is due from his master to protect him. *Chicago &c. R. Co. v. Blinkopski*, 72 Ill. App. 22.

Servant may assume that he will not be exposed to risk not necessarily connected with his employment. *Graver Tank Works v. O'Donnell*, 91 Ill. App. 524.

Pool v. Southern Pac. Co., 20 Utah, 210; *Herdler v. Buck's Stove & R. Co.*, 136 Mo. 3.

An employé is only bound to the use of ordinary care in discovering

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the risks of the business; he is not absolutely bound to ascertain them. *Holman v. Kempe*, 70 Minn. 422.

Servant may assume that master has used reasonable care. *Carroll v. Tidewater Oil Co.*, 67 N. J. L. 679.

Texas &c. R. Co. v. Echols, 17 Tex. Civ. App. 677; Galveston &c. R. Co. v. Pitts (Tex. Civ. App.) 42 S. W. Rep. 255; Grace & Hyde Co. v. Kennedy, 99 Fed. Rep. 679; Hill v. Southern P. Co., 23 Utah, 94.

Servant is not bound to look for defects in the absence of facts reasonably calling for inquiry. *Strabler v. Toledo Bridge Co.*, 11 Oh. C. D. 87.

Servant does not assume the risks arising from master's own neglect unless he necessarily acquires knowledge thereof in the ordinary performance of his duties. He is not bound to use ordinary care even to ascertain them. *Missouri &c. R. Co. v. Hannig*, 91 Tex. 347.

Missouri &c. R. Co. v. Baker, (Tex. Civ. App.) 58 S. W. Rep. 964.

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Former failure of brakes to work did not prevent engineer's relying on the sufficiency of the engine, where they subsequently work all right. *Pierson v. New York &c. R. Co.*, 53 App. Div. 363.

Risk of horse being vicious is not assumed, in the absence of notice thereof. *Lawlor v. French*, 14 Misc. 497.

Wilson v. Sioux Consol. Min. Co., 16 Utah, 392; Konold v. Rio Grande &c. R. Co., 21 id. 379.

Employé may assume that a foreign car is reasonably safe to handle. *Denver &c. R. Co. v. Smock*, 23 Colo. 456.

That appliances are safe and suitable. *Whitney &c. R. Co. v. O'Rourke*, 172 Ill. 177; aff'g s. c., 68 Ill. App. 487.

See, also, Chicago &c. R. Co. v. Gillison, 173 Ill. 264; aff'g s. c., 72 Ill. App. 207; Ohio Valley R. Co. v. McKinley, (Ky.) 33 S. W. Rep. 186; Frye v. Bath Gas & Electric Co., 94 Me. 17; Chapman v. Southern Pac. Co., 12 Utah, 30.

He need not look for defects in the absence of a reasonable suspicion thereof. *Pioneer Cooperage Co. v. Romanowics*, 85 Ill. App. 407.

Morton v. Zwierzykowski, 91 Ill. App. 462; Leonard v. Kinnare, 174 Ill. 532; aff'g s. c., 75 Ill. App. 145; Bradshaw v. Chicago &c. R. Co., 58 Kan. 618; Champion Ice &c. Co. v. Carter, (Ky.) 51 S. W. Rep. 16; Lake Shore &c. R. Co. v. Corcoran, 3 Oh. Dec. 641; Jones v. Shaw, 16 Tex. Civ. App. 290; Terrell Compress Co. v. Arrington, (Tex. Civ. App.) 48 S. W. Rep. 59, especially to make a critical examination. *Alabaster Co. v. Lonergan*, 9 Ill. App. 353.

Safety of a crane may be assumed in the absence of notice. *Ashley Wire Co. v. Mercier*, 61 Ill. App. 485.

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So an employé need not anticipate the fall of a derrick. *Ashley Wire Co. v. McFadden*, 66 Ill. App. 26.

He need not test the fitness of a scaffold. *Chicago & A. R. Co. v. Maroney*, 67 Ill. App. 618.

Brakeman, in the absence of notice, may assume that coupling link is free from defects. *Louisville &c. R. Co. v. Howell*, 147 Ind. 266.

Where no defects are apparent to one exercising reasonable care, he may assume that the appliance furnished is free therefrom. *Indiana &c. Gas Co. v. Marshall*, 22 Ind. App. 121.

Edward Hines Lumber Co. v. Ligas, 172 Ill. 315; aff'g s. c., 68 Ill. App. 523; *Union Stock-Yards Co. v. Goodwin*, 57 Neb. 138.

So an engineer may assume that a conductor and trainmen had pursued the proper method of repairing a leaky air pipe. *Merritt v. Great Northern R. Co.*, 81 Minn. 496.

Station agent may assume brakes of cars are safe. *Chicago &c. R. Co. v. Kellogg*, 54 Neb. 127.

Conductor may assume that car steps are safe. *Cameron v. Great Northern R. Co.*, 8 N. D. 124.

That the servant had better facilities for discovering a defect, did not change the rule where he had no orders to, and no time to do it. *Spronk v. Addyston Pipe &c. Co.*, 19 Oh. C. C. 714.

Engineer may assume that a locomotive is reasonably free from defects in construction. *Galveston &c. R. Co. v. Smith*, (Tex. Civ. App.) 57 S. W. Rep. 999.

Where a boy was taken from his employment into the midst of dangerous machinery to adjust a belt, he had the right to rely on the orders of his superior and was not responsible for the perils, and his father recovered for injuries received. *Railroad Co. v. Fort*, 84 U. S. (17 Wall.) 553.

Though defects might have been discovered by ordinarily careful inspection an employé may nevertheless assume that appliances are safe. *Texas &c. R. Co. v. Archibald*, 170 U. S. 665.

He may assume that skids for unloading rails, are safe. *Great Northern R. Co. v. McLaughlin*, 70 Fed. Rep. 669.

Servant was warranted in relying on the sufficiency of the rope furnished, where it appeared to be safe. *The Ethelred*, 96 Fed. Rep. 446.

2. AS TO SAFE PLACE TO WORK.

The mere fact that the engineer knew that the track was somewhat out of repairs does not constitute negligence, but if he knew that it was dangerous to ride on, he was negligent. An engineer does not have the

same opportunity as the company has to know that it is out of repair. *Mehan v. S. B. & N. Y. R. Co.*, 73 N. Y. 585, aff'g judg't for pl'ff.

An engineer was running his locomotive without a train, under express orders, when, by a derailment caused by a defective track, he was injured. He knew that the track was out of repair, and that he incurred some danger, but he did not know that it was badly out of repair. Several trains daily passed over it without accident. Assurances had been given that it would be put in repair. For the jury. *Hawley v. Northern Central R. Co.*, 82 N. Y. 370, aff'g 17 Hun, 115, and judg't for pl'ff.

That plaintiff was employed to remove loose rock from a hill side does not prevent recovery for neglect to use reasonable care to make the place safe and prevent injury. *Perry v. Rogers*, 91 Hun, 243.

Trimmer of electric light lamps was justified in assuming that the wires on those he is set to work are dead. *Harroun v. Brush & Co. L. Co.*, 12 App. Div. 126; s. c., 152 N. Y. 212.

See, also, *Pierson v. New York & C. R. Co.*, 53 App. Div. 363; *Jarvis v. Northern & C. Co.*, 55 id. 272.

Employé was justified in assuming the safety of platform, where defects were concealed. *Cunningham v. Sicilian & C. P. Co.*, 49 App. Div. 380.

Plumber was justified in assuming that the place is free from dangerous chemicals. *Dunn v. Connell*, 20 Misc. 727; s. c. aff'd, 21 id. 295.

Servant must know of the danger to impose upon him the risk. *Higgins v. Williams*, 114 Cal. 176.

Servant's duty to avoid incidental dangers does not conflict with master's duty to provide a safe place to work. *Middle Georgia & C. R. Co. v. Barnett*, 104 Ga. 582.

Brakeman may assume that the track is reasonably safe within the switching limits. *Illinois C. R. Co. v. Sanders*, 166 Ill. 270; aff'g s. c., 66 Ill. App. 439.

Atchison & C. R. Co. v. Swarts, 58 Kan. 235; *Wilkie v. Raleigh & C. R. Co.*, 127 N. C. 203; *Texas & C. R. Co. v. Magrill*, 15 Tex. Civ. App. 353; *Galveston & C. R. Co. v. Slinkard*, 17 id. 585; *Gulf & C. R. Co. v. Warner*, 22 id. 167; *International & C. R. Co. v. Johnson*, 23 id. 160; *San Antonio & C. R. Co. v. Brooking*, (Tex. Civ. App.) 51 S. W. Rep. 537; *Gulf & C. R. Co. v. Moore*, 68 id. 559.

The right of a towerman of a railroad to rely on the company's making its premises safe relieves him of the duty of inspection. *Lake Shore & C. R. Co. v. Conway*, 169 Ill. 505; aff'g s. c., 67 Ill. App. 155.

Servant may assume that the place is safe for the work he is set at. *Ross v. Shanley*, 185 Ill. 390; aff'g s. c., 86 Ill. App. 144.

Chicago & C. R. Co. v. Cullen, 187 Ill. 523; aff'g s. c., 87 Ill. App. 374; *Swift & C. Co. v. Wyatt*, 75 Ill. App. 348; *Kirk v. Senzig*, 79 id. 251; *O'Brien v. Sullivan*, 195 Pa. St. 474.

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Switchman may assume that a car he is directed to move is at least on the track. *Chicago &c. R. Co. v. Driscoll*, 70 Ill. App. 91.

Servant has a right to assume that master has complied with statutory requirements as to daily examination and reports of the condition of a mine. *Spring Valley Coal Co. v. Rowatt*, 96 Ill. App. 248; s. c. aff'd, 196 Ill. 156.

Right to presume safety exists, unless reasonable observation charges servant with duty to look. He need not look for latent defects. *Summit Coal Co. v. Shaw*, 16 Ind. App. 9.

That servant had a good opportunity to observe the condition of the place does not change the rule. *Ft. Wayne v. Patterson*, 25 Ind. App. 547.

Risk of rubbish being on the track was not assumed, where brakeman had known thereof but supposed it had been removed. *Pittsburg &c. R. Co. v. Elwood*, 25 Ind. App. 671.

So knowledge that stones fall along the way, where he also knows that they are cleared away from time to time. *Fish v. Illinois C. R. Co.*, 96 Iowa, 702.

Servant, in the night, ordered peremptorily to couple a car, could assume that it was properly loaded, as he did not have a fair opportunity to discover the defect. *Haugh v. Chicago &c. R. Co.*, 73 Iowa, 66.

Miner was not negligent in failing to investigate the condition of the roof of a mine. *Blazenic v. Iowa &c. Coal Co.*, 102 Iowa, 706.

Miner may assume that his master has complied with statutory requirement as to ventilating mines. *Mosgrove v. Zimbleman Coal Co.*, 110 Iowa, 169.

Elevator man not required to look out for projections into the shaft. *Olson v. Hanford Produce Co.*, 111 Iowa, 347.

Miner may assume safety of an entrance unless, while acting as an ordinarily prudent person he would have discovered it. *Ashland Coal &c. R. Co. v. Wallace*, 101 Ky. 626.

Employés on a "repair train" may assume that conductor will use proper caution in view of increased dangers. *Wilson v. Louisiana &c. R. Co.*, 51 La. Ann. 1133.

Laborer held entitled to rely on warning of danger in electrical construction. *Thompson v. New Orleans &c. R. Co.*, 108 La. 52.

Servant may rely on the general appearance of safety. *Frye v. Bath Gas & Electric Co.*, 94 Me. 17.

Hayes v. Frederick Stearns & Co., (Mich.) 89 N. W. Rep. 947; *Carlson v. Northwestern Teleph. &c.*, 63 Minn. 428.

Employés were not negligent in working near a derrick. *McMahon v. McHale*, 174 Mass. 320.

Brakeman may assume that there would be nothing projecting within dangerous proximity of the main track. *Phelps v. Chicago &c. R. Co.*, 122 Mich. 171.

See, also, *Texas &c. R. Co. v. Kenna*, (Tex. Civ. App.) 52 S. W. Rep. 555; *International &c. R. Co. v. Stephenson*, 22 Tex. Civ. App. 220.

Servant may assume that necessary hinges had been placed on a trap door. *Dieters v. St. Paul Gaslight Co.*, (Minn.) 91 N. W. Rep. 15.

Risk of defects were not assumed because tracks were known to be owned by another company, bound to keep them in repair. *Story v. Concord &c. R. Co.*, 70 N. H. 364.

Servant was not negligent in standing on the last planks of a scaffold without noticing whether the hangers were in place. *Cole v. Warren Man. Co.*, 63 N. J. L. 626.

See, also, *Richards v. Hayes*, 17 App. Div. 422; *Stewart v. Ferguson*, 34 id. 515; *McLean &c. Co. v. Simpson*, 97 Ill. App. 21; s. c., aff'd, 196 Ill. 258; *Ide v. Fratcher*, 96 Ill. App. 549; s. c., aff'd, 194 Ill. 552; *Smeizel v. Odanah Iron Co.*, 116 Mich. 149; *Sinclair Co. v. Waddell*, 99 Ill. App. 334; *Swenson v. Bender*, 114 Fed. Rep. 1.

He is not bound to verify his assumption. *Strabler v. Toledo Bridge Co.*, 11 Oh. C. D. 87.

Miners may assume that the duty of keeping a safe passage to the mine has been complied with. *Wellston Coal Co. v. Smith*, 65 Oh. St. 70.

See *Fulkner v. Mammoth Min. Co.*, 23 Utah, 437.

Brakeman may assume that the statutory duty to block frogs on a track has been performed. *Pittsburg &c. R. Co. v. Burroughs*, 6 Oh. N. P. 37.

Pittsburg &c. R. Co. v. Burroughs, 9 Oh. S. & C. P. Dec. 324; *Curtis v. Chicago &c. R. Co.*, 95 Wis. 460.

Motorman may assume that defendant's contractor had properly used its road and block system. *Ortlip v. Philadelphia &c. Traction Co.*, 9 Pa. Dist. 291.

Servant working between tracks, cautioned to look out for himself, cannot assume that his employer will look out for him. *Brady v. New York &c. R. Co.*, 20 R. I. 338.

Risk of negligent inspection is not assumed though known to be customary. *Missouri &c. R. Co. v. Chambers*, 17 Tex. Civ. App. 487.

Employé may assume that railroad fence is kept in repair. *Houston &c. R. Co. v. Quill*, (Tex. Civ. App.) 55 S. W. Rep. 1126; s. c. aff'd, 57 id. 948.

Though a brakeman knew that a step was secured with only one nut, he had a right to assume that that was the proper method of securing it. *Missouri &c. R. Co. v. Beiley*, (Tex. Civ. App.) 68 S. W. Rep. 803.

Driver did not assume duty of inspection for defects in roadbed simply

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because the road was mountainous. *Union P. R. Co. v. O'Brien*, 161 U. S. 451.

Miner may assume that a timbered room is properly timbered. *Western Coal & M. Co. v. Ingraham*, 70 Fed. Rep. 219.

Louisville & C. R. Co. v. Cornelius, 14 Ind. App. 399.

Reasonable safety of machinery may be presumed in the absence of dangers so patent as to make it imprudent to work without protest. *Mason & C. R. Co. v. Yockey*, 103 Fed. Rep. 265.

3. AS TO RULES AND REGULATIONS.

Assumption allowed where servant had no duty to perform in regard to inspection. *Jarvis v. Northern & C. Co.*, 55 App. Div. 272.

Engineer was justified in assuming that the rules of the company for his protection would be complied with. *Chicago & C. R. Co. v. Eaton*, 194 Ill. 441; aff'd s. c., 96 Ill. App. 570.

See, also, *Gray v. Commutator Co.*, 85 Minn. 463; *Connolly v. St. Joseph & C. Co.*, 166 Mo. 447.

Conductor was not negligent in failing to stop at a station, in the absence of orders to do so, where there were no signals to warn him of trains ahead. *Houston & C. R. Co. v. Higgins*, 22 Tex. Civ. App. 430.

Conductor was not negligent in extending his cars on the main track, there being insufficient space on the siding, where he had followed the company's rules as to giving notice to other trains. *Carl v. Pierce*, 20 Oh. C. C. 68.

Railroad hand may assume that proper rules have been promulgated. *Texas & C. R. Co. v. Eberhart*, 91 Tex. 321.

4. AS TO WARNING AND INSTRUCTIONS.

The plaintiff was the engineer of locomotive No. 9 of the defendant's railroad, and while running a regular train from Aspinwall to Panama, he received the following instructions from the train dispatcher: "No 9 will leave Aspinwall and run to Bohio ahead of time. Nos. 9 and 10, ahead of time, will meet at Bohio."

Bohio was a station on the defendant's road about fifteen miles from Aspinwall, and San Pablo was a station beyond Bohio. After the train drawn by engine No. 9 had passed San Pablo it collided with the train drawn by engine No. 30, which was coming from Panama to Aspinwall.

The engineer and conductor of the train drawn by engine No. 30 had received instructions from the train dispatcher as follows: "Eng. 30 will run special Panama to Aspinwall. Will not pass Bohio until No. 9, ahead of time, has arrived there."

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The plaintiff received no notice of the running of the train drawn by engine No. 30, and he had a right to assume that the track would be clear after he left Bohio.

The engineer and conductor of the train drawn by No. 30 had the right to assume that they would not meet engine No. 9 until they reached Bohio. Verdict for pl'ff sustained. *McChesney v. Panama R. Co.*, 74 Hun, 150; s. c. aff'd, 148 N. Y. 729.

Where servant knows he is seen he may rely on the machine not being started while he is exposed to peril. *Rhoades v. Varney*, 91 Me. 222.

Quarryman may assume that warning of a blast will be given. *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323; s. c. aff'd, 61 N. J. L. 253; s. c., 39 L. R. A. 834.

Defendant was not held liable for not providing a rule requiring a whistle before a train stops or starts, where plaintiff knew the rules regarding signals governing the movements of trains. *Crawford v. New York &c. R. Co.*, 23 Oh. C. C. 207.

5. AS TO SELECTION OF SERVANTS.

Employé may assume that co-employés are competent. *Charles Pope Glucose Co. v. Byrne*, 60 Ill. App. 17.

Jenson v. Great Northern R. Co., 72 Minn. 175; *Texas &c. R. Co. v. Johnson*, 89 Tex. 519; *International &c. R. Co. v. Cook*, 16 Tex. Civ. App. 386; *Lantry Sons v. Lowrie*, (Tex. Civ. App.) 58 S. W. Rep. 837; *Olsen v. North Pacific Lumber Co.*, 100 Fed. Rep. 384.

Though he has equal means with the master of acquiring knowledge. *Galveston &c. R. Co. v. Sherwood*, (Tex. Civ. App.) 67 S. W. Rep. 776.

And mere suspicion of incompetency does not deny him this right. *Bell v. Globe Lumber Co.*, 107 La. 725.

(b). BUT, WHEN DANGER READILY DISCOVERABLE WHILE IN EXERCISE OF ORDINARY CARE IN EMPLOYMENT, SERVANT CANNOT RECOVER.

Plaintiff, an employé of the defendants, was going along the passage-way in the performance of his work, when the trap-door was suddenly raised from below by a workman in the planing room, plaintiff fell through the opening and was injured. Plaintiff had been in defendant's employ for about twenty-two months and was fully informed as to the location and use of the trap-door and the manner of its construction. Defendants had given instructions that the trap-door should not be opened from below, and the employé who opened it had been so instructed by the foreman. Held, that the action was not maintainable, as the injury was caused by the negligence of a co-employé; that the location of the trap-door in the passage-way was not *per se* a wrongful act, that

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defendants had a right to place it there and were not bound to change the arrangement to secure greater safety to their employes; and that plaintiff took the risk of the obvious dangers connected with his employment. *Anthony v. Leeret*, 105 N. Y. 591, rev'g judg't for pl'ff.

Tendrup v. John Stevenson Co., 51 Hun, 462; also *Bevier v. Kraft*, 31 Ohio St. 287.

Brakeman had the opportunity of discovering the danger but failed to avail himself of it. Risk was assumed. *Renninger v. New York &c. R. Co.*, 11 App. Div. 565.

Risk from a defect was not assumed where it could not be known from where plaintiff was stationed. *Spaulding v. O'Brien*, 26 Misc. 184.

Indiana &c. Coal Co. v. Buffey, 28 Ind. App. 108.

It was for jury to say whether stevedore assumed the risks of loading lumber in open boxes where he may not have known of the danger. *Hennessey v. Bingham*, 125 Cal. 627.

Servant does not assume risks which are of a peculiar nature and not obvious to the senses. *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550; aff'g s. c., 70 Ill. App. 55.

Servant having constant use of an appliance is chargeable with risk from a defect which should reasonably come to his attention. *Illinois C. R. Co. v. Pummill*, 58 Ill. App. 83.

Chicago &c. R. Co. v. Merriman, 86 Ill. App. 454.

Where duty of inspection is cast on the servant, he cannot recover for damages from failure to perform it. *Chicago &c. R. Co. v. Merriman*, 95 Ill. App. 628.

Pennsylvania Co. v. Ebaugh, 152 Ind. 531; *Stuart v. New Albany Man. Co.*, 15 Ind. App. 184; *Pennsylvania Co. v. Witte*, id. 583; *Baltimore &c. R. Co. v. Amos*, 20 id. 378; *Bryce v. Chicago &c. R. Co.*, 103 Iowa, 665; *Chicago &c. R. Co. v. Garner*, 78 Ill. App. 281; *Southern Ind. R. Co. v. Moore* (Ind. App.) 63 N. E. Rep. 863; *Anderson v. C. N. Nelson Lumber Co.*, 67 Minn. 79; *Doyle v. Missouri &c. R. Co.*, 140 Mo. 1; *Western &c. Teleg. Co. v. McMullen*, 58 N. J. L. 155; *Comben v. Belleville Stone Co.*, 59 id. 226; *Regan v. Palo*, 62 id. 30; *Atha &c. I. Co. v. Costello*, 63 id. 27; *Dillenger v. Weingartner*, 64 id. 292; *Fricker v. Penn Bridge Co.*, 197 Pa. St. 442; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236; *De La Vergne &c. Mach. Co. v. Stahl*, (Tex. Civ. App.) 60 S. W. Rep. 319; *Texas &c. R. Co. v. Rhodes*, 71 Fed. Rep. 145; *The Saratoga*, 87 Fed. Rep. 349; *Klatt v. Foster Lumber Co.*, 92 Wis. 622, 628.

Ordinary care of servant does not require him to look for concealed dangers. *Streets' &c. Line v. Bonander*, 97 Ill. App. 601.

Haas v. Chicago &c. R. Co., 97 Ill. App. 624; *Wellston Coal Co. v. Smith*, 65 Oh. St. 70.

Servant is not bound to make a critical examination to discover dangers. *Rock Island Sash &c. Works v. Pohlman*, 99 Ill. App. 670.

Baltimore &c. R. Co. v. Clifford, 99 Ill. App. 381; Anderburg v. Chicago &c. R. Co., 98 Ill. App. 207; Baltimore &c. R. Co. v. Burris, Ill. Fed. Rep. 882.

Servant assumes the risk where defects are as obvious to him as to the master. *Guedelhofer v. Ernsting*, 23 Ind. App. 188.

Trainmen were not charged with knowledge of obstructions which were not always obvious, by reason of smoke, shadows, etc. *Pittsburg &c. R. Co. v. Parish*, 28 Ind. App. 189.

Risk involved in a new but temporary duty is assumed where employé may be reasonably supposed to know the dangers involved. *Hanson v. Hammel*, 107 Iowa, 171.

Brakeman is not required to exercise the highest "degree of care" for his own safety. Ordinary prudence is sufficient. *Louisville &c. R. Co. v. Schumaker*, (Ky.) 67 S. W. Rep. 829.

Servant is negligent in failing to use reasonable care to look and listen for cars. *Missouri &c. R. Co. v. Faber*, 7 Kan. App. 481.

Risk of unknown defects in a rope which servant was not himself using, are not assumed. *Thomas v. Ann Arbor R. Co.*, 114 Mich. 59.

If employer's unsafe and careless custom of doing business is open to observation so that it can be readily observed by the senses, and employé has ample and reasonable means of using his senses, he assumes the risk from such custom. *Hughes v. Winona &c. R. Co.*, 27 Minn. 137.

Where the dangers are so obvious as to deter a reasonably prudent man, servant is contributorily negligent. *Sours v. Great Northern R. Co.*, 84 Minn. 230.

East Chicago &c. R. Co. v. McGinnis, 49 Neb. 649; *Union Stockyards Co. v. Goodwin*, 57 Neb. 138; *Carlson v. Sioux Falls Water Co.*, 8 S. D. 47.

Servant assumes risks of dangers open to observation, which required no special skill to foresee, although at the time he was performing duties he did not contract to render. *Cummings v. Collins*, 61 Mo. 523.

Winship Mach. Co. v. Burger, 110 Ga. 296; *Howe v. Medaris*, 82 Ill. App. 515; *East Chicago Iron & S. Co. v. Williams*, 17 Ind. App. 573; *Beard v. American Car Co.*, 72 Mo. App. 583; *Missouri &c. R. Co. v. Gordon*, 11 Tex. Civ. App. 672.

Plaintiff was not negligent in failing to inspect the work of a co-employé. *Adams v. McCormick Harvesting Mach. Co.*, (Mo. App.) 68 S. W. Rep. 1053.

It is the failure of a fellow servant to exercise reasonable care, not his knowledge of a specific danger, that absolves the master from liability to a co-employé for injuries caused thereby. *Levene v. Standard Oil Co.*, 64 N. J. L. 63.

Risk of defect in appliances is not assumed unless grossly defective. *Sims v. Lindsay*, 122 N. C. 678.

See, also, *Silveira v. Iversen*, 128 Cal. 187; *Chicago &c. R. Co. v. Price*, 97 Fed. Rep. 423; *Kansas City &c. R. Co. v. Spellman*, 102 Fed. Rep. 251.

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Ordinary care to notice defects does not call for the same degree of inspection from servant as from master under duty to provide safe appliances. *Schall v. Heck*, 8 Oh. C. D. 596.

Smith v. Tromanhauser, 63 Minn. 98.

But the risk is not assumed where the servants' means of acquiring knowledge is not unequal to that of the master. *Sackewitz v. American &c. Man. Co.*, 78 Mo. App. 144.

General reputation of a servant for recklessness not sufficient to charge fellow servant with knowledge. *Texas &c. R. Co. v. Johnson*, 90 Tex. 304.

Negligence of servant at crossing held no defense where ordinary care in keeping a lookout would have avoided the accident. *Galveston &c. R. Co. v. Collins*, (Tex. Civ. App.) 57 S. W. Rep. 884.

"While in many circumstances, a servant may, by giving notice of defects in machinery or in the course of business, relieve himself from the risks which he ordinarily assumes, yet this relates more particularly to the question of the negligence of the employer, and the question of the contributory negligence of the servant, nevertheless, always remains to some extent." "He is always bound to use reasonable care under all the circumstances known to him." *McPeck v. Central Vt. R. Co.*, 79 Fed. Rep. 590.

Where the defect in the machinery was plainly visible the employé was not allowed to set up that he did not fully realize the danger. *Detroit Crude-Oil Co. v. Grable*, 94 Fed. Rep. 73.

Servant is not chargeable unless the other servant's incompetency should come to his notice while in the performance of his duties. *Daly v. Sang*, 91 Wis. 336.

Risk of uniformly defective construction may be assumed. *Paine v. Eastern R. Co.*, 91 Wis. 340.

No recovery where the defect was as obvious to employé as to the employer. *Holt v. Chicago &c. R. Co.*, 94 Wis. 596.

Stewart v. Seaboard Air Line R., 115 Ga. 624; *Baltimore &c. R. Co. v. Welsh*, 17 Ind. App. 505; *Erskine v. Chino &c. Sugar Co.*, 71 Fed. Rep. 270; *Russell Creek Coal Co. v. Wells*, 96 Va. 416.

A servant is chargeable with actual notice of every fact which he would have known had he exercised ordinary care to keep himself informed as to matters concerning which it was his duty to inquire. *Shearman & Redfield on Neg.* vol. 1, (4th ed.) 375.

Lumley v. Caswell, 47 Iowa, 159; *Cooper v. Butler*, 103 Penn. 412; *Loonan v. Brockway*, 3 Robertson 74; 28 How. 472; *Malone v. Hawley*, 46 Cal. 409.

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Railroads:

Locomotives and Cars.—Where the absence of safeguards, such as chains across the openings between the cab and the tender, is visible to the plaintiff he must be held to assume the risk attending the use of the engine without them. *Fancher v. N. Y., L. E. & W. R. Co.*, 75 Hun, 350.

When it was apparent that draw bars were not on same level, brakeman took the risk. *Brewer v. Flint R. Co.*, 56 Mich, 620.

Distinguishing *Fort Wayne R. Co. v. Gildersleeve*, 33 Mich. 133, and citing *Smith v. Potter*, 46 Mich. 258; *Michigan Central R. Co. v. Smithson*, 45 id. 212; *Botsford v. R. Co.*, 33 id. 256; *Davis v. Railroad Co.*, 20 id. 105; *Michigan Central R. Co. v. Austin*, 40 id. 247; *Day v. Toledo &c. R. Co.*, 42 id. 524; *Hathaway v. Railroad Co.*, 51 id. 253; *Cleary v. Long Island R. Co.*, 54 App. Div. 284.

An obvious defect in the engine which should have been discovered before starting. *Fordyce v. Edwards*, 65 Ark. 98.

Conductor assumed the risk of the absence of a fender from a trail car. *Denver Tramway Co. v. Nesbit*, 22 Colo. 408.

Draw bar on switch engine was too short and notoriously dangerous, and injured a switchman who had not been long in the service, and he recovered. *Toledo &c. R. Co. v. Fredericks*, 71 Ill. 294.

Section foreman was not negligent in failing to see door of a freight car hanging only by its top corner and swinging outward as it passed. *Chicago &c. R. Co. v. Cullen*, 187 Ill. 523; aff'g s. c., 87 Ill. App. 374.

Brakeman may be held to assume the risk of the absence of draw-bars from freight cars, where he has an opportunity to know of it. *Illinois C. R. Co. v. Orr*, 59 Ill. App. 260.

Brakeman assumed the risk of projecting aprons over the couplings on cars which his attention had been called to. *Chicago &c. R. Co. v. Wagner*, 17 Ind. App. 22.

Freight conductor was not negligent *per se* in failing to notice that a bolt holding a ladder round had become defective. *Illinois C. R. Co. v. Hilliard*, 99 Ky. 684.

Fact that brakeman knew or ought to have known of the inequality of draw bars, will not *per se* preclude his recovery. *Lawless v. R. Co.*, 136 Mass. 1.

Citing *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Gaynor v. Old Colony R. Co.*, 100 Mass. 208; *Chaffee v. Boston &c. R. Co.*, 104 Mass. 108.

Trainman assumed risk from wide cars on a side track. *Content v. New York &c. R. Co.*, 165 Mass. 267.

Vining v. New York &c. R. Co., 167 Mass. 539.

Six months as a locomotive fireman besides prior experience with a

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stationary engine held sufficient to charge one with notice of the effect that steam might have upon the glass tube of an oiler. *Fuller v. New York &c. R. Co.*, 175 Mass. 424.

If engineer had equal means of knowledge with the company of a defect, and failed to protest against it, he ought not to recover for injury therefrom. Flat car by some means ran on main track from siding, with the track in good condition and no evidence of want of ordinary care shown. It was not company's duty to use stop blocks, and it was error to leave it to the jury whether such car was liable to get on main line by some peculiar construction or condition of the side track. Company was not obliged to provide a flat car on siding with brakes. Company was not bound to change its manner of using its side tracks as regards a servant who knows or has ample means of knowing. Negligence in a servant may consist in failing to know as well as in failing to do. *Hewitt v. Flint R. Co.*, 67 Mich. 61.

Engineer assumed risk of an obvious defect which it was his duty to report. *Peppett v. Michigan C. R. Co.*, 119 Mich. 640.

Servant must use care commensurate with the risks. Such defects as are obvious to the senses, or as with reasonable diligence ought to be discovered, are assumed.

Handle of hand car, too weak, broke and threw operative, a laborer, on the track, whereby the car ran over him; he denied knowledge of inadequacy of handle. For jury. *Anderson v. Minnesota &c. R. Co.*, 39 Minn. 523.

Switchman or brakeman held not *per se* negligent in grasping a bent brake staff so turned from him as to appear to be straight. *Prosser v. Montana C. R. Co.*, 17 Mont. 372.

A road engine without step rail or flag post used instead of a shift engine with them, held an obvious defect. *Young v. Boston &c. R. Co.*, 69 N. H. 356.

Brakeman cannot complain where he has the same opportunity of discovering defects in loaded cars as any other servant. *Toledo &c. R. Co. v. Beard*, 20 Oh. C. C. 681.

Defect discoverable in attempt to use it; brakeman had but two or three minutes to consider whether to use it. For jury whether he used brake with knowledge of the defect. *Phila. &c. R. Co. v. Huber*, 128 Pa. St. 63.

Fireman is not negligent in continuing on the engine where the defects are inside the boiler. *Tyler &c. R. Co. v. Raspberry*, 13 Tex. Civ. App. 185.

Brakeman was not negligent where the defect overlooked was in a

catch to a brake. *International &c. R. Co. v. Emery*, 14 Tex. Civ. App. 551.

Engineer was not bound to ascertain the sufficiency of a locomotive step by unscrewing a nut thereon which was apparently firm. *San Antonio &c. R. Co. v. Lindsay*, (Tex. Civ. App.) 65 S. W. Rep. 668.

Brakeman charged with risk of obvious defect in a coupling link and drawhead which should have been seen. *Texas M. R. Co. v. King*, 14 Tex. Civ. App. 290.

That a coupling pin does not at first go down is not necessarily notice that it is too large. *Missouri &c. R. Co. v. Hauer*, (Tex. Civ. App.) 43 S. W. Rep. 1078.

That an inspector would have had no difficulty in discovering the defect does not necessarily show that a brakeman should have discovered it at night. *Missouri &c. R. Co. v. Chambers*, 17 Tex. Civ. App. 487.

Trainman had a right to rely on the appearance of a platform where the defect had been painted over. *Galveston &c. R. Co. v. Adams*, (Tex. Civ. App.) 55 S. W. Rep. 803; s. c. aff'd, 58 id. 831.

Error to instruct that servant was chargeable with what he "could" have seen by exercise of ordinary care, as implying an obligation to inspect. The word "would" should have been used. Servant slipped on greasy engine step while cleaning light. *Bookrum v. Galveston &c. R. Co.*, (Tex. Civ. App.) 57 S. W. Rep. 919.

Engineer is not chargeable with defects in an engine which are only obvious to one experienced in its construction. *Galveston &c. R. Co. v. Smith*, (Tex. Civ. App.) 57 S. W. Rep. 999.

A brakeman was charged with knowledge of defectiveness of coupling apparatus, where the road is a short one with few cars and only two kinds. *Rio Grande &c. R. Co. v. Lynch*, (Tex. Civ. App.) 66 S. W. Rep. 712.

Switchman was not charged with knowledge of custom not to inspect certain cars. *Texas &c. R. Co. v. Archibald*, 75 Fed. Rep. 802.

Steel splinter projecting one-half inch beyond the tire of an engine wheel along six inches of its circumference, held an obvious defect. *McCain v. Chicago &c. R. Co.*, 76 Fed. Rep. 125.

Foreman in switchyard was not negligent *per se* in failing to examine a brake, where it was night and the cars had been just inspected. *New Orleans &c. R. Co. v. Clements*, 100 Fed. Rep. 415.

Brakeman was not charged with defects which were visible only by inspection which he did not have time to make. *Chesapeake &c. R. Co. v. Lash*, (Va.) 24 S. E. Rep. 385.

Roadbed.—A switchman had for ten years known of a trench into

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which he fell in the night while coupling cars. As his duty took all his attention, his knowledge did not necessarily preclude his recovery. *Plank v. N. Y. C. R. Co.*, 60 N. Y. 607. See 116 N. Y. 634; 138 id. 302.

Brakeman was not as matter of law charged with knowledge of a cattle guard within switching limits. *Illinois C. R. Co. v. Sanders*, 166 Ill. 270; aff'g s. c., 66 Ill. App. 439.

Street car conductor was not charged with knowledge of the existence of a pile of stones piled near the track at an unusual place for changing cars. *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 477; aff'g s. c., 83 Ill. App. 528.

Engineer not charged with risk from defendant's omissions to fence. *Terre Haute &c. R. Co. v. Williams*, 69 Ill. App. 392.

A section hand must use ordinary care to look where he is stepping on ground he is unfamiliar with. *Terry v. Louisville &c. R. Co.*, 15 Ind. App. 353.

Brakeman was not charged with knowledge that semaphore wires were not boxed. *Flutter v. New York &c. R. Co.*, 27 Ind. App. 511.

Where switchman, just employed, while coupling cars, stepped into a ditch of which he had no knowledge, contributory negligence was for the jury. *Brown v. Atchison &c. R. Co.*, 31 Kas. 1.

Switchman was not charged with knowledge of a slight incline between a track and a walk beside it. *Rouse v. Ledbetter*, 56 Kan. 348.

Switchman was not charged with knowledge of insufficient ballasting. *Louisville &c. R. Co. v. Ross*, (Ky.) 56 S. W. Rep. 14.

A brakeman in freight yard stepped in hole while attending to his duty, with his attention distracted by his work, and was not *per se* precluded from recovery. The hole had been there a week, but the brakeman had not noticed it. Although yard master had told plaintiff not to go between the rails in uncoupling cars, there was no evidence that he had authority over the plaintiff, nor was there any rule forbidding the coupling in that manner, hence, the direction of the yard master did not prevent recovery. *Hannah v. Conn. R. Co.*, 154 Mass. 529.

See *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Plank v. N. Y. R. Co.*, 60 N. Y. 607.

Brakeman was charged with knowledge of the proximity of a cattle guard by which he had walked several times on the day of the accident. *Fuller v. Lake Shore &c. R.*, 108 Mich. 690.

Switchman assumed risk, where the tracks in a yard were obviously slippery. *Fay v. Chicago &c. R. Co.*, 72 Minn. 192.

Handcar jumped track, experienced employé was presumed to know the risk. *Gulf &c. R. Co. v. Williams*, 72 Texas 159.

A general character of ballast at one point does not charge a brakeman with knowledge that specific stones are dangerously large at another point. *Galveston &c. R. Co. v. Pitts*, (Tex. Civ. App.) 42 S. W. Rep. 255.

Actual knowledge of low joints is not imputed because brakeman knew that the ground was wet and soft, and that they were liable to occur. *Texas &c. R. Co. v. McCoy*, 17 Tex. Civ. App. 494.

Knowledge that rocks fall on the track and can cause derailment if not removed did not make a yard master negligent in riding from place to place on switch engines in the discharge of his duty. *Galveston &c. R. Co. v. Bohan*, (Tex. Civ. App.) 47 S. W. Rep. 1050.

Frequent experience with stock on the track charged engineer with notice of probability of their being there. *Houston &c. R. Co. v. Quill*, (Tex. Civ. App.) 55 S. W. Rep. 1126; s. c. aff'd, 57 id. 948.

Engineer was not charged with notice of the danger from a concealed gully on a hillside. *Union P. R. Co. v. O'Brien*, 161 U. S. 451.

Yard hand was not, as matter of law, charged with knowledge of a defect in the road bed of two months' standing in a switch yard containing 22 tracks. *Valley R. Co. v. Keegan*, 87 Fed. Rep. 849.

Where railroad yards were interlaced with drains, nine months employment charged plaintiff with knowledge of the one in question. *Lindsay v. New York &c. R. Co.*, 112 Fed. Rep. 384.

Risk was deemed obvious, where a brakeman had passed over the place over 350 times, 36 of which were over the defective siding in question. *Skinner v. Central Vermont R. Co.*, 73 Vt. 336.

Switch foreman was not negligent in stumbling on a mound of ashes covered with snow on a dark day while making a coupling. *Kennedy v. Lake Superior &c. R. Co.*, 93 Wis. 32.

Risk of falling into a deep ditch between the tracks was not assumed. *Hennessey v. Chicago &c. R. Co.*, 99 Wis. 109.

Switches and guard rails.—Brakeman was not charged with knowledge of specific defect because he had passed through the yard twice a day for three weeks. *Illinois C. R. Co. v. Sanders*, 166 Ill. 270; aff'd s. c., 66 Ill. App. 439.

Employé failed to discover a defective frog in a switch yard, whose surroundings he was familiar with. Contributory negligence was a question for the jury. *Walker v. Atlanta &c. R. Co.*, 103 Ga. 820.

Brakeman familiar with the existence of an unblocked guard rail assumed the risk. *Wabash R. Co. v. Ray*, 152 Ind. 392.

Where unblocked frog is obvious, servant will be presumed to know;

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so, if by the exercise of ordinary diligence he should know. *Mayes v. Chicago &c. R. Co.*, 63 Iowa, 562.

Citing *Wells v. B. &c. R. Co.*, 56 Iowa, 520; *Perigo v. C. R. &c. R. Co.*, 52 id. 276.

One was chargeable with knowledge of defects in a switch where he has been at work thereabouts hundreds of times a year for several years. *Quinn v. Chicago &c. R. Co.*, 107 Iowa, 710.

Engineer was negligent in asking another to look for a switch instead of doing so himself. *Jensen v. Omaha &c. R. Co.*, 115 Iowa, 404.

Where the road has just been constructed, brakeman cannot assume that a statutory requirement as to blocking frogs, has been complied with. *Gillin v. Patten &c. R. Co.*, 93 Me. 80.

Frogs had been blocked, but some blocks were removed or worn out. Frogs should be protected. Whether this put the risk on the servant was for the jury. *Sherman v. R. Co.*, 34 Minn. 259.

Risk of injury from an unprotected guard rail was assumed where such danger was a frequent one. *Burnham v. Concord &c. R. Co.*, 68 N. H. 567.

Risk of master's failure to comply with a statute as to blocking a switch was assumed, where the defect was obvious. *Johns v. Cleveland &c. R. Co.*, 7 Oh. N. P. 592.

Missouri &c. R. Co. v. Thompson, 11 Tex. Civ. App. 658.

Where the defects on a switch were in a side track, which plaintiff had occasion to use only once or twice a month, he was not chargeable with knowledge thereof. *San Antonio &c. R. Co. v. Waller*, (Tex. Civ. App.) 65 S. W. Rep. 210.

Where servant had been employed long enough to know that no switches have been blocked he assumed the risk. *Narramore v. Cleveland &c. R. Co.*, 96 Fed. Rep. 298.

An extra switch hand shifted from yard to yard was not charged with knowledge of a defect in a particular switch in the night time though it was obvious in daylight; especially where men were constantly employed in repairing. *Hunt v. Kane*, 100 Fed. Rep. 256.

Obstructions near track.—Fireman failed to notice that a mail crane came within seven inches of the train. His negligence was for the jury. *Brown v. New York &c. R. Co.*, 42 App. Div. 548.

See, also, *Baker v. New York &c. R. Co.*, 28 App. Div. 316.

Switchman stood on the running board of a switch engine with his foot protruding so as to hit an obstruction, dangerously near the track, it being while he was engaged in the ordinary performance of his duties.

The question of contributory negligence was for the jury. *Louisville &c. R. Co. v. Bouldin*, 121 Ala. 197.

Brakeman in the service 28 days was not chargeable with the risk of the dangerous proximity of a coal shed to the track. *Chicago &c. R. Co. v. Stevens*, 189 Ill. 226.

Telegraph pole was for three years within eighteen inches of passing freight cars, so that brakeman in descending from car was hit by it and injured. Company was culpably negligent.

Although the brakeman disobeyed instructions and unnecessarily got down that side of the car, he was not regarded as negligent, and it was said that there was no evidence that he knew of the pole, and that he was not chargeable with negligence in not looking, as he was occupied in getting down. The plaintiff had been in the employ of the company from June to November 2. *Chicago &c. R. Co. v. Russell*, 91 Ill. 299.

The servant may be precluded from recovery, through ignorance of a defect causing the injury, by the fact that he did not ascertain the danger; though he might have done so by the exercise of reasonable care *Chicago &c. R. Co. v. Clark*, 11 Ill. App. 104 (where the injury was caused by a platform built too near the defendant's track).

Failure of a brakeman to see a water plug in plain view and avoid it on descending from a passing car was negligence. *Pennsylvania Co. v. Finney*, 145 Ind. 551.

Where an employé continued in the service of a company for two years after a platform was built between the tracks in such a manner as to leave only a few inches between it and a passing car, and he knew or might have known with ordinary care of the defect, he assumes the risk. *Perigo v. Chicago &c. R. Co.*, 52 Iowa, 276.

Cattle chute too near the track. Brakeman getting down from car in night was hit by the chute. It was negligence on the part of the company. The question of plaintiff's contributory negligence in his manner of getting down from the car, whereby he was hit by the chute, is discussed, but the question of assumption of risk is ignored. *Allen v. B. &c. R. Co.*, 57 Iowa, 623.

Brakeman's allowing his coat to catch while uncoupling cars on a slightly projecting bridge truss was not as matter of law negligence. *Bryce v. Chicago &c. R. Co.*, 103 Iowa, 665.

Knowledge of switch gained through handling it did not charge switchman with knowledge of the dangerous proximity of its spear when turned toward the track. *Southern &c. R. Co. v. Michaels*, 57 Kan. 474.

That a brakeman unnecessarily went on an unsafe car while passing

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under a low bridge did not charge him with negligence. *Southern R. Co. v. Duvall*, (Ky.) 54 S. W. Rep. 741.

In the absence of reasonable means of acquiring knowledge of the precise danger from overhanging guy wire, plaintiff was not chargeable with negligence. *Erslew v. New Orleans &c. R. Co.*, 49 La. Ann. 86.

Conductor of street car did not assume the risk of the dangerous proximity of a pole not perceptibly closer than others. *Pikesville &c. R. Co. v. State*, 88 Md. 563.

Potter v. Detroit &c. R. Co., 122 Mich. 179; *Whipple v. New York &c. R. Co.*, 19 R. I. 587.

Engineer watching for signals was hit by a signal post three feet eight inches from the track. Plaintiff knew of signal posts but had not noticed the one in question. He assumed risk. *Lovejoy v. Boston &c. R. Co.*, 125 Mass. 79.

Signal post three and one-half feet from the track; brakeman on first trip, unfamiliar with road and running of train, not cautioned, was hit, and the risk was not so obviously incident to the employment that he could be said to have assumed the risk. *Scanlon v. Railroad Co.*, 147 Mass. 484.

Where a fence about four feet from the track was a permanent, visible structure, a brakeman was held to take the chance of running against it in descending from a passing car. *Ryan v. New York &c. R. Co.*, 169 Mass. 267.

Switchman was not negligent *per se* in jumping on a moving engine where he did not know of the proximity of a pile of stones by the track. *Donahue v. Boston &c. R. Co.*, 178 Mass. 251.

Conductor of a trolley car assumed the obvious danger from trolley poles by the side of the road, having made a trip for the special purpose of becoming familiar with the route. *Ladd v. Brockton Street R. Co.*, 180 Mass. 454.

Brakeman was chargeable with risk of striking low cornice of station while riding on high car. *Quinn v. New York &c. R. Co.*, 175 Mass. 150.

See, also, *Lake Shore &c. R. Co. v. Gilday*, 16 Oh. C. C. 665.

Brakeman had been at that point for six weeks, where side track was placed so near obstruction that brakeman was killed. It was for the jury to determine whether he had reason to apprehend the special danger so as to assume the risk. *Sweet v. Railroad Co.*, 87 Mich. 559.

Brakeman assumed the risk of contact with a chute projecting dangerously near a passing car, where he could have seen the danger had he looked. *Phelps v. Chicago &c. R. Co.*, 122 Mich. 171.

Trainmen were charged with knowledge that they were liable to run

against structures near a station while pushing cars in the dark. *Pahlan v. Detroit &c. R. Co.*, 122 Mich. 232.

It is the duty of a company to place signal posts and structures at reasonably safe distances from tracks, so as not to injure operatives on trains, or to warn them of dangers, if they exist. Employé is not presumed to assume risk in absence of notice. Servant employed had been two weeks in yard, where there were numerous tracks and trains; was killed by coming in contact with signal post four feet from track. Plaintiff recovered and new trial granted. *Johnson v. St. Paul &c. R. Co.*, 43 Minn. 53.

Irregularity of distance of trolley poles made it difficult to estimate their proximity, especially to one having made but one run. Contributory negligence in allowing oneself to be struck was for the jury. *Pierce v. Camden &c. R. Co.*, 58 N. J. L. 400.

Risk from a cattle chute too near, was assumed, where plaintiff has passed it almost daily for two years. *Boyd v. Harris*, 176 Pa. St. 484.

Fireman was not negligent in failing to see a station-limit board, dangerously near the track, while leaning out to look at the engine. *Central Trust Co. v. East Tennessee &c. R. Co.*, 73 Fed. Rep. 661.

Brakeman was not negligent in failing to see a cattle chute near the track and make a critical calculation to avoid it. *Wood v. Louisville &c. R. Co.*, 88 Fed. Rep. 44.

Risk from a low bridge was assumed, though, by reason of fog, steam, or smoke, it could not be exactly located. *Norfolk &c. R. Co. v. Marpole*, 97 Va. 594.

One injured by a cattle chute, while climbing up freight car, knew cattle chute was there. As he knew generally but not the precise distance of the chute from the track, he may not have known the precise danger. *Dorsey v. Construction Co.*, 42 Wis. 196.

For more than a year a small pile of lumber eighteen inches to two feet high was so near one of side tracks that a person pushing a car along the track could not pass between. Plaintiff, in defendant's employ for a month, had assisted in moving cars, but whether on this track did not appear. While pushing car hard with his head down, he did not see pile which was covered by snow, and he stepped on misplaced board of pile which gave way, throwing him under the car where he was injured. Plaintiff's contributory negligence for jury. *Bessex v. Chicago &c. R. Co.*, 45 Wis. 477.

Man assisting, by direction of foreman, in pushing car on an unfinished track, was, in the absence of warning, caught between car and a projecting bank. Plaintiff did not know of the narrow place and did not have time for deliberation or to look ahead and was not negligent, and

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recovered. The ground was so muddy that he had to look where he stepped. *Stackman v. Chicago R. Co.*, 80 Wis. 428.

Switchman on platform of car to avoid water running from steam pipe at end of car, leaned outward and was hit by a shed twenty-two and one-half inches from the car. He had a year's experience in the yard, but there was evidence that he did not know and had no means of knowledge of the shed. The court held that contributory negligence was for jury. *Kelleher v. Railroad Co.*, 80 Wis. 584.

See, also, *Randall v. Baltimore &c. R. Co.*, 109 U. S. 487.

In the case of a private logging railroad, a contractor's negligence in loading does not make the owner of the road liable to his servant for injuries therefrom. There was a derailment from a log lying in a ditch. If the plaintiff ought to have observed it and comprehended the danger likely to result, he assumed the risk. *Haley v. Jump River L. Co.*, 81 Wis. 412.

Citing *Dorsey v. P. &c. Co.*, 42 Wis. 583; *Goltz v. M. &c. Co.*, 76 id. 136; *Hackett v. W. U. T. Co.*, 80 id. 187.

Whether plaintiff assumed the risk, where pipe was within a dangerous proximity to the track was for the jury, where he had not before been in the exact position in which he was injured. *Renne v. United States Leather Co.*, 107 Wis. 305.

Operation and construction.—A jigger to load car wheels was defective, and the defendant's master mechanic had notice of it. The plaintiff was loading on his first day for the first time, and was injured through the defect. For the jury. *Kain v. Smith*, 89 N. Y. 375, aff'g 25 Hun, 146, and order granting new trial after nonsuit.

A train was divided near the point where the plaintiff was working as defendant's trackman. Plaintiff waited until the forward section thus made had passed him, and then went to work with his back to the rear section, which, coming by its own momentum, injured him. This division at this point was not unusual and was known to the plaintiff and other trackmen observed it. No liability. *Haley v. N. Y. C. & H. R. R. Co.*, 7 Hun, 84, granting new trial after verdict for plaintiff.

Upon the trial of an action, brought to recover damages for personal injuries, it was shown that the plaintiff, as employé of the defendant, while giving necessary signals to the engineer of a train which was being loaded with crushed stone, stood, for from four to six minutes, on the main track of the defendant's steam railroad where he was run over by an engine and sustained the injuries complained of.

He testified upon the trial that he did not know that he stood upon

the track; he did not know that the tracks were there and that engines and trains were constantly passing that point. He was not directed to go there, and there was nothing to interfere with his observation in each direction.

Held, that the accident was the result of carelessness of the grossest kind, for which the plaintiff had no one to blame but himself. *Clark v. N. Y., L. E. & W. R. Co.*, 80 Hun, 320.

Track laborer without looking stepped in front of a train coming up from behind on an adjoining track, to avoid one on the track he was on where there was no track on the opposite side. No recovery. *Tomko v. Central R. Co. &c.*, 1 App. Div. 289.

Royskoyek v. St. Paul &c. Co., 76 Minn. 28.

Whether the operating of a hand car was so dangerous and obvious a risk as to deter an ordinary man from undertaking it was held to be a question for the jury. *Southern R. Co. v. Guyton*, 122 Ala. 231.

Danger of blocks of wood used to stop wheels of a car splitting, was obvious. *Boyd v. Indian Head Mills*, 131 Ala. 356.

Whether operators of a train following another are negligent in assuming that the former have performed their duty to close a switch behind them was for the jury. *Chicago &c. R. Co. v. House*, 172 Ill. 601; aff'g s. c., 71 Ill. App. 147.

A new hand was not charged with knowledge of a certain custom forbidding men on switching cars. *Chicago &c. R. Co. v. Kane*, 70 Ill. App. 676.

Headlight to defendant's engine was not burning as required in case of fog; plaintiff knowing that trains were likely to pass got down on his knees with his back to the direction in which they would approach. Negligence and contributory negligence were for the jury. *Illinois C. R. Co. v. McNicholas*, 98 Ill. App. 54.

Section hand was not negligent in relying on warnings from his foreman or engineers of trains, while engaged in a stooping position. *Comstock v. Union P. R. Co.*, 56 Kan. 228.

See, also, *Snyder v. Cleveland &c. R. Co.*, 60 Oh. St. 487; *Southern P. Co. v. Wellington*, (Tex. Civ. App.) 36 S. W. Rep. 1114; *Missouri &c. R. Co. v. McGlamory*, 89 Tex. 635; *Gulf &c. R. Co. v. Calvert*, 11 Tex. Civ. App. 297.

Yard clerk on a switch engine required to look in one direction was not negligent in failing to see a push car near the track in another. *Atchison &c. R. Co. v. Slattey*, 57 Kan. 499.

Obvious risk in operating a turntable was assumed. *Melott v. Louisville &c. R. Co.*, 40 S. W. Rep. 696.

That workman asked engineer to look out for him did not prevent his

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taking some precaution himself to look out for engines liable to pass at any time. *Tumalty v. New York &c. R. Co.*, 170 Mass. 164.

Railroad employé was negligent in jumping off a moving engine onto an adjoining track without looking behind him, where he knew that there was a probability of an engine coming along in the same direction on that track. *Jean v. Boston &c. R. Co.*, 181 Mass. 197.

Where workman was injured by a car which might have been seen, but was not heard on account of the noise caused by the work. Contributory negligence was for the jury. *Mark v. St. Paul &c. R. Co.*, 32 Minn. 208.

Duty to look out for obstructions ahead, did not show negligence in failing to see one, where he was at the same time charged with the duty of keeping watch of the track beneath. *Koralewski v. Great Northern R. Co.*, 85 Minn. 140.

Servant held not negligent in unloading a hand car above him on a high and slippery embankment. *Thomas v. Raleigh &c. R. Co.*, 129 N. C. 392.

Plaintiff had looked and listened but allowed sufficient time to elapse for a train to approach before crossing. No recovery. *Pennsylvania Co. v. Mahoney*, 22 Oh. C. C. 469.

Section foreman was charged with risk of ties slipping while being loaded. *Texas &c. R. Co. v. Lyons*, (Tex. Civ. App.) 34 S. W. Rep. 362.

Notice of the shunting of cars without lights or other signal as to repair tracks was not imputed to a night watchman. *Galveston &c. R. Co. v. Hynes*, 21 Tex. Civ. App. 34.

Engineer, ordered to go on a main track only after a third section of a train had passed, was negligent, where he went to sleep, and, upon awaking was misled as to which section was passing. *Galveston &c. R. Co. v. Brown*, (Tex. Civ. App.) 63 S. W. Rep. 305; rev'g s. c., 59 id. 930.

Section hand was not bound to anticipate another would become so much frightened at the near approach of a train so as to drop his end of a hand car being lifted off the track. *International &c. R. Co. v. Newburn*, (Tex. Civ. App.) 63 S. W. Rep. 542; s. c. aff'd, 60 id. 429.

Switchman not charged with knowledge that a fireman was incompetent. *Galveston &c. R. Co. v. Eckles*, (Tex. Civ. App.) 60 S. W. Rep. 830.

The risk of running train backward at night without lights was assumed; running it without brakes, was not. *Choctaw &c. R. Co. v. Hol- loway*, 114 Fed. Rep. 458.

Factories, mills and machine shops:

Plaintiff's intestate had for a number of years been employed in testing casts for steam heating purposes manufactured by the defendants. A new pattern of castings had been introduced, of which only four or five had been tested, when one of them exploded causing his death.

This new pattern had a greater interior cross section, so that the pressure to the square inch of a given force of steam was greater, and consequently the liability to explosion was greater. The appliances were some that had been in use for seven or eight years without explosion, and the pressure of steam and application of the hammer, by which the test was made, were under the control of the intestate. It was held that it was for the jury to determine whether the intestate was chargeable with knowledge of the danger, and with negligence in adopting this mode of operation to the requirements of the changed condition of affairs. *Moeller v. Brewster*, 57 Hun, 554, granting new trial after nonsuit.

Servant was not chargeable with notice of a defect in a beetle held by another servant. *Daly v. Lee*, 39 App. Div. 188.

Removal of planks between two platforms in a place of extreme danger was an obvious danger to deceased. *Robbins v. Brownsville Paper Co.*, 53 App. Div. 641.

Plaintiff knew of the danger and could have seen during the day that the defect still existed. It was also unnecessary for him to have placed his foot where he did. No recovery. *Carlson v. Walsh*, 56 App. Div. 551.

Risk of loose boards constituting a passage way over a tank was assumed, where they had been in the same condition throughout the plaintiff's employment of three and a half years. *Sherlock v. Sherlock*, 66 App. Div. 328.

A servant is not obliged to actively inspect machinery and structure on which he is set at work, save as to defects and dangers of which he must be presumed to be aware. *Rigdon v. Alleghany Lumber Co.*, 13 N. Y. Supp. 871.

If the employé works with or near unsafe machinery, liable to injure him, with knowledge, or means of knowledge thereof, he takes the risk. Plaintiff fell upon that portion of the machinery of the foundry used for melting iron, which he had helped to repair, but which the next day caused the injury. *McGlynn v. Brodie*, 31 Cal. 377.

Employé was negligent in watching wood he had been boring instead of taking precautions to avoid contact with the running machinery. *Buehner Chair Co. v. Feulner*, 28 Ind. App. 479.

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Obvious danger from unprotected cog wheels was assumed. *Wortman v. Minich*, 28 Ind. App. 31.

No recovery, where deceased, to reach the place where he was injured, must have passed over a place of obvious danger. *Foster v. Kansas Salt Co.*, 60 Kan. 859.

Risk of board turning over and letting operator's hands in the knives of a planing machine was obvious and not affected by an assurance of safety. *Reis v. Struck*, (Ky.) 64 S. W. Rep. 729.

Petition alleged that servant's hand was crushed by cog-wheels while he was brushing them off, and that he was inexperienced in handling machinery, and did not know and had not been told of danger. The danger was apparent and incidental to the employment. (*Tuttle v. Railroad Co.*, 122 U. S. 195; *Carey v. Sellers*, 41 La. Ann. 500.) Master is not *per se* negligent for failure to cover cog-wheels. *Townsend v. Langles*, 41 Fed. Rep. 919.

Schroeder v. Car. Co., 56 Mich. 132; *Sanborn v. Railroad Co.*, 35 Kas. 292.

An experienced employé in a candy factory was charged with notice of the liability of a kettle ring to stick to the kettle. *Barnard v. Schrafft*, 168 Mass. 211.

The danger of putting damp lead into molten lead is not so obvious as to charge an ordinary employé with notice thereof. *Redmund v. Butler*, 168 Mass. 367.

Danger of a board, falling on a circular saw in motion without guards, being thrown off with force, was obvious. *Tenanty v. Boston Man. Co.*, 170 Mass. 323.

Fact that the guard rail did not cover the entire sweep of knives, was obvious. *Gleason v. Smith*, 172 Mass. 50.

Knowledge that the dust of a fertilizing mixture is inflammable, is as imputable to an employé after three years' experience as to the employer. *O'Reilly v. Bowker Fertilizer Co.*, 174 Mass. 202.

The danger in using gas pipe with which to "true" a grindstone, used for grinding down cutting dies instead of iron wire, was obvious, especially where the "rests" on the machine were defective. *Smith v. Beaudry*, 175 Mass. 286.

Set screws in a shaft which could be seen from the floor, held an obvious danger. *Demers v. Marshall*, 178 Mass. 9.

Servant was negligent in failing to examine, on his return, a planing machine which was dangerous to use if its adjustment had been changed, when he knew that there was a liability of its having been used in his absence. *Wyman v. Clark*, 180 Mass. 173.

Danger of rope running off a wheel stripped of its guard pieces was

so obvious as to charge a servant with the risk thereof. *Bays v. Warren Featherbone Co.*, (Mich.) 91 N. W. Rep. 164.

Cogs had been covered until seven days before the injury, when they were uncovered. Questions were for jury. Servant said they had *never* been covered. Held, that he had not noticed the change. *Barbo v. Bassett*, 35 Minn. 485.

Machinery in a mill was extensive and complicated, and certain parts that had been covered were uncovered some days before the injury. Question whether servant took the risk was for the jury. *Carver v. Christian*, 36 Minn. 413.

Person had for a month used a roller whose danger was apparent. He assumed the risk. *Berger v. St. Paul &c. R. Co.*, 39 Minn. 78.

An engineer of a mill was charged with notice of a change in the use of hot water instead of steam in a corn meal dryer which it was his duty to repair. *Glover v. Meinrath*, 133 Mo. 292.

Servant was charged with knowledge of the danger of potassium to explode when placed in water. *Hill v. Meyer Bros. Drug Co.*, 140 Mo. 433.

Servant may assume the risk of falling in a trap door which he knew might be open. *Irmer v. St. Louis Brew. Co.*, 69 Mo. App. 17.

Where plaintiff had been working about the machine for nearly a year and understood the danger of getting his hands caught in its cog wheels, he was charged with knowledge of the danger. *Collins v. Laconia Car Co.*, N. H. 196.

The fall of a plank used to reach a pulley to a belt which was left unfastened was not an obvious danger. *Quimby v. Boston &c. R. Co.*, 69 N. H. 334.

Plaintiff did not assume the risk of using a passage way between machines he had seen others use; he looked for obstructions but, through the lack of light, failed to see one. *Edwards v. Tilton Mills*, 70 N. H. 574.

Where the risk in feeding tobacco to a roller was obvious, a servant was charged with knowledge of increased danger in the use of green tobacco. *Johnson v. Devoe Snuff Co.*, 62 N. J. L. 417.

Operator charged with notice of absence for nine months of a bolt from a lever to a guide of a machine. *Coyle v. Griffing Iron Co.*, 63 N. J. L. 609.

Negligence in a girl of twelve working at a machine for five days without a guard as others had done was for the jury. *Sims v. Lindsay*, 122 N. C. 678.

Plaintiff knew that machine occasionally discharged chips but knew it usually gave notice and did not know it would throw them in a certain

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direction. Question of contributory negligence was for the jury. *Denning v. Midvale Steel Co.*, 192 Pa. St. 182.

That a girl of 17 was present when a belt was laced did not charge her with knowledge that it was unsafe. *McGar v. National Providence Worsted Mills*, 22 R. I. 347.

Servant overtaxed himself in lifting. No recovery. *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236.

Danger of contact with band saw in looping up electric light cord above it, held obvious. *Everhard v. Diamond Match Co.*, 98 Fed. Rep. 555.

Though steam usually arose from a barrel for waste steam sunken below floor, it was not an obvious danger when the engine had stopped and it was partially covered over with bits of bark. *Johnson v. Tacoma Mill Co.*, 22 Wash. 88.

Risk from passing under a shaft a few feet above a floor was assumed. *Brown v. Tabor Mill Co.*, 22 Wash. 317.

Danger of stepping on sawdust about a saw which is not protected with guards is obvious. *Hazen v. West Superior Lumber Co.*, 91 Wis. 208.

One of mature age and long experience with machinery is chargeable with the injury liable to result from the use of a large plate saw cracked near the edge. *Erdman v. Illinois Steel Co.*, 95 Wis. 6.

Boy of 16 was familiar with the dangers of working about the machinery of a paper cutter in plain sight and was charged with the risks thereof. *Helmke v. Thilmany*, 107 Wis. 216.

Servant charged with knowledge of danger from a hook furnished for manipulating slabs before a slab saw which was dull and straight. *Olson v. Doherty Lumber Co.*, 102 Wis. 264.

Danger from the skids of a log deck in a saw mill being without stops or barriers, was obvious to one familiar with logging in general. *Sladky v. Marinette Lumber Co.*, 107 Wis. 250.

Danger of working near a rapidly revolving shaft was obvious. *Muenchow v. Zschetzsche & Co.*, 113 Wis. 8.

Mines, tunnels and excavations:

Failure to discontinue work by a pile of ore because the light was dim, did not charge one with an assumption of risk of the unsafe condition of the pile. *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447.

Miner, giving his whole attention to the running of his machine, cannot be charged, as matter of law, with the knowledge that the mine inspector was neglecting his duty. *Westville Coal Co. v. Schwartz*, 177 Ill. 272; aff'g s. c., 75 Ill. App. 468.

Operator of steam shovel was not charged with knowledge of the dangerous condition of the clay bank at which he was set to work. *Alton Pav. &c. Co. v. Hudson*, 74 Ill. App. 612.

A quarryman did not assume the risk of a clay bank falling. *Peerless Stone Co. v. Wray*, 152 Ind. 27.

Collins v. Greenfield, 172 Mass. 78.

Foundryman cannot be excused for failing to see a moulding pit which is a usual appurtenance to a foundry. *East Chicago Foundry Co. v. Ankeny*, 19 Ind. App. 150.

Plaintiff stepped in a depression beside a catch-basin at night. Jury decided that it was not negligence. *Ft. Wayne v. Mellinger*, 22 Ind. App. 191.

Plaintiff fell into a hole, unknown to him and having nothing to indicate its presence but a lantern in its vicinity and lying in the line of where he was directed to go. Facts presented a question as to his negligence for the jury. *Grimmelman v. Union P. R. Co.*, 101 Iowa, 74.

Miner was not negligent in proceeding because the air at the entrance to the mine was bad. *Mosgrove v. Zimbleman Coal Co.*, 110 Iowa, 169.

Knowledge that an under cut machine repeated did not charge miner with risk of its premature starting. *Packer v. Thompson &c. Co.*, (Mass.) 56 N. E. Rep. 704.

Miner with no duty of inspection did not assume risk of improper condition of a mine entrance he was unfamiliar with. *Cushman v. Carbondale Fuel Co.*, (Iowa) 88 N. W. Rep. 817.

An experienced ditch digger did not assume the risk of danger from a crack in the earth which he had no reason to anticipate. *McCoy v. Westborough*, 172 Mass. 504.

Hill v. Winston, 73 Minn. 80.

Laborer was not precluded from recovering because he noticed the dangerous condition of the bank above him, not imminently dangerous, where he relied on its being remedied. *Bradley v. Chicago &c. R. Co.*, 138 Mo. 293.

Knowledge that a car was not locked to prevent its coming down a grade while not in use, did not charge a miner with notice that children were liable to get in and start off. *Knight v. Sadtler Lead &c. Co.*, 75 Mo. App. 541.

An experienced miner was charged with knowledge of danger from bank of loose earth not braced as usual. *Cummings v. Helena &c. Co.*, 26 Mont. 434.

One who has had eight years' experience at shoveling coal in an uncovered yard took the risk of a fall of a frozen crust of coal, as he

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shoveled away loose coal underneath. *Casey v. Grand Trunk R. Co.*, 68 N. H. 162.

Danger of a bank of earth falling was obvious. *Brown v. Chattanooga Electric R. Co.*, 101 Tenn. 252.

Miner was not negligent in stepping off a ladder in the dark, where he had no reason to anticipate danger. *Downey v. Gemini Min. Co.*, 24 Utah, 431.

Danger of a frozen sand bank falling in where it had been blasted to loosen it was assumed. *Larsson v. McClure*, 95 Wis. 533.

Building operations:

Workmen on a scaffold were not allowed to recover where the danger was obvious. *Daniel v. Forsyth*, 106 Ga. 568.

Mason did not assume risk from a defective scaffold which he had no opportunity to inspect. *Chicago &c. R. Co. v. Scanlan*, 170 Ill. 106; aff'g s. c., 67 Ill. App. 621.

That plaintiff objected to the manner of fastening a scaffold did not charge him with risk, where that method was occasionally used. *Offutt v. World's Columbian Exposition Co.*, 175 Ill. 472; rev'g s. c., 73 Ill. App. 231.

Otherwise where its insufficiency was as obvious to the employé as to his master. *Poznonski v. Szezech*, 71 Ill. App. 670.

So where the means of knowledge was clearly within the plaintiff's reach. *Duffy v. Upton*, 113 Mass. 544 (breaking of derrick spar in hoisting timber which encountered an unforeseen obstruction).

De Graff v. N. Y. C., 76 N. Y. 125.

Servant at work about a derrick was not charged with the risk of its defective condition where his duties did not call upon him to observe such defectiveness. *Attix v. Minnesota Sandstone Co.*, 85 Minn. 142.

By consenting to work without a guy rope about a pile driver, raising logs, plaintiff assumes the obvious risk. *Delisle v. Ward*, 168 Mass. 579.

Though the servant could have seen the dangerous position of a plank on a scaffold, he was not charged with a failure to observe it, where his attention was directed toward his work. *Thompson v. Bartlett*, (N. H.) 51 Atl. Rep. 633.

Knowledge that a scaffold has been erected, by servants on whom such duty is customarily imposed in his line of work, charges plaintiff with assumption of risk of their acts, though it was completed before he became a co-servant. *Olsen v. Nixon*, 61 N. J. L. 671.

In *Green v. Banta*, 48 N. Y. Supr. Ct. 156, aff'd 97 N. Y. 627, and

Solarz v. Man. R. Co., 8 Misc. 656, it was held that the breaking down of a scaffold upon which a servant was at work, unexplained, was sufficient to present a question to the jury.

An employé who goes upon an unsafe structure assumes the risk thereof, discoverable by the exercise of reasonable care. *Linyall v. Wood*, 44 Fed. Rep. 855.

Where the question is as to the safety of an appliance, the question of reasonable care on the part of the servant to discover the defect does not arise. *Mexican C. R. Co. v. Murray*, 102 Fed. Rep. 264.

Buildings and grounds:

Looseness of a bar to an elevator shaft was obvious. *Tisch v. Hirsch*, 34 App. Div. 623.

So was the danger of striking a beam over a driveway. *Miller v. Grieme*, 53 App. Div. 276.

Servant was negligent in catching his foot on a timber on a stairway, which he frequently used, which had been there for some time. *Tuscaloosa Waterworks Co. v. Herren*, 131 Ala. 81.

Direction to work beside a pile of ore does not require a servant to investigate its stability. *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447.

Where employé was not in charge of the elevator, he was not chargeable with notice of its defects so as to impose the risk thereof upon him. *McGregor v. Reid &c. R. Co.*, 178 Ill. 464; rev'g s. c., 76 Ill. App. 610.

Watchman was negligent in failing to see a trap door in the room he made his headquarters which had been open for three days. *Mutual Wheel Co. v. Mosher*, 85 Ill. App. 240.

Servant assumed the risk by unnecessarily passing under an elevator. *Stover Man. Co. v. Millane*, 89 Ill. App. 532.

Servant assumes the risk of falling down a shaft, where she knew the elevator might not be standing at her floor. *Browne v. Siegel*, 90 Ill. App. 49; s. c. aff'd, 60 N. E. Rep. 815.

Risk from obvious lack of safety appliances to an elevator was assumed. *Sievers v. Peters Box &c. Co.*, 151 Ind. 642.

Danger from slipping on loose pasteboard placed on steps just treated with oil, to protect them, was obvious. *McIntire v. White*, 171 Mass. 170.

Where depression in a floor was obvious, risk was assumed. *Hoard v. Blackstone Man. Co.*, 177 Mass. 69.

Whalen v. Whitcomb, 178 Mass. 33.

Elevatorman of 23, familiar with the action of an elevator charged with risk of the liability of loose boxes to shift and catch under a projecting beam in the shaft. *Barry v. New York Biscuit Co.*, 177 Mass. 449.

WHAT HELD DISCOVERABLE WHILE IN EXERCISE OF ORDINARY CARE.

Employé thoroughly acquainted with his elevator was negligent in failing to see a defective spring in plain sight. *Juchatz v. Michigan Alkali Co.*, 120 Mich. 654.

Employé was negligent in walking at night without necessity where he knows flooring had been torn up for repairing without making sure that it has been replaced. *Hurley v. Lukens Iron &c. Co.*, 186 Pa. St. 187.

In the absence of knowledge that lumber pile was dangerous, a laborer was not negligent in passing near it. *Pilling v. Narragansett Mach. Co.*, 19 R. I. 666.

Danger from obvious slipperiness around an unguarded hole was assumed. *Disano v. New England &c. Brick Co.*, 20 R. I. 452.

Employé was negligent in rolling a large stone over an uneven floor without taking ordinary care to prevent its running into a depression. *Sullivan v. Nicholson File Co.*, 21 R. I. 540.

Where an employé once or twice used a steep stairway, without railing, and steps at irregular distances, the defects were obvious, and servant took the risk. *Sweet v. Coal Co.*, 78 Wis. 127.

Kelley v. C. M. &c. R. Co., 53 Wis. 74; *Naylor v. C. & N. &c. R. Co.*, 53 id. 661.

An experienced mechanic was negligent in failing to notice the absence of spikes in a ladder before mounting it. *Borden v. Daisy Roller-Mill Co.*, 98 Wis. 407.

Miscellaneous instances:

Servant is not chargeable with the knowledge of a fellow servant of the insufficiency of an appliance. *Illinois C. R. Co. v. Swisher*, 61 Ill. App. 611.

Risk of the force being made insufficient by the withdrawal of an assistant is not assumed. *Braun v. Conrad Seipp Brew. Co.*, 72 Ill. App. 232.

Knowledge that engineers were permitted to practice in the vicinity with engines did not charge one with notice that parties entirely incompetent would be intrusted therewith. *Morbey v. Chicago &c. R. Co.*, (Iowa) 89 N. W. Rep. 105.

Coal shoveler assumed the risk of tubs unlatching while being hoisted, where he might have seen that their latches were loose. *Dolan v. Atwater*, 167 Mass. 274.

Plaintiff assumed the risk in throwing his weight upon a trough which he not only knew was not to be used for that purpose, but was unfinished. *Gibbons v. British &c. Nav. Co.*, 175 Mass. 212.

SERVANT'S CONDUCT MUST BE GOVERNED BY ORDINARY CARE.

Knowledge that a fireman is handling an engine does not impose upon a brakeman the assumption of the risk of his being careless, where he is under the direction and supervision of the regular engineer. *Leonard v. Minneapolis &c. R. Co.*, 63 Minn. 489.

Carpenter knowing a box furnished him was not held out to be sufficient, assumed the risk in standing on it without examining it. *Souter v. Minneapolis &c. E. Co.*, 68 Minn. 18.

Where the only duty of night watchman as to a horse is to put down a little hay in the morning, he is not chargeable with notice of its viciousness. *Schiltz Brew. Co. v. Blacklay*, 10 Oh. C. D. 17.

Lineman not charged with knowledge of defect in a cross arm of a pole covered with paint, and discoverable only by careful inspection. *McDonald v. Postal Tele. Co.*, 22 R. I. 131.

Work at electric wires for two months without gloves charged servant with notice of the dangers involved. *Wagner v. Portland*, 40 Or. 389.

Risk of negligent piling of lumber was assumed where servant had as good an opportunity to know thereof, as his master. *Sonnefield v. Mayton*, (Tex. Civ. App.) 39 S. W. Rep. 166.

So as to fall of an icicle. *Johnson v. Oakes*, 70 Fed. Rep. 566.

Where a beam over a gate was obviously low, risk therefrom was assumed. *Baker v. Barber &c. Pav. Co.*, 92 Fed. Rep. 117.

Where there was nothing to prevent one's discovering the danger in working near a dam, he assumed the risk. *Bullivant v. Spokane*, 14 Wash. 577.

Teamster was not negligent *per se* in driving down a steep grade of about 1 foot fall in 10, with an 18-inch hole at the foot, without looking to see if it had been filled. *Nelson v. Shaw*, 102 Wis. 274.

Fourteen years' companionship with a co-servant in a work charges one with risk of his incompetence. *Wiskie v. Montello Granite Co.*, 111 Wis. 443.

(c). SERVANT'S CONDUCT IN HIS EMPLOYMENT MUST BE GOVERNED BY ORDINARY CARE.

Where defective condition requires greater care to secure safety, that care must be used. *Southern R. Co. v. Arnold*, 114 Ala. 183.

The degree of care is not measured by what might be expected of plaintiff's age in view of his capacity; but what one of ordinary capacity at his age would exercise. *Georgia Cotton Oil Co. v. Jackson*, 112 Ga. 620.

Ft. Wayree v. Christie, 156 Ind. 172; *Hillsboro Oil Co. v. White*, (Tex. Civ. App.) 41 S. W. Rep. 874.

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Care required of railroad night watchman is not greater than that due from ordinary persons similarly situated. *Baltimore &c. R. Co. v. Alsop*, 71 Ill. App. 54.

Care required is that a reasonably prudent person would have used, in view of the character of his occupation. *Ashland Coal &c. R. Co. v. Wallace*, 101 Ky. 626.

Wilson v. Williams, (Ky.) 58 S. W. Rep. 444; *Merchant v. Pine Woods Lumber Co.*, 107 La. 463; *Parks v. St. Louis &c. R. Co.*, (Tex. Civ. App.) 69 S. W. Rep. 125.

1. WHAT HELD NEGLIGENT CONDUCT.

Railroads:

Coupling cars.—Brakeman caught his foot in a hole while walking in front of slowly moving cars to couple them. Not negligent *per se*. *Bird v. Long Island R. Co.*, 11 App. Div. 134.

Brakeman was negligent *per se* in unnecessarily going between dead-wood of cars in motion. *Alabama &c. R. Co. v. Richie*, 111 Ala. 297; *Southern R. Co. v. Arnold*, 114 id. 183; *McDonald v. Alabama Midland R. Co.*, 123 Ala. 227.

But see *Tibbs v. Alabama &c. R. Co.*, 111 Ala. 449.

Where there is no prescribed rules as to couplings, custom to couple by hand may be shown. *Louisville &c. R. Co. v. York*, 28 Ala. 305.

Where brakeman signaled engine to "slow up," and, without waiting, attempted to couple cars. Contributory negligence was for the jury. *Beems v. Chicago &c. R. Co.*, 58 Iowa, 150.

Where brakeman was injured in coupling cars in a backing train according to the custom permitted by the defendant, he was contributorily negligent. *Ferguson v. Cent. Iowa R. Co.*, 58 Iowa, 293.

Where brakeman attempted to couple moving cars. Contributory negligence was for the jury. *Hammer v. Chicago &c. R. Co.*, 61 Iowa, 56.

Where coupler, having given signal to stop and supposing it had been received, stepped on the track and was struck. Contributory negligence was for the jury. *Bucklew v. Central &c. R. Co.*, 64 Iowa, 603.

Compare *Pringle v. Chicago &c. R. Co.*, 64 Iowa, 613.

Brakeman was not negligent *per se* in getting caught on a dark night by a projecting timber on a flat car which he was attempting to couple. *Atchison &c. R. Co. v. Wells*, 56 Kan. 222.

Corbin v. Winona &c. R. Co., 64 Minn. 185.

Switchman was negligent in making a coupling on the inside of a

curve where he was expressly told that it could be done safely only on the outside. *Brown v. Louisville &c. R. Co.*, (Ky.) 65 S. W. Rep. 588.

Brakeman is negligent in going between cars without giving notice, knowing that two other attempts have failed. *Nihill v. New York &c. R. Co.*, 167 Mass. 52.

Brakeman was not negligent in going between cars to repair coupling with the conductor in charge of the signaling outside. *Bowes v. New York &c. R. Co.*, 181 Mass. 89.

Brakeman is not *per se* negligent in going in front of a car to couple though it is dark. *Knapp v. Chicago &c. R. Co.*, 114 Mich. 199.

Brakeman was not *per se* negligent in walking in front of a car slowly approaching another, to better prepare its coupling. *Munch v. Great Northern R. Co.*, 75 Minn. 61.

Hollenbeck v. Missouri P. R. Co., 141 Mo. 97.

Switchman unnecessarily tried to force a link in a high drawhead down to a low one instead of propping up the lower one. He was negligent. *Moore v. Kansas City &c. R. Co.*, 146 Mo. 572.

Knowledge that there were no drawheads and that the cars were coupled with a chain did not make it negligent *per se* to go between them at night, where there was no knowledge that there were not bumpers. *Harney v. Missouri P. R. Co.*, 80 Mo. App. 667.

Coupling cars is not negligence simply because an engineer is unassisted. *Wabash R. Co. v. Heeter*, 7 Oh. Dec. 485.

Where it was the duty of the conductor to examine cars to discover the defect, whereby he was killed. Contributory negligence was for the jury. *International &c. R. Co. v. Kindred*, 57 Tex. 491.

Brakeman was not negligent in resting a pilot bar on his knee to make a coupling. *Texas &c. R. Co. v. McCoy*, 17 Tex. Civ. App. 494.

Negligence in not observing a disputed custom of helpers in switching crews to come out from between the cars and look to see if others were approaching when they failed to make the coupling the first time, was for the jury. *Andrews v. Chicago &c. R. Co.*, 96 Wis. 348.

Brakeman was negligent in standing with one foot on each car to remove a coupling pin, not knowing that it had already been removed. *Young v. West Virginia &c. R. Co.*, 42 W. Va. 112.

Brakeman was negligent in allowing his arm to get caught where he saw the signal given to close up the cars and had ample time to prepare himself. *Jackson v. Norfolk &c. R. Co.*, 43 W. Va. 380.

Coupling cars while in motion.—After signaling engine to back, brakeman attempted to get out drawhead, which stuck, instead of getting out of the way until it was too late. He was negligent. *Renninger v. New York &c. R. Co.*, 11 App. Div. 565; s. c. aff'd, 162 N. Y. 595.

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Switchman was negligent in unnecessarily attempting to uncouple cars when the cars were going as fast as one could walk. *George v. Mobile &c. R. Co.*, 109 Ala. 245.

Freight conductor was negligent in voluntarily going between cars liable to start, to unchain them knowing they had no bumpers or draw-head. *Whitton v. South Carolina &c. R. Co.*, 106 Ga. 796.

Brakeman knowing the location of cattle guard was *per se* negligent in walking between moving cars in its vicinity to uncouple them. *Ford v. Chicago &c. R. Co.*, 106 Iowa, 85.

Crawford v. Houston &c. R. Co., 89 Tex. 89.

Brakeman was negligent in uncoupling moving cars where there was no one on the following car to stop it. *Louisville &c. R. Co. v. Fox*, (Ky.) 42 S. W. Rep. 922.

Brakeman was negligent in going between moving cars to uncouple them, knowing that frogs and switches were unblocked. *Gillin v. Patten &c. R. Co.*, 93 Me. 80.

Act. No. 174, L. 1883, p. 191, (3 How. Stat., sec. 3397a), requiring railroad companies to so adjust, fill or block frogs, switches and guard rails, as to prevent the feet of employes from being caught therein, will not, in case of failure to comply, make company liable to servant contributing by his negligence to his injury by trying to uncouple cars in motion. *Grand v. Michigan &c. R. Co.*, 83 Mich. 564.

Citing *Mynning v. R. Co.*, 64 Mich. 93; *Malta v. R. Co.*, 69 id. 109; *Kwiatkowski v. R. Co.*, 70 id. 549.

Brakeman was not negligent *per se*, where the motion was only such as was necessary to give a slack to enable the cars to be uncoupled. *Toledo &c. R. Co. v. Frick*, 14 Oh. C. C. 453.

He was negligent in running backward in front of a rapidly moving car to fix its coupling. *Houston &c. R. Co. v. Smith*, (Tex. Civ. App.) 38 S. W. Rep. 51.

It is negligent to try to uncouple cars in motion. *Grand v. Michigan &c. R. Co.*, 83 Mich. 564.

Citing *Gardner v. R. Co.*, 58 Mich. 584; *Cook v. Johnson*, id. 437; *Lyon v. Railroad Co.*, 30 id. 429; *Goulin v. Bridge Co.*, 64 id. 190; *Brewer v. Railroad Co.*, 56 id. 620; *Illick v. Railroad Co.*, 67 id. 632.

Brakeman was negligent in going between cars going about five miles an hour at night when the ground was slippery and where there were apt to be projecting ties and cross rails. *Lake Erie &c. R. Co. v. Craig*, 73 Fed. Rep. 642.

Brakeman is negligent in uncoupling cars in motion where it is unnecessary. *Gleason v. Detroit &c. R. Co.*, 73 Fed. Rep. 647.

But the fact that they are moving does not make him negligent *per se*. *Cleveland &c. R. Co.*, 91 Fed. Rep. 224.

Where the cars were moving slowly it was not negligent to follow the custom of going between them and manipulating the coupling, while walking along. *Curtis v. Chicago &c. R. Co.*, 95 Wis. 460.

Hennessey v. Chicago &c. R. Co., 99 Wis. 109; *Carrier v. Union P. R. Co.*, 58 Kan. 816.

Otherwise where there is snow rendering the ties slippery. *Carrier v. Union P. R. Co.*, 61 Kan. 447.

Going in front of moving cars.—Intestate went between two cars for his own purposes and was crushed by a lumber car, killing him. He was ordered to help move the lumber car and knew it was to be moved and could have heard it coming. Contributory negligence. *Toomey v. Turner*, 24 Hun, 599, aff'g nonsuit.

Citing *Van Schaick v. Hudson R. R. Co.*, 43 N. Y. 527; *O'Mara v. Delaware &c. Co.*, 18 Hun, 192.

Inspector went between parts of train being made up when the weather was such that brakes were liable to fail. Negligence. *Hanrahan v. Brooklyn Street R. Co.*, 17 App. Div. 588.

Where laborer was lacking in ordinary care in the railroad yard, he was contributorily negligent. *Murphy v. N. Y. &c. R. Co.*, 11 Daly, 122.

Brakeman was not negligent *per se* in running alongside a moving engine. Tripped over wires. *Flutter v. New York &c. R. Co.*, 27 Ind. App. 511.

Section hand was negligent in trying to rescue a hand car where the train was almost upon it. *Nelling v. Chicago &c. R. Co.*, 98 Iowa, 554.

One assumed the risk of injury by going in front of a moving engine, though it was the duty of the hostler in charge to have stopped it until a signal had been given. *Cowles v. Chicago &c. R. Co.*, 102 Iowa, 507.

Gateman was negligent where, against his express order, to remain by his gates, he left them and got in front of the train he knew was moving back and forth over the crossing. *Tirrell v. New York &c. R. Co.*, 180 Mass. 490.

Section hand was negligent in standing on a track on which he knew cars were about to be kicked, with his back to them. *Union P. R. Co. v. Clark*, 51 Neb. 220.

Employé went behind cars without notice to any one and for purposes of his own. No recovery, though he could not understand a warning given in English. *Gawlack v. Michigan C. R. Co.*, 11 Oh. C. C. 59.

Servant not allowed to recover for injury received while passing

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through space between cars liable to be moved in spite of warning signals. *Southern P. R. Co. v. Wellington*, 65 S. W. Rep. 219.

See, also, *Pennsylvania Co. v. Mahoney*, 22 Oh. C. C. 469.

Brakeman was negligent in going on the track in front of a tender without looking, knowing it to be approaching. *Guthrie v. Great Northern R. Co.*, 76 Minn. 277.

State Trust Co. v. Kansas City &c. R. Co., 111 Fed. Rep. 769.

Especially in the vicinity of frogs and switches. *Lake Shore &c. R. Co. v. Egan*, 18 Oh. C. C. 886.

Where it is a part of a switchman's duty he may go in front of a moving car without being negligent. *Paine v. Eastern R. Co. &c.*, 91 Wis. 340.

Where the train was moving rapidly and almost upon him, an employé was not justified in trying to remove a tie from the track. *Writt v. Girard Lumber Co.*, 91 Wis. 496.

Getting on and off, and going about on moving cars.—Conductor attempted to get on the front platform of a car just as it was about to pass an obstruction near the track. Was negligent. *Reiser v. New York &c. R. Co.*, 24 App. Div. 23.

See, also, *Sullivan v. Third Ave. R. Co.*, 19 App. Div. 195.

Employé, required to accompany a flat car with a vehicle on it, and not allowed to ride in the passenger coach, was not negligent in riding on the former. *Butler v. New York &c. R. Co.*, 42 App. Div. 280.

Brakeman tried to light a cigarette while sitting on the rear bolster of a skeleton car. Was not *per se* negligent, however. *Davis v. Miller*, 109 Ala. 589.

That the brakeman gave the signal does not preclude recovery for its negligent execution in running against the car on which he was standing. *Louisville &c. R. Co. v. Morgan*, 114 Ala. 449.

Street car conductor was negligent in unnecessarily leaning out and looking backward under the car as it moved along. *Sundy v. Savannah Street R. Co.*, 96 Ga. 819.

Night watchman was negligent in climbing on cars likely to be moved without notice to anyone. *Lumpkin v. Southern R. Co.*, 99 Ga. 111.

Where brakeman, knowing that cars had no ladder or handle, attempted to pass from one to the other and was injured by such defect. Contributory negligence was for the jury. *Chicago &c. R. Co. v. Warner*, 108 Ill. 538.

Where employé attempted at night to jump on foot board of a moving

engine in the night time, he was contributorily negligent. *L. S. & C. R. Co. v. Roy*, 5 Ill. App. 82.

Young v. Boston &c. R. Co., 69 N. H. 356.

Custom does not justify assuming a position of danger unnecessarily. *Chicago &c. R. Co. v. Harrington*, 77 Ill. App. 499.

Brakeman was negligent in trying to board with a heavy load, the pilot of a moving engine without handholds, running on a rough track. *Wabash &c. R. Co. v. Kastner*, 80 Ill. App. 572.

Employé was negligent in jumping from a moving construction train. *McArthur Bros. Co. v. Troutt*, 88 Ill. App. 638.

Employé not on duty was killed while on tender of the engine; a caboose was provided for employés, and he would not have been injured if he had ridden there; no recovery was allowed. *Doggett v. Illinois Cent. R. Co.*, 34 Iowa, 284.

Coal platform several inches from passing car. No recovery. *Perigo v. Chicago &c. R. Co.*, 52 Iowa, 276.

Where conductor was killed while riding on the front of a coal car in a mining train, contributory negligence was for the jury. *Crabell v. Wapello Co.*, 68 Iowa, 751.

Switchman was negligent in getting on in front of a moving engine instead of at its side. *Ferguson v. Chicago &c. R. Co.*, 100 Iowa, 733.

Fireman was negligent in going around by the front of the engine to get in the cab on his own side instead of going back by running board and getting in on the engineer's side. *Kelsey v. Chicago &c. R. Co.*, 106 Iowa, 253.

Brakeman was injured in walking over a train of freight cars, stepping from one to the other. Contributory negligence was for the jury. *Atchison &c. R. Co. v. McCandliss*, 33 Kas. 366.

It was not negligent *per se* to ride sitting on a car with legs hanging over its sides. *Illinois C. R. Co. v. Clark*, (Ky.) 55 S. W. Rep. 699.

Brakeman was not negligent where his duties required him to ride on the tender of the backing engine. *Southern R. Co. v. Barr*, (Ky.) 55 S. W. Rep. 900.

Plaintiff was negligent in leaving a car by climbing over the end when steps were furnished at the side. *Tradewater Coal Co. v. Head*, (Ky.) 66 S. W. Rep. 721.

Plaintiff to steady himself in uncoupling a car put his hand between a tank on a car and a timber designed to keep it in place and was caught by the tank shifting against the timber on the cars suddenly moving. No recovery. *Larkin v. New York &c. R. Co.*, 166 Mass. 110.

Conductor was negligent in getting on the running board without

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looking out for obstructions where he had previously been sent along the route to observe them. *Ladd v. Brocton Street R. Co.*, 180 Mass. 454.

Where switchman was injured while riding on the front of the engine, with feet hanging down. He was negligent. *Glover v. Scotten*, 72 Mich. 369.

Whether a brakeman riding between two tiers of logs on a flat car was negligent or not was for the jury to decide. *Balhoff v. Michigan C. R. Co.*, 106 Mich. 606.

Fireman was negligent *per se* in riding on the side of the engine in spite of warning. *Niles v. Minneapolis &c. R. Co.*, 107 Mich. 238.

Section hand was negligent in responding to a call to the rear of a train of dirt cars by running over them while in motion contrary to warnings. *Saner v. Lake Shore &c. R. Co.*, 108 Mich. 31.

"Swingman" charged with the duty of looking for signals from the rear was not negligent *per se* in failing to look while setting a brake. *Wood v. Chicago &c. R. Co.*, 66 Minn. 49.

Brakeman mounted a moving car by grasping a brakestaff, not knowing its defects. Negligence in so doing held to be a question for the jury. *Prosser v. Montana C. R. Co.*, 17 Mont. 372; s. c., 30 L. R. A. 814.

Switchman was not *per se* negligent in walking ahead of a slowly moving car, where he fell on ice between the rails. *Rifley v. Minneapolis &c. R. Co.*, 72 Minn. 469.

Section hand was not negligent in remaining on the platform of a caboose while it was moving slowly, from whence he was thrown by its sudden stopping. *Union P. R. Co. v. Doyle*, 50 Neb. 555.

Not negligence to be on the pilot of the engine when it is moving slowly. *Wabash R. Co. v. Heeter*, 14 Oh. C. C. 257.

Brakeman is negligent in walking along a four-inch deadwood in front of a moving car without anything to hold on with. *Dooner v. Delaware &c. Canal Co.*, 171 Pa. St. 581.

Bridge over track, decedent walking on cars. No recovery. *Pittsburg &c. R. Co. v. Sentmeyer*, 92 Penn. St. 276.

Street car conductor was negligent in standing on a car in such a position that he was struck by a passing car three feet from the track he was on. *Fletcher v. Philadelphia Traction Co.*, 190 Pa. St. 117.

Brakeman struck by bridge while walking on cars higher than ordinarily used. No recovery. *Stonebach v. Thomas Iron Co.*, 2 Cent. Penn. 604.

Clark v. Richmond &c. R. Co., 78 Va. 709.

Employé was negligent in attempting to board an engine going at high

speed. *Houston &c. R. Co. v. Milam*, (Tex. Civ. App.), 58 S. W. Rep. 735; s. c. rev'd, 60 id. 591.

Railroad hand jumped from a train going about four miles an hour to a station platform at the direction of his foreman or conductor when his co-laborers had done so safely. Question of negligence held to be one for the jury. *Northern P. R. Co. v. Eheland*, 163 U. S. 93.

Brakeman was negligent, where, instead of using hand holds provided for the purpose; he grasped a grip iron designed for another purpose. *Dawson v. Chicago &c. R. Co.*, 114 Fed. Rep. 870.

Brakeman was negligent in not discovering, though at night, that his train had separated. *Richmond &c. R. Co. v. Tribble*, (Va.) 24 S. E. Rep. 278.

Railroad employé was negligent in trying to board in the dark and with a lantern in his hand, a freight car running eight miles an hour. *Kilpatrick v. Grand Trunk R. Co.*, 72 Vt. 263.

Plaintiff was negligent in standing contrary to warnings on a truck running in front of an engine. *Reese v. Wheeling &c. R. Co.*, 42 W. Va. 333.

Where engineer failed to jump to avoid collision. Contributory negligence was for the jury. *Cottrill v. Chicago &c. R. Co.*, 47 Wis. 634.

See *Penn. &c. R. Co. v. Rooney*, 89 Ind. 453.

Going under cars.—Car inspector was negligent in going under cars in the dark without giving notice to anyone. *Alabama &c. R. Co. v. Roach*, 116 Ala. 360.

So as to car repairer. *Southern P. Co. v. Pool*, 160 U. S. 438; *Norfolk &c. R. Co. v. Graham*, 96 Va. 430.

Night clerk was negligent in crossing a track at night by going under the cars. *Chicago &c. R. Co. v. Eggman*, 59 Ill. App. 680.

Enginewiper was negligent in remaining in the pit under the engine after the foreman had ordered all enginewipers out and the engineer had rung his bell as a signal that he was going to start. *Knox v. Southern R. Co.*, 101 Tenn. 375.

Engineer was not negligent in going under his engine relying on the conductor's obeying the rules of the company to send back a flagman. *International &c. R. Co. v. Culpepper*, 19 Tex. Civ. App. 182.

Engineer was negligent in going under his engine without setting his brakes or giving notice, knowing that another would back on the same track. *Whitcomb v. McNulty*, 105 Fed. 863; *Huloen v. Chicago &c. R. Co.*, 107 Wis. 122.

Employé was negligent *per se* in going under an engine knowing that cars on a grade 120 feet above him were likely to be moved. *Seldomridge v. Chesapeake &c. R. Co.*, 46 W. Va. 569.

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Hand cars.—He is not negligent in suddenly applying the brake where another hand car has suddenly stopped immediately in front of his. *Alabama Mineral R. Co. v. Jones*, 114 Ala. 519.

Where servant on hand car attempted to reach his destination ahead of a train instead of removing hand car from the track. He was contributorily negligent. *Pittsburg &c. R. Co. v. Goss*, 13 Ill. App. 619.

Section foreman was not negligent *per se* in proceeding with his hand car because a fast train is over due where he does not know how much. *Chicago &c. R. Co. v. Goltz*, 71 Ill. App. 414.

Whether an employé was negligent in attempting to remove a hand car to prevent collision with an approaching train, held to be a question for the jury. *Walker v. Shelton*, 59 Kan. 774.

See, also, *Johnson v. Southern R. Co.*, 122 N. C. 955.

Section boss was not negligent *per se* in risking injury by attempting to rescue a hand car from before an approaching train to protect the lives of passengers. *Dailey v. Burlington &c. R. Co.*, 58 Neb. 396.

Where employé, knowing that a train might come at any time, rode on a hand car, he was contributorily negligent. *McGrath v. N. Y. &c. R. Co.*, 14 R. I. 357.

Employé was negligent in sitting on a hand car in a careless manner. He was thrown by its sudden stopping. *Galveston &c. R. Co. v. Parrish*, (Tex. Civ. App.) 40 S. W. Rep. 191; *Gulf &c. R. Co. v. Hubert*, 54 id. 1074.

Where employé let his legs hang over the side of a hand car, and one of them was caught in the cattle guard, he was contributorily negligent. *St. Louis &c. R. Co. v. Marker*, 41 Ark. 542.

Employé on hand car going at full speed into a cloud of smoke without any precaution on the part of the foreman to discover danger concealed thereby, held not negligent *per se* in failing to request foreman to stop. *Woodward Iron Co. v. Andrews*, 114 Ala. 243.

See, also, *Woodward Iron Co. v. Herndon*, 114 Ala. 191.

Failure to keep lookout for known dangers.—A brakeman who, for three weeks had passed under a bridge on the defendant's road, turned his back to it while on top of the cars and was struck. He was negligent and could not recover. *Williams v. D., L. & W. R. Co.*, 116 N. Y. 628; aff'g 39 Hun, 430, and rev'g judg't for pl'ff. The general term was reversed on the main question of liability.

Where one of two brakemen on a train of fifty-four cars was charged with the duty of keeping watch to see that the train did not part, and for that purpose was facing the rear of the train to more effectually

discharge his duty, at a reverse curve where special care was required, he was not *per se* guilty of negligence in not observing a low bridge of which he had previous knowledge and by which he was injured.

It was proper to show the usual and ordinary distance to erect tell-tales from a bridge to suitably warn brakeman. *Wallace v. Central Vermont R. Co.*, 138 N. Y. 302, rev'g judg't for def't.

Distinguishing *Williams v. D., L. & W. R. Co.*, 116 N. Y. 628, and citing *Kane v. Northern Central R. Co.*, 128 N. S. 91.

Persons, servants of contractor, doing work on a railroad are not required to look both ways to see, if a train is coming. Although the contractor and plaintiff agreed to exempt the defendant from liability for injury from defendant's negligence; yet this does not bind servants of a contractor, not privy thereto nor knowing thereof. *Ominger v. N. Y. C. & H. R. R. Co.*, 4 Hun, 159, rev'g judg't for def't.

Same care is not required of an employé in the course of duty on a railroad track as of a traveler crossing track. *Roll v. N. C. R. Co.*, 15 Hun, 496, aff'g judg't for pl'ff.

Fact that brakeman had forgotten low bridges in absence of exciting or confusing conditions, did not excuse him. *Wallace v. Cent. Vt. R. Co.*, 63 Hun, 632.

Working on a stone known to be dangerously near passing trains was contributory negligence. *Columbus &c. R. Co. v. Bradford*, 86 Ala. 574.

Instruction, that if servant injured coupling cars did not always bear in mind the danger of the occupation and act upon them, he could recover, was erroneous, in absence of sudden danger or emergency. *Martin v. Cal. &c. R. Co.*, 94 Cal. 326.

Motorman was aware of the possibility of meeting a returning car on his track. Recovery was denied. *Savage v. Nassau Electric R. Co.*, 42 App. Div. 241.

Car repairer was negligent in repairing on a track which he knew was unguarded, and was liable to be used by moving trains. *Chicago &c. R. Co. v. McGraw*, 22 Colo. 363.

Employé was negligent in cleaning a crossing without paying any attention to trains likely to pass. *Carlson v. Cincinnati &c. R. Co.*, 120 Mich. 481.

Where employé, knowing that a train was approaching, worked with his back to it, he was contributorily negligent. *Kelly v. Union R. & Trans. Co.*, 11 Mo. App. 1.

Section hand was negligent in stepping back upon the track after a gravel train had passed without looking, knowing it was likely to be followed by a switch engine. *Chicago &c. R. Co. v. Yost*, 56 Neb. 439.

Foreman of track repairers was negligent in crossing a track without

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looking where he knew it was liable to be in use at any time. *Grand Trunk R. Co. v. Baird*, 94 Fed. Rep. 946.

Employé engaged in picking up pins and links on the track is not negligent *per se*, where he looked before he went on the track a short time before. *Chicago &c. R. Co. v. Kane*, 70 Ill. App. 676.

Brakeman was negligent in not avoiding an overhead bridge while standing on a foreign car which was higher than those of his own line. *Southern R. Co. v. Duvall*, (Ky.) 50 S. W. Rep. 535.

Brakeman of one company using track of another was hurt by collision with station awning while ascending box car at the side. Plaintiff's contributory negligence was for the jury. Train did not often stop at station, and plaintiff had never particularly noticed awning, so that his knowledge was slight, and it could hardly be expected that he would always bear in mind the existence of the awning, although he knew it, or be prepared at all times to avoid it. (*Snow v. Railroad Co.*, 8 Allen 441, 450.) *Nugent v. Railroad Co.*, 80 Me. 62.

Employé was negligent in walking on the track at night at a place which is dangerous in the daytime. *Tumalty v. New York &c. R. Co.*, 170 Mass. 164.

Track hand was negligent in failing to get off the track where the engine was in plain sight for a quarter of a mile and he had received warnings of the danger. *St. Jean v. Boston &c. R. Co.*, 170 Mass. 213; *Buckmaster v. Chicago &c. R. Co.*, 108 Wis. 353.

Motorman was negligent in running his car rapidly back when he was liable to meet another and without watching for the latter. *Hudson v. People's Street R. Co.*, 175 Mass. 23.

Plaintiff was negligent, where he failed to avoid a snow covered wall close to the track, which he had been warned against, because he mistook it for a snow bank. *Hitchcock v. Railway Transfer Co.*, 81 Minn. 352.

Engineer was negligent in running at the rate of 30 miles an hour on a foggy morning into an open switch without a light, which was a sign of danger requiring him to stop. *Illinois C. R. Co. v. Guess*, 74 Miss. 170.

Brakeman knew foot bridge was low over the track, but walked on the cars. No recovery. *Reims v. St. Louis &c. R. Co.*, 71 Mo. 164.

Deceased was negligent in going to work between the rails after seeing a train ready to approach and failing to get out of the way in time when it starts. *McCarty v. Baltimore &c. R. Co.*, 20 Oh. C. C. 536.

Employé was negligent where while shoveling off a platform, he stood with his back to the track and so near to it that he was liable to be

struck by trains which he knew were likely to pass at any time. *Brady v. New York &c. R. Co.*, 20 R. I. 338.

Whether brakeman must keep lookout for collision while at work was for the jury. *Houston &c. R. Co. v. Smith*, (Tex. Civ. App.) 51 S. W. Rep. 506.

Whistle for brakes did not excuse a brakeman failing to avoid an overhanging bridge which he knew of. *Haffner v. Chesapeake &c. R. Co.*, 96 Va. 528.

Miscellaneous instances.—Motorman ran an east-bound car on a west-bound track so fast that he could not stop within the distance, he could see another car coming; was negligent. *Savage v. Nassau &c. R. Co.*, 42 App. Div. 241.

See, also, *Hudson v. People's Street R. Co.*, 175 Mass. 23.

Where brakeman had a club for setting brake, which was a dangerous practice, and where the evidence was conflicting as to whether he used the same, contributory negligence was for the jury. *Leahy v. So. Pacific R. Co.*, 65 Cal. 150.

A conductor without necessity occupying a position of danger, was not allowed to recover on complaint of engineer's violation of rules. *Central of Georgia R. Co. v. McWhorter*, (Ga.) 42 S. E. Rep. 82.

Giordano v. Brandywine Granite Co., (Del.) 52 Atl. Rep. 332; *Boyd v. Blumenthal*, id. 330.

Employé could not recover where the fall of a crowbar was due to his negligent manner of placing it on a hand car. *Freyermuth v. South-Bound R. Co.*, 107 Ga. 31.

Where conductor failed to properly stop his train before collision with another train, he was contributorily negligent. *Chicago &c. R. Co. v. Snyder*, 117 Ill. 376.

Brakeman was not negligent in putting excessive pressure on a brake where no others on the train would work. *St. Louis &c. R. Co. v. Dorsey*, 189 Ill. 251; aff'g s. c., 89 Ill. App. 555.

Working an apparatus negligently constructed and known to be defective was contributory negligence. *Wabash &c R. Co. v. Thompson*, 15 Ill. App. 117.

Employé was held negligent in making a running switch without making a prior examination as to safety. *Jarvis v. Drake*, 97 Ill. App. 153.

A bridge employé was held negligent in failing to see that a wedge under the track was in place before transporting timbers over it. *Bedford Belt R. Co. v. Brown*, 142 Ind. 659.

Employé was negligent in going in the vicinity of pits in a roundhouse

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at night, knowing their location. *McDonnell v. Illinois C. R. Co.*, 105 Iowa, 459.

Engineer was not negligent *per se* in allowing a switchman to go from his post at the head of the engine to the caboose, where he could still keep a lookout. *Atchison &c. R. Co. v. Tunnell*, 58 Kan. 815.

Laborer was negligent in unnecessarily putting his hand on a tie being removed from a bridge in order to guide it. *Daniels v. Covington &c. B. Co.*, (Ky.) 66 S. W. Rep. 187.

Employé unloading lumber, was held not negligent in failing to keep the load at a level to guard against a fall of the timber, should the car be run against by others. *Ragland v. St. Louis &c. R. Co.*, 49 La. Ann. 1166.

Flagman injured at crossing by train which he should have flagged against, assumed the risk. *Clark v. W. B. &c. R. Co.*, 128 Mass. 1.

Stepping once outside of a rail on a trestle after being cautioned to keep within them may be held not negligence *per se*. *Houlihan v. Connecticut River R. Co.*, 164 Mass. 555.

Employé was not negligent *per se* in passing through a space of about three feet between a post and a car on which brakes were set. Latter was struck suddenly by others. *Murray v. Fitchburg R. Co.*, 165 Mass. 448.

Where a signal agent piled smoke-stacks near a track, from whence they were pushed against a door, causing injury to him, contributory negligence was for the jury. *Martin v. North Star &c. Works*, 31 Minn. 407.

Where sleeping fireman let his foot lie on the track in the round-house he was contributorily negligent. *Price v. H. &c. R. Co.*, 77 Mo. 508.

Where engineer was requested to use a defective engine until an exchange could be made, whereby he was injured. Contributory negligence was for the jury. *Sioux City R. Co. v. Finlasen*, 16 Neb. 578.

Conductor was negligent in failing to inform his engineer of a train ahead. *Lake Shore &c. R. Co. v. Hunter*, 13 Oh. C. C. 441.

Deceased with three years' experience was negligent in placing his head and arms under a tank which had been left supported only by a jack, when he could have accomplished his object, safely in another way. *Lake Shore &c. R. Co. v. Whidden*, 23 Oh. C. C. 85.

Where brakeman deliberately walked into a cloud of steam, he was contributorily negligent. *Payne v. Reese*, 100 Pa. St. 301.

Negligence of brakeman in putting his foot where a tie is to go does not excuse negligence of a foreman in shoving the tie against it before he can remove it. *Texas &c. R. Co. v. Gale*, (Tex. Civ. App.) 35 S. W. Rep. 802.

Conductor was not negligent *per se* in failing to see to it that the brakeman is keeping a lookout in the cupola of the caboose, where his duties at the time demand his attention elsewhere. *Galveston &c. R. Co. v. Sweeney*, 14 Tex. Civ. App. 216.

Switchman was negligent in attempting to throw a switch while the engine was on or moving over the "feather" rail thereof. *Matthews v. Missouri &c. R. Co.*, (Tex. Civ. App.) 66 S. W. Rep. 902.

Conductor of a freight train was not negligent in remaining in the caboose to attend to switches, where lights were set for other trains, and the rules of the company required that the latter should approach all stations under control. *Missouri &c. R. Co. v. Pawkett*, (Tex. Civ. App.) 68 S. W. Rep. 323.

See *Missouri &c. R. Co. v. Follin*, (Tex. Civ. App.) 68 S. W. Rep. 810.

Where a brakeman used a ladder against which he had been warned, he was contributorily negligent. *The Privateer*, 14 Fed. Rep. 872.

Failure of defendant to furnish a derailing switch did not permit recovery where engineer could, notwithstanding, have avoided the accident. *Norfolk &c. R. Co. v. Cromer*, 99 Va. 763.

Factories, mills and machine shops:

Plaintiff was negligent in starting to work within a few inches of a revolving shaft and set screw. *Horton v. Vulcan Iron Works*, 13 App. Div. 508.

An involuntary movement while at work cannot be ground for predicating negligence. *Floetl v. Jonson &c. Co.*, 19 App. Div. 136.

Plaintiff shifted a belt by hand instead of using a belt shifter. No recovery. *Fleming v. Buswell*, 39 App. Div. 196.

Plaintiff was negligent in continuing on under a lever without knowing that the operator would comply with his request to stop lowering it. *Goodman v. Crystal*, 56 App. Div. 64.

Imprudence in attempting to counteract defects in a machine prevents recovery. *Willingham v. Rockdale Oil &c. Co.*, 101 Ga. 713.

Employé was negligent in putting his hand into the conveyor of a grain elevator machine. *Star Elevator Co. v. Carlson*, 69 Ill. App. 212.

One charged with cleaning and oiling shafting was not negligent in getting close enough to it to detect a squeak. His clothing was caught on it by a draft of wind. *Knuth v. Weiss Malting &c. Co.*, 72 Ill. App. 389.

Employé was negligent in failing to block a log in a saw mill to prevent its rolling. *Agnew v. Supple*, 80 Ill. App. 437.

Operator of machinery was negligent when proper attention to the

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work would obviate danger from falling shafting. *Ervin v. Evans*, 24 Ind. App. 335.

A girl was not negligent in attempting to descend stairs carrying some boards four feet long and from six to twelve inches wide in her arms. *Ferris v. Hensheim Bros.*, 51 La. Ann. 178.

It was negligence to go down into a sewer to clean it without giving notice, when the sewer is also used for blowing off steam from boilers. *McLean v. Chemical Paper Co.*, 165 Mass. 5.

Employé was not negligent in repairing a machine, where he had no reason to suppose that the belt, transmitting power would shift on again after being removed from the machine. *Martineau v. National Blank Book Co.*, 166 Mass. 4.

Employé was not negligent *per se* where the only passage afforded him was one two feet wide between a circular saw and a stationary object. *Dolphin v. Plumley*, 167 Mass. 167.

An experienced employé of ordinary mental capacity was not allowed to recover for catching his glove in a set screw in the course of his work about it. *Donahue v. Washburn & Co. Man. Co.*, 169 Mass. 574.

See *Demers v. Marshall*, 172 Mass. 548.

Employé was negligent in trying to stop the revolving of the handle of a windlass which had no ratchet. *Cunningham v. Lynn & Co. Street R. Co.*, 170 Mass. 298.

Servant was negligent in choosing a dangerous, instead of a safe position from which to remove a belt from a shafting. *Cushman v. Cushman*, 179 Mass. 601.

See, also, *Demers v. Marshall*, 178 Mass. 9.

Plaintiff was negligent in placing his hand on revolving rolls of a paper machine in stooping down to pick up paper. *Meunier v. Chemical Paper Co.*, 180 Mass. 109.

Deceased stepped inside a chimney to put out a fire and was hit by a plank thrown down the chimney from the top. He was not negligent. *Cote v. Lawrence Man. Co.*, 178 Mass. 295.

Employé was negligent in leaning over a shafting near a set screw to oil it without a light and with loose clothing. *Sakol v. Rickel*, 113 Mich. 476.

So, where, while working unnecessarily near a dangerous machine, he inadvertently allowed his hand to rest upon it. *Perlick v. Detroit Wooden-Ware Co.*, 119 Mich. 331.

Plaintiff was negligent in passing over planks over vats, known to be slippery, in the dark from which arose so much vapor that he had to feel his way. *Shippey v. Grand Rapids Leather Co.*, 124 Mich. 533.

Employé was negligent in attempting to replace a sash on rapidly revolving machinery when he could have done so safely by stopping the machine. *Moody v. Smith*, 64 Minn. 524.

Employé was negligent in allowing his hand to come in contact with a saw below its table in attempting to remove a clog of sawdust. *Ander-son v. Nelson Lumber Co.*, 67 Minn. 79.

See, also, *Parker v. Pine Tree L. Co.*, 85 Minn. 13.

Plaintiff was negligent in starting a circular saw violently with a four to six-inch block, when he knew better. *Wulff v. Wood Harvester Co.*, 67 Minn. 423.

Employé was negligent in entering a scraping machine, knowing of its liability to start, without notifying the person in charge of running it. *Cleary v. Dakota Packing Co.*, 71 Minn. 150.

Servant was not *per se* negligent in attempting to push an obstruction out of the way, though it was charged with electricity. *Klages v. Gillete-Herzog Man. Co.*, (Minn.) 90 N. W. Rep. 1116.

Murray v. Chicago &c. R. Co., (Minn.) 90 N. W. Rep. 1056.

Employé was negligent in unnecessarily using his arm to remove shavings from under a planing machine. *George v. St. Louis Man. Co.*, 159 Mo. 333.

It was not negligent for a spinner not to stop the machine before going to the rear to help the minder. *Colliott v. American Man. Co.*, 71 Mo. App. 163.

Plaintiff was negligent in using a "rip" adjustment of a machine where the "cutting" adjustment was required and in standing in front of it while in operation. *Vicksburg Man. Co. v. Vaughn*, (Miss.) 27 South. Rep. 599.

Employé was not negligent *per se* in reversing a board where it had been improperly sawed on one side. *Brown v. Concord &c. R. Co.*, 68 N. H. 518.

Servant was not held to a nicety of judgment as to the relative weight and strength of a lug supporting a moulding and was not negligent because he apprehended that it might be overloaded. *Spronk v. Addyston Pipe &c. Co.*, 19 Oh. C. C. 714.

Servant was negligent in trying to take a tin sheet from under a defective stamping machine by hand instead of shoving it out with another sheet. *Brown Oil Can Co. v. Green*, 22 Oh. C. C. 518.

Where plaintiff was negligent in getting her hand caught defendants cannot be charged with negligence because they did not know how to release it. *Stager v. Troy Laundry Co.*, 38 Or. 480.

Permitting tools to accumulate where they may cause injury is the

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negligence of the employes using them. *Devlin v. Phoenix Iron Co.*, 182 Pa. St. 109.

Employé was negligent in trying to replace a belt on a rapidly revolving pulley near a collar and set screw, without stopping the machinery. *Hoffman v. American Foundry Co.*, 18 Wash. 287.

The same care is not required of employes crossing the tracks of their own mills, using slow going engines, to shift iron, as of travelers at a public crossing. *Weiss v. Bethlehem Iron Co.*, 88 Fed. Rep. 23.

Employé was negligent in attempting to oil the shaft of a circular saw without guarding against slipping on the slanting floor of the box thereof. *Jones v. Sutherland*, 91 Wis. 587.

So, where he unnecessarily puts his hand within two or three inches of a revolving saw to pick up a broken chain. *Schultz v. Thompson Lumber Co.*, 91 Wis. 626.

So, where he attempted to clear away sawdust with a stick, which was caught in the saw and thrown in his face. *Foss v. Bigelow*, 102 Wis. 413.

Boy was negligent in grasping felt to straighten it near the rollers of a machine. *Bigelow v. Danielson*, 102 Wis. 470.

Employé was negligent in placing his hand on an adjoining planing machine without looking. *Gossens v. Mattoo Man. Co.*, 104 Wis. 250.

Employé was negligent in rolling a log down to the skids while the saw carriage was absent. *Sladky v. Marinette Lumber Co.*, 107 Wis. 250.

Mines, quarries and excavations:

Laborer unacquainted with the conditions of digging a cut in hard earth beside a tall chimney was not negligent *per se*, in working in the trench, knowing it to be unshored. *Finn v. Cassidy*, 165 N. Y. 584.

Miner was not negligent in using car tracks to enter mine. *Whatley v. Zenida Coal Co.*, 122 Ala. 118.

It was for the jury to say whether an unskilled miner was negligent in not avoiding danger from loose rock. *Hanley v. California Bridge &c. Co.*, 127 Cal. 232.

Where, although warned, one was killed in digging under a clay bank, he was contributorily negligent. *Simmons v. Chicago &c. R. Co.*, 110 Ill. 340.

Not negligent *per se*, to get on in front of slowly moving cars. *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9.

Where one by his own negligence failed to supply lifting apparatus in a mine with brake, as required by statute, he was contributorily negligent. *Blauncoup Coal Co. v. Cooper*, 12 Ill. App. 373.

Recovery denied to one who, without looking, passed near a slab of stone being sawed. *Bedford Quarries Co. v. Thomas*, (Ind. App.) 63 N. E. Rep. 880.

Miner loading ore in a car from a dangerous position, not allowed to recover. *Leppala v. Cleveland Iron Min. Co.*, 122 Mich. 633.

Miner was negligent in using a cross cut, designed for the circulation of air, as a passageway. *Lenk v. Kansas &c. Coal Co.*, 80 Mo. App. 374.

Plaintiff was negligent in trying to run in front of an approaching car and jump on a platform. *Kansas &c. Coal Co. v. Reid*, 85 Fed. Rep. 914.

Miner was negligent in lighting a match without seeing whether or not it was safe to do so. *Sommers v. Carbon Hill Coal Co.*, 91 Fed. Rep. 337.

It was negligent to drill where there might be "missed shots" without trying to find out. *Browne v. King*, 101 Fed. Rep. 561.

Reese v. Morgan Silver Min. Co., 15 Utah, 453.

Miner was not negligent in trying to locate a cave in, which he heard the noise of. *Frank v. Bullion &c. Min. Co.*, 19 Utah, 35.

Where a fire lit to warm employes was improperly used to thaw dynamite, a miner was not negligent in going to it for warmth. *Bertha Zinc Co. v. Martin*, 93 Va. 791.

Miner was negligent in remaining in a mine afire, after warning to leave. *Hughes v. Oregon Imp. Co.*, 20 Wash. 294.

Building operations:

In an action for personal injuries by the alleged negligence of the defendant, it was shown that the plaintiff, an employé of the defendant, went up a ladder onto a scaffold and left his tools to be thrown up after him. Then, standing on the platform of the scaffold and leaning over to catch such tools, he put one hand on a stay lath, which had been left on by order of the foreman. The lath broke and the plaintiff was precipitated to the ground.

The work had been completed around the upper part of the scaffold, and as fast as the workmen had finished the work they knocked off the stay laths, which did not aid the strength of the scaffold. Held, that the action was not maintainable. *Crebarry v. The National Transit Co.*, 77 Hun, 74.

Constructing a scaffold through a rope attached to an elevator which would upset the scaffold if raised, was negligence. *Simpson v. Gerken*, 19 App. Div. 68.

So, where servant crossed a beam in an unfinished building next to an

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elevator in operation. *Clancy v. Guaranty Const. Co.*, 25 App. Div. 355.

See, also, *Carnegie v. Penn Bridge Co.*, 197 Pa. St. 441.

Servant was negligent in standing on one end of a plank, where a timber, likely to fall on the other, would toss him off. *Stobba v. Fitzimmons & Co.*, 58 Ill. App. 427.

See also *Geesen v. Saguin* 115 Iowa, 7.

Employé was negligent in stepping on an ornament he had affixed to a building, when it was in such a condition that it would come off. *Campbell v. Mullen*, 60 Ill. App. 497.

Employé on a staging was not negligent in failing to guard against injury, where he had no reason to apprehend the fall of a beam against it. *Myhre v. Tromanhauser*, 64 Minn. 541.

Descending a ladder, nearly perpendicular with one's back to it presents a question of negligence for the jury. *Reese v. Morgan Silver Min. Co.*, 17 Utah, 489.

Buildings and grounds:

Employé crossed through shaft under elevator in operation. Negligent. *Hoes v. Edison & Co.*, 23 App. Div. 433.

O'Donnell v. International Nav. Co., 49 App. Div. 408.

So, where truckman backed into a shaft when he should have known that the elevator had been removed. *Maxwell v. Thomas*, 31 App. Div. 546.

Poindexter v. Benedict Paper Co., 84 Mo. App. 352.

So, where plaintiff at her own instance went upon a roof with which she was unfamiliar. *Kane v. Whitaker*, 33 App. Div. 416.

Plaintiff was negligent in proceeding in the dark in a cellar having a furnace pit without taking a candle. *Behsmann v. Waldo*, 74 N. Y. Supp. 929.

Elevatorman was negligent in leaving doors to a shaft on a floor open, where he knows that the automatic closing apparatus does not work. *Reichert v. Buffalo Spring & Co.*, 15 Misc. 222.

Floor scrubber was negligent in groping about in the dark in a strange part of the building. *Jorganson v. Johnson Chair Co.*, 67 Ill. App. 80.

Employé was negligent in walking out of a window 20 feet above the ground in the dark without looking to see if the ladder was there. *Swift & Co. v. McInery*, 90 Ill. App. 294.

Employé was negligent in sitting under a coal chute where he knew coal was liable to fall upon him. *Louisville & C. R. Co. v. Walker*, (Ky.) 40 S. W. Rep. 461.

An inexperienced elevatorman was negligent in trying to remedy what he supposed to be the trouble instead of calling in skilled mechanics provided for the purpose. *Nelson v. Sanford Mills*, 89 Me. 219.

Employé was negligent in attempting to cross an elevator shaft on an elevator without looking to see if the elevator is there. *Meister v. Alber*, 85 Md. 72.

Elevatorman was not negligent in failing to get out and see what the matter was, where the elevator stopped several feet below a floor. *Kleibaz v. Middleton Paper Co.*, 180 Mass. 363.

Engineer was negligent in attempting to remove a part of a pipe while steam was up in the boiler. *Bischoff v. St. Paul &c. Asso.*, 82 Minn. 105.

Mill hand was negligent in groping about over slippery ground at night in a yard containing a cistern. *McCann v. Atlantic Mills*, 20 R. I. 566.

Employé was negligent in removing sticks keeping apart marble slabs, one of which fell upon him. *Motey v. Pickle Marble &c. Co.*, 74 Fed. Rep. 155.

Miscellaneous instances:

Defect was obvious and could have been repaired easily by the men while at work. Delay in repair did not charge employer. *O'Connor v. Pennsylvania R. Co.*, 48 App. Div. 244.

Employé was not negligent in allowing his leg to rest near the wheel of a wagon he had reason to suppose was not going to be used. *Laying v. Mt. Shasta &c. Spring Co.*, 135 Cal. 141.

Lineman was negligent in getting out on a cross arm of a pole without inspecting it, knowing that it might be in a decayed condition. *Roberts v. Missouri &c. Teleg. Co.*, 166 Mo. 370.

An experienced electric light inspector, held negligent in placing his bare hands, one on an electric light wire and the other on a telephone wire. *Hart v. Allegheny County Light Co.*, 201 Pa. St. 234.

Servant used an obviously defective pulley made especially so by the defective collar of the crane it was used with. He was held negligent. *St. Louis &c. R. Co. v. Threat*, 12 Tex. Civ. App. 375.

Servant did not know that a greasy pulley had not been sanded, a usual precaution. Was not negligent. *Terrell Compress Co. v. Arlington*, (Tex. Civ. App.) 48 S. W. Rep. 59.

Miner went to notify ventilator of a dangerous accumulation of gas and returned after a reasonable time to remedy the difficulty, was not negligent. *Sommer v. Carbon Hill Coal Co.*, 89 Fed. Rep. 54.

A seaman, concealing his mate's intoxication from the master,

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assumes the risk of injury therefrom. *The Antonio Zambrana*, 89 Fed. Rep. 60.

Promise on behalf of employer to make a place safe does not relieve employé from the exercise of reasonable care. *Miller v. Bullion-Beck & Co.*, 18 Utah, 358.

See, also, *Fowler v. Pleasant Valley Coal Co.*, 16 Utah, 348.

Plaintiff's negligence was for the jury, where, notwithstanding a pole was marked as condemned and needing repairs, it appeared safe enough to climb. *Southern & C. Teleg. Co. v. Clements*, 98 Va. 1.

Employé was negligent in venturing into a ferry boat at high tide with an old rope. *Chesapeake & C. R. Co. v. Sparrow*, 98 Va. 630.

(d). VIOLATION OF RULES, ORDERS, &C.

1. NO RECOVERY WHERE THEY ARE VIOLATED.

The plaintiff attempted to shift a belt on a shaft to release it, and used a ladder not furnished for that purpose. The rules forbade repairs while machinery was in motion. The plaintiff was caught in the machinery and injured. Held, that he was guilty of contributory negligence, and that the defective ladder did not produce the accident. *Cahill v. Hilton*, 106 N. Y. 512, rev'g judg't for pl'ff.

The plaintiff, the defendant's brakeman, knew and had read the printed rules which require a brakeman, before starting, "to see that the hand brakes are in proper condition and work easily," but this was not done. The train stopped two hours where there usually was an inspection, but none was made, and it again stopped at the station, just beyond which, was a steep down grade, well known to the brakeman and his assistants, but no examination of the brakes was made. In going down this grade a number of the brakes failed to work, whereby the train was thrown from the track and the plaintiff was injured. As the accident was caused by the disobedience of the rules, the plaintiff could not recover. Had the plaintiff been unacquainted with the rules, yet, it was incumbent upon him and his assistants, before reaching the down grade, to ascertain that there were sufficient brakes in such order as to check the train. *La Croy v. N. Y., L. E. & W. R. Co.*, 132 N. Y. 570, rev'g 57 Hun, 67, and judg't for pl'ff.

An empty oil barrel upon the first or upper floor of a mill rolled from its position, apparently put in motion by the vibrations of the mill, caused by the workings of the powerful machinery, into the open well of an elevator, and fell upon plaintiff's intestate's head, causing his death. The evidence tended to show that plaintiff's intestate, against warnings,

left down the bar that protected the well of the elevator and allowed the barrel to fall in. *Freeman v. Glens Falls Paper Mill Co.*, 70 Hun, 530, aff'g judg't for def't; s. c., 61 Hun, 125; s. c. aff'd, 142 N. Y. 639.

Track repairer went to work without complying with the rule requiring the setting of a flag before doing so. Recovery denied. *Bruen v. Uhlmann*, 30 App. Div. 453.

See, also, *Moeller v. Delaware &c. R. Co.*, 55 App. Div. 636; *Devoe v. York &c. R. Co.*, 70 App. Div. 495; *Crane v. Chicago &c. R. Co.*, 93 Wis. 487.

Where conductor failed to require a flagman to go back the proper distance as enjoined by rule, he was not allowed to recover for collision. *Frounfelker v. Delaware &c. R. Co.*, 48 App. Div. 206.

Where the rules of the company required the use of a stick in coupling cars, the master is not liable for injuries resulting from failure to use the same. *Ga. Pac. R. Co. v. Probst*, 83 Ala. 518; *Darracott v. R. Co.*, 83 Va. 288.

See, also, *Rome &c. R. Co. v. Dempsey*, 86 Ga. 499; *Binion v. Georgia &c. R. Co.*, 115 Ga. 340; *Bird v. Sparks*, 100 Ga. 616; *Lake Shore &c. R. Co. v. Ney*, 8 Oh. C. D. 567; *Hodges v. Kimball*, 104 Fed. Rep. 745.

Master is not liable for injuries received from a prohibited coupling of cars while in motion. *Pryor v. Louisville &c. R. Co.*, 90 Ala. 32.

See, also, *Francis v. R. Co.*, 110 Mo. 387; *East Tennessee &c. R. Co. v. Smith*, 89 Tenn. 114; *Sanders v. McGhee*, 114 Ala. 373; *Shorter v. Southern R. Co.*, 121 id. 158; *Schaub v. Hannibal &c. R. Co.*, 106 Mo. 74; same principle, *East Tenn. &c. R. Co. v. Smith*, 89 Tenn. 114; *Grand v. Mich. &c. R. Co.*, 83 Mich. 564; *Lockwood v. Chicago &c. R. Co.*, 55 Wis. 50.

A master is not liable for injuries resulting from disobedience of a rule forbidding coupling cars unless coupling appliances are known to be in good order. *St. Louis R. Co. v. Rice*, 51 Ark. 457.

Where an oiler went into a place of danger without, contrary to rule, giving or leaving any notification to the engineer, the master was not liable for injury from the starting of the engine. *Stevens v. San Francisco R. Co.*, 100 Cal. 554.

A servant injured while moving a car contrary to rules of the company, did not recover. *Ga. Pac. R. Co. v. Mapp*, 80 Ga. 631.

Failure of an employé to examine the bottom of a still as his duty required, prevented recovery. *Wright v. Pacific Coast Oil Co.*, (Cal.) 53 Pac. Rep. 1086.

Previous instruction not to climb upon stringers to put on a belt on a line shafting did not prevent recovery where permission was given. *Chielinsky v. Hoopes &c. Co.*, 1 Marv. (Del.) 273.

Deceased was on the engine, derailed by negligence, in violation of his duty. No recovery. *Chattanooga S. R. Co. v. Myers*, 112 Ga. 237.

NO RECOVERY WHERE THEY ARE VIOLATED.

So, where flag brakeman was not where his duty required him to be. *Wabash R. Co. v. Zerwick*, 74 Ill. App. 670.

See, also, *Central Trust Co. v. East Tennessee &c. R. Co.*, 69 Fed. Rep. 353.

So, where deceased was doing an act expressly forbidden. *Illinois C. R. Co. v. Zerwick*, 88 Ill. App. 651.

Carlson v. Marston, 68 Minn. 400.

Violation of a company's rule is negligence. *Chicago &c. R. Co. v. Myers*, 95 Ill. App. 578.

See, also, *Green v. Brainerd*, 85 Minn. 318; *Lake Shore &c. R. Co. v. Whidden*, 23 Oh. C. C. 85; *Southern R. Co. v. Winton*, (Tex. Civ. App.) 66 S. W. Rep. 477; *Fisk v. Chicago &c. R. Co.*, 111 Iowa, 392; *Lake Shore &c. R. Co.*, 7 Oh. Dec. 282; *Davis v. Nuttallsburg &c. R. Co.*, 34 W. Va. 500; *Boyd v. Blumenthal*, (Del.) 52 Atl. Rep. 330.

But is not negligence *per se*. *Galveston &c. R. Co. v. Sweeney*, 14 Tex. Civ. App. 216.

Employé injured while on engine in violation of rules, cannot recover. *O'Neill v. Keokuk &c. R. Co.*, 45 Iowa, 564.

Connors v. Burlington &c. R. Co., 74 Iowa 383; *Louisville &c. R. Co. v. Wilson*, 88 Tenn. 316; *Shenandoah Valley R. Co. v. Lucado*, 19 Va. L. J. 866; *McGucken v. West. N. Y. R. Co.*, 77 Hun, 69; *Abend v. Terre Haute R. Co.*, 111 Ind. 202.

One who has been in the habit of assisting a station agent is bound by same rules of the company as the latter is. *Helm v. Louisville &c. R. Co.*, (Ky.) 33 S. W. Rep. 396.

Engineer was not allowed to recover for a collision, where he himself was negligent in violating a rule against approaching too close to a train ahead. *Louisville &c. R. Co. v. Hiltner*, (Ky.) 60 S. W. Rep. 2.

A servant obligates himself to conform to the rules and not to the customary practices of the company. Brakeman was injured in a position where he did not belong, contrary to rules. *Gordy v. N. Y. &c. R. Co.*, 75 Md. 297.

Deceased approached danger without necessity and contrary to orders. Was negligent. *O'Brien v. Staples Coal Co.*, 165 Mass. 435.

Engineer injured while disregarding orders. No liability. *Lyon v. R. Co.*, 31 Mich. 429.

A servant, in violation of an order, crawled under a car to repair the same, and did not recover for injuries there received. *Coops v. Lake Shore R. Co.*, 66 Mich. 448.

Same principle, *Central R. &c. Co. v. Kitchens*, 83 Ga. 83; so mounting a moving train, *Francis v. R. Co.*, 110 Mo. 387.

When it was the duty to examine coupling appliances before making

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a coupling of cars, servant was not allowed to recover for injuries from defective link. *Karrer v. Detroit R. Co.*, 76 Mich. 400.

Alabama &c. R. Co. v. Carroll, 84 Fed. Rep. 772; Butte v. Pleasant Valley Coal Co., 14 Utah, 282.

A brakeman did not recover for injuries from a derailment caused by the excessive speed of the train. *Conger v. Flint &c. R. Co.*, 86 Mich. 76.

Where it was the duty of a servant to clean a saw, and injury arose through his failure to do so, the master was not liable. *Johnson v. Hubby*, 98 Mich. 343.

Engineer was denied recovery for collision due to his failure to test air brakes as instructed. *Merritt v. Great Northern R. Co.*, 81 Minn. 496.

Employé bars his recovery by violation of express orders. *Card v. Wilkins*, 61 N. J. L. 296.

Styles v. Richmond &c. R. Co., 118 N. C. 1084; *Rittenhouse v. Wilmington Street R. Co.*, 120 N. C. 544; *Miller v. Lozier Man. Co.*, 19 Oh. C. C. 666; *Lonzer v. Lehigh &c. R. Co.*, 196 Pa. St. 610; *Higgins Carpet Co. v. O'Keefe*, 79 Fed. Rep. 900.

A boy, contrary to instructions, entered a chute in a coal breaker at an unaccustomed place, and did not recover for injuries there received. *Penn. Coal Co. v. Nee*, 12 Cent. (Penn.) 524.

No recovery can be had where collision was due to engineer's own failure to whistle on stopping as a signal for a brakeman to flag the next train as rules required. *Culpepper v. International &c. R. Co.*, 90 Tex. 627.

International &c. R. Co. v. Culpepper, 19 Tex. Civ. App. 182.

No recovery where employé failed to put cold water in a pulp digester before emptying it, the established method of performing the work. *Berlick v. Ashland Sulphite &c. Co.*, 93 Wis. 437.

Fireman was injured by a step on an engine, which he had failed to remove, as directed by the engineer. No recovery. *Kerrigan v. Chicago &c. R. Co.*, 104 Wis. 166.

2. PROVIDED THE VIOLATION CONTRIBUTED TO THE INJURY.

Engineer sat in the doorway, eighty feet from the engine, smoking, and the door fell on account of defective ropes and killed him. He could have obtained fresh air nearer the engine. For jury to say whether the deceased violated rules in going to the door during working hours and whether it contributed to the injury. *Williams v. Syracuse Iron Works*, 31 Hun, 392, rev'g judg't of nonsuit.

If it is shown that the employé has disobeyed the orders of his superior, the burden is upon him of showing that such disobedience did not con-

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tribute in any degree to the injury. *Prather v. Richmond &c. R. Co.*, 80 Ga. 435-6.

Citing *Central R. Co. v. Mitchell*, 63 Ga. 174; *Atlanta &c. R. Co. v. Ray*, 70 id. 674.

Where the neglect of a servant and disobedience of a rule by a servant contributed to his injury, there can be no recovery, although the negligence of his co-servant may have also contributed to the injury. *Savannah R. Co. v. Folks*, 66 Ga. 527.

Violation of a rule has no effect unless it proximately contributes to the injury. *Western &c. R. Co. v. Bussey*, 95 Ga. 584.

Rome R. Co. v. Thompson, 101 Ga. 26; *Fickett v. Lisbon Falls Fibre Co.*, 91 Me. 268; *Lake Erie &c. R. Co. v. Craig*, 80 Fed. Rep. 488.

Where an observance of the rule would have made the injury impossible, and disobedience alone brought the servant into the danger, he cannot recover for injury. *Knickerbocker Ice Co. v. De Haas*, 37 Ill. App. 195.

A person failed to use a safety coupler as directed, but was injured by a defect in the engine while in the act of coupling cars, and recovered. *Wabash &c. R. Co. v. Morgan*, 132 Ind. 430.

Failure of brakeman coupling cars to observe defendants' rules does not defeat his action, if other employes had knowledge of his negligence and failed to use proper care to avoid the accident. *Deeds v. Chicago &c. R. Co.*, 69 Iowa, 164.

Disobedience of a rule must have contributed to an injury to relieve the master from liability. *Reed v. Burlington R. Co.*, 72 Iowa, 166.

Same principle, *Bonner v. Beam*, 80 Tex. 152; *Whitaker v. D. & H. C. Co.*, 126 N. Y. 544.

Fireman failed to call engineer's attention to his violation of a rule as to excessive speed. Such failure held not proximate cause of accident due to excessive speed. *Missouri &c. R. Co. v. Fowler*, 61 Kan. 320.

Violation of rule as to use of coupling stick which did not contribute to injury, did not bar recovery. *Louisville &c. R. Co. v. Veach*, (Ky.) 46 S. W. Rep. 493.

Servant not precluded from recovering from explosion of locomotive from fact of intentional violation of rules, unless it contributed to accident; nor by fact that rules made him responsible for the conditions of engine, and provided he must be sure it was in good working order and must immediately stop, draw his fire, station signal men and procure assistance, whenever any defect was detected that would make it, in his judgment, unsafe to proceed, nor by fact that he knew engine was not

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in good working order, if he did not know and ought not to have known that it was unsafe. *Ford v. Fitchburg R. Co.*, 110 Mass. 240.

Violation of a rule as to change of clothing within labor hours, did not contribute to the injury from the bursting of a grindstone. *Helfenstein v. Medart*, 136 Mo. 595.

Where his own violation of a rule to any degree contributed to a servant's injury, he cannot recover, as where a conductor was injured while unnecessarily on top of a car. *San Antonio R. Co. v. Wallace*, 76 Tex. 636.

3. AND THE RULES WERE VALID.

Rule requiring use of stick to couple cars is not effective unless sticks are provided. *Hissong v. Richmond &c. R. Co.*, 91 Ala. 514.

Failure to obey an unreasonable rule as to coupling cars did not preclude recovery. *Holmes v. Southern P. Co.*, 120 Cal. 357.

It is error to submit to the jury whether rule adopted by company is a reasonable one. *Ill. Cent. R. Co. v. Whittemore*, 43 Ill. 420.

Chicago &c. R. Co. v. McLallen, 84 Ill. 109; *Hoffbauer v. D. & N. &c. R. Co.*, 52 Iowa, 342; *Tullis v. Hassell*, 54 N. Y. Supr. Ct. 391; *State v. Overton*, 24 N. J. L. 434, passenger case; *Vedder v. Fellows*, 20 N. Y. 126.

A servant is not obliged to obey an order, if obedience would result in his personal injury. *Hawley v. Chicago &c. R. Co.*, 71 Iowa, 717.

Whether rule is reasonable is often question of law, but in this case, involving order of superintendent whereby servant was injured, was a question of law and fact. *R. Co. v. Henderson*, 37 Oh. St. 549.

Is a mixed question of law and fact. *Day v. Owen*, 5 Mich. 520, passenger case.

Bass v. Chicago &c. R. Co., 36 Wis. 450, passenger case; citing, 1 Redf. on R. 88; *Commonwealth v. Power*, 7 Metc. 596; *Morris &c. R. Co. v. Ayers*, 5 Dutcher, 393; *Jenck v. Coleman*, 2 Sumner, 221.

4. AND BROUGHT HOME TO SERVANT.

Company should give its rules due publicity, but is not obliged to bring them home to the knowledge of its servants. *Slater v. Jewett*, 85 N. Y. 61.

Although a brakeman was not furnished with a copy of the book containing all the rules, or required to read it, yet where he had frequently seen and read a copy in the car, he was not excused for disobedience of a rule resulting in his injury. *Lacroix v. N. Y. &c. R. Co.*, 132 N. Y. 570; so when rules were posted in a car where the servant frequently rode. *Penn. R. Co. v. Langdon*, 92 Pa. St. 21.

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Same principle, *Covey v. Hannibal &c. R. Co.*, 27 Mo. App. 170; *Louisville &c. R. Co. v. Utz*, (Ind.) 32 N. E. 881; *Central &c. R. Co. v. Ryles*, 84 Ga. 420; *Fay v. R. Co.*, 30 Minn. 231; *Parker v. Ga. R. Co.*, 83 Ga. 539; *Atchison R. Co. v. Plunkett*, 25 Kas. 188.

Where a master's rule requires the servant to examine and know for himself that brake shafts and attachments were in a safe and proper condition, and such rule is accessible to the brakeman, he is chargeable with knowledge of the rule although he had not seen it; but there must be ample time and opportunity for examination and inspection required by the rule. Where a car at a way station was attached to a train only a few minutes before the train was to leave the station, although the train was delayed for fifteen minutes while waiting for another train, yet, as it was uncertain how long the delay would continue, and the train was liable to start at any moment, there was no safe opportunity given to discover the weak condition of the brake through the absence of a bolt and the loose condition of two remaining bolts. *O'Malley v. N. Y., L. E. & W. R. Co.*, 67 Hun, 130, aff'g judg't for pl'ff; distinguishing *La Croy v. May*, 132 N. Y. 570; aff'd, 142 N. Y. 665.

Warning of danger in riding in elevators is not for elevatormen. *Boess v. Clausen &c. Co.*, 12 App. Div. 366.

A knowledge of the rule must be brought home to the servant in order to excuse the master. *Louisville &c.-R. Co. v. Hawkins*, 92 Ala. 241.

Same principle, *Ga. Pac. R. Co. v. Davis*, 92 Ala. 300.

To constitute the violation of a rule a bar to recovery, the servant must have knowledge of the rule, not simply facts sufficient to put him upon inquiry as to its existence. *Brown v. Louisville &c. R. Co.*, 111 Ala. 275.

Alabama Midland R. Co. v. McDonald, 112 Ala. 216.

So, though he has been told that there is a rule on the subject but does not know what it is. *Daubert v. Western Meat Co.*, 135 Cal. 144.

Hill v. Lake Shore &c. R. Co., 22 Oh. C. C. 291.

One coupling cars may presume a rule that train should not be put in motion, would be observed, and recovery may be had for injuries. *Central R. Co. v. Harrison*, 73 Ga. 744.

One to whom rules have not been issued and who has no knowledge of the same, is not precluded from recovering for injuries received from disobedience thereof, although he has stipulated in writing, in consideration of his employment, "to study the rules governing employes and carefully keep posted and obey orders." *Carroll v. East Tenn. &c. R. Co.*, 82 Ga. 452.

Employé may be charged with a knowledge of a rule, where he knows

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how he might become aware of its terms, or hears thereof through co-employé. *Port Royal &c. R. Co. v. Davis*, 95 Ga. 292.

It is the duty of a conductor to acquaint himself with the rules even though he was ignorant of their existence, and was not supplied with a copy. *Alexander v. R. Co.*, 83 Ky. 598.

A brakeman's acknowledgement of the receipt of rules, which he agrees to abide by in his contract, binds him. *Fluhrer v. Lake Shore &c. R. Co.*, 121 Mich. 212.

Rule of a company forbidding "coupling by hand," not properly published and brought to brakeman's knowledge, and not enforced, will not defeat action by him for injuries received while coupling by hand a defective car. *Fay v. Minneapolis &c. R. Co.*, 30 Minn. 231.

There is a presumption that a servant is acquainted with the general rules established to govern him. *Oleson v. Chicago &c. R. Co.*, 38 Minn. 412.

Same principle, *Gulf &c. R. Co. v. Ryan*, 69 Tex. 665; *Pilkinton v. R. Co.*, 70 id. 226.

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Rules requiring examination of appliance before use was not broken, where there was no opportunity to make it. *Myers v. Erie &c. R. Co.*, 44 App. Div. 11.

Denver &c. R. Co. v. Smock, 23 Colo. 456.

Although a rule required an injured person to have made a careful inspection, yet the master is not excused for the servant's failure where he does not afford him a reasonable opportunity and appliances to make the same. *Chicago &c. R. Co. v. Fry*, 131 Ind. 319.

Switchman is not required to remove an obstruction near the track, which it is the duty of another workman to remove, under a rule requiring employes to look to the safety of the premises. *Louisville &c. R. Co. v. Bouldin*, 121 Ala. 197.

Requirement to have a train under control is not violated where signals for brakes are not complied with. *Louisville &c. R. Co. v. Mothershed*, 121 Ala. 650.

That conductor stood by and made no objection does not excuse brakeman's failure to use a stick or knife in coupling as required. *Port Royal &c. R. Co. v. Davis*, 95 Ga. 292.

Rule requiring stopping trains at schedule meeting and passing points is not violated by running at a cautious rate at other meeting points. *Western &c. R. Co. v. Bussey*, 95 Ga. 584.

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A standing rule is superseded by a special order to the extent that they are inconsistent. *Illinois Central R. Co. v. Neer*, 31 Ill. App. 126.

A rule to run inferior class trains through the yard with caution was superseded by an order "to hurry up" given by the yard master. *Norris v. Illinois C. R. Co.*, 88 Ill. App. 614.

Engineer was negligent in obeying conductor at risk of collision in circumstances under which rules gave him full power to act independently. *York v. Chicago &c. R. Co.*, 98 Iowa, 544.

See, also, *Louisville S. R. Co. v. Tucker*, (Ky.) 49 S. W. Rep. 314.

Failure to comply with a rule to post a flag when under a car, held not to make a car inspector negligent *per se*, where the yardmaster had assured him that no car would approach his. *Canon v. Chicago &c. R. Co.*, 101 Iowa, 613.

Brakeman recovered though the engineer failed to comply with a rule requiring him to send back a flagman. *Southern R. Co. v. Barr*, (Ky.) 55 S. W. Rep. 900.

Engineer was negligent in allowing inexperienced fireman to run engine at a rate far in excess of that allowed by the rules. *Louisville &c. R. Co. v. Scanlon*, (Ky.) 60 S. W. Rep. 643.

Car repairer cannot excuse a violation of rules as to posting signals by an agreement with a conductor not to run into his car. *Johnson v. Cleveland &c. R. Co.*, 11 Oh. C. C. 553.

Agreement by a brakeman to do his own inspecting of cars, etc., does not apply, where the cars are supposed to have been already inspected. *Lake Shore &c. R. Co. v. Gilday*, 16 Oh. C. C. App. 649.

Direction to be on the top of cars to assist on down grades was not violated by not being there when there were no such grades. *Texas &c. R. Co. v. Magrill*, 15 Tex. Civ. App. 353.

See, also, *Tullis v. Lake Erie &c. R. Co.*, 105 Fed. Rep. 554.

Brakeman went between cars at rest. He did not violate a rule against "entering between cars in motion" by remaining there while they were starting. *Galveston &c. R. Co. v. Pitts*, (Tex. Civ. App.) 42 S. W. Rep. 255.

Company's acquiescence in an engineer's violation of an ordinance against speed does not prevent his act being negligence *per se*. *Missouri &c. R. Co. v. Roberts*, (Tex. Civ. App.) 46 S. W. Rep. 270.

Order to make 25 miles an hour for the whole trip, including stops, is not violated by running faster to make up a loss. *Houston &c. R. Co. v. Higgins*, 22 Tex. Civ. App. 430.

Rules as to an engineer's inspection of his engine do not hold him as

to defects in mechanical construction. *Galveston &c. R. Co. v. Smith*, (Tex. Civ. App.) 57 S. W. Rep. 999.

Where, in consideration of his employment, a brakeman understandingly signed a paper waiving all liability of the master for the result of his servant's violation of the rule prohibiting the coupling or uncoupling of cars without a stick, and was injured while coupling cars without a stick, he did not recover although the disuse of the stick was customary and known to the conductor. *Russell v. Richmond &c. R. Co.*, 47 Fed. Rep. 204.

Rule requiring an engineer to examine culverts for washouts in case of storms, was not necessarily violated, where there was no reason to suppose a storm was severe enough to cause washouts. *Crouse v. Chicago &c. R. Co.*, 102 Wis. 196.

A brakeman, although not using a stick, may recover for injuries where the position of the cars would have made the stick useless. *Berrigan v. N. Y. &c. R. Co.*, 59 Hun, 627.

Same principle, *Richmond &c. R. Co. v. Rudd*, 16 Va. L. J. 96; *Memphis &c. R. Co. v. Graham*, 94 Ala. 545. Or where injury would have happened if stick had been used. *Reed v. Railway Co.*, 72 Iowa, 166.

Where an engineer knows that a signal is not given in accordance with the rules of the company, he is not justified in relying upon it. *Columbus R. Co. v. Bridges*, 86 Ala. 448.

A disobedience of a rule by one employé does not justify such disobedience by another. *Central &c. R. Co. v. Kitchens*, 83 Ga. 83.

A conductor may not disregard a signal although he may think that he has information justifying him in so doing. *Hannibal &c. R. Co. v. Kanaley*, 39 Kas. 1,

A conductor started his train in violation of the rules, but under the direction of a superior officer, and did not recover for injury therefrom, where he knew that another train had the right of way and that such officer had no special information, and offered no objection beyond saying that he would not take the responsibility. *Westcott v. N. Y. C. R. Co.*, 153 Mass. 460.

Same principle, *Sutherland v. Troy &c. R. Co.*, 125 N. Y. 737.

A servant is excused from following a general rule where compliance therewith is made impossible by inconsistent orders. *Hall v. Chicago &c. R. Co.*, 46 Minn. 439.

Where a conductor ordered a brakeman to uncouple cars, contrary to rule, when he could not otherwise uncouple them, it did not prevent a recovery. *Mason v. Richmond &c. R. Co.*, 111 N. C. 482.

Although, by a rule, an engineer may not commit the performance of

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his duties to another, yet this did not prevent recovery where the engineer, through sickness, was obliged so to do. *East Line R. Co. v. Scott*, 72 Tex. 70.

6. EFFECT OF HABITUAL VIOLATION.

The rules required a brakeman to be at his post but did not designate where his post was. He was injured in a collision while riding on an engine, according to a custom sanctioned by the superiors, and in this case known by the conductor and superintendent. For jury. *Sprong v. B. & A. R. Co.*, 58 N. Y. 56, aff'g judg't for pl'ff.

Approval of a custom to ride on loaded cars contrary to statute did not permit recovery. *Voshefskey v. Hillsdale Coal &c. Co.*, 21 App. Div. 168.

Violation by servant is not excused by violations by his fellow servants. *Sheridan v. Long Island &c. R. Co.*, 40 App. Div. 381.

Wilson v. Mich. R. Co., 94 Mich. 20.

A brakeman did not recover for injuries received in coupling cars in violation of the rule requiring the use of a stick, although the rule was frequently disregarded by other employes, but without the knowledge and acquiescence of the company. *Sloane v. Georgia R. Co.*, 86 Ga. 15.

Failure to comply with an order to stop presses did not bar recovery, where it has been disregarded by others. *Sawyer v. Rumford Falls Paper Co.*, 90 Me. 354.

That an employer has himself violated a rule does not justify a servant in following his example. *Lake Shore &c. R. Co. v. Litz.*, 7 Oh. 'Dec. 282.

Habitual violation with knowledge of the company constitutes a practical abrogation of rules. *Louisville &c. R. Co. v. Reagan*, 96 Tenn. 128.

Galveston &c. R. Co. v. Slinkard, (Tex. Civ. App.) 39 S. W. Rep. 961; *Missouri &c. R. Co. v. Mayfield*, (Tex. Civ. App.) 68 id. 807; *Knickerbocker Ice Co.*, 80 Fed. Rep. 483; *Atchison &c. R. Co. v. Slattery*, 57 Kan. 499; *Alabama &c. R. Co. v. Roach*, 110 Ala. 266.

Although the disobedience of a rule by a brakeman was with the knowledge and consent of the conductor of the train, the servant was not excused. *Atchison &c. R. Co. v. Reesman*, 60 Fed. Rep. 370.

Penn. R. Co. v. Langdon, 92 Penn. St. 21.

(e). EFFECT OF COMPLIANCE WITH EXPRESS ORDERS, THREATS, OR ASSURANCES OF SAFETY.

Servant did not go at his peril, beneath a pulley block in course of adjustment upon the orders of a foreman. *Murray v. Dwight*, 15 App. Div. 241.

Servant seeing nothing wrong was entitled to rely on master's assurance of safety. *Schmit v. Gellen*, 41 App. Div. 302.

See, also, *Richards v. Hayes*, 17 App. Div. 422; *Hass v. Chicago &c. R. Co.*, 97 Ill. App. 624.

Servant obeys at his peril, where his opportunity to see the danger equals that of the master. *O'Connell v. Clark*, 22 App. Div. 466.

See also *Miller v. Grieme*, 53 App. Div. 276.

Servant did not assume risk of danger he could not reasonably have seen by complying with an order, to resume work. *Eicholz v. Niagara Falls &c. Co.*, 68 App. Div. 441.

Order to uncouple cars, given while in motion, should be construed as intended to take effect when it was safe to do so. *Davis v. Western R. Co.*, 107 Ala. 626.

Brakeman was allowed to rely on the section foreman's statement that a defective stub switch had been repaired, and to continue in service without being chargeable with negligence. *Alabama &c. R. Co. v. Davis*, 119 Ala. 572.

Section hand whose whole attention is devoted to getting a hand-car off the track, may rely on his foreman to protect him from an approaching train. *St. Louis &c. R. Co. v. Rickman*, 65 Ark. 138.

It was not negligent to use a defective elevator after having been informed that it had been "fixed." *Goggin v. Osborne & Co.*, 115 Cal. 437.

Bricklayer was not negligent while building a wall alongside another wall, in relying on an assurance of safety as to height where he did not know of the relative positions of the thicknesses of the other wall. *Starr v. Kreuzberger*, 129 Cal. 123.

Assurance of foreman of a manufacturer that a scaffolding was safe did not render the latter liable to its employé, where such employé was told by the latter that another party would see to its erection. *Channon v. Sanford Co.*, 70 Conn. 573.

Order by the person in charge of a skip to get on when it is already overloaded does not excuse one's running the risk of the obvious danger without necessity. *Last Chance Min. &c. Co. v. Ames*, 23 Colo. 167.

The plaintiff was employed as a special train hand to run on defendant's cars at night to put on and off brakes, to couple and uncouple cars; while train was moving at a speed of from four to six miles per hour, the plaintiff was directed by the conductor to get off the train with him and go to the side track near the depot on which cars were placed to couple them to the train, when it should be backed for this purpose. Plaintiff, using his lamp, carefully got from the train, but in alighting his feet came in contact with two pieces of timber lying across on the roadway

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of defendant and he was thrown against the moving train and was hurt. *Central R. Co. v. DeBray*, 71 Ga. 406.

From opinion.—"But it is insisted that the plaintiff was not bound to obey the orders of the conductor to get off the train before the same ceased running. The conductor acted for the defendant corporation; he had charge and command of the train, and it was not the fault of the plaintiff in obeying this order, and defendant cannot set up the wrongful act of itself or its agents to excuse itself from liability to one who merely obeys an order of this sort."

See *Augusta Factory v. Barnes*, 72 Ga. 216.

Fear of discharge is no excuse for overstraining one's self. *Worlds v. Georgia R. Co.*, 99 Ga. 283.

Robertson v. Chicago &c. R. Co., 146 Ind. 486.

Where the superior servant gave an order which he knew to be dangerous, and servant, not knowing this, obeyed it, master was liable. *Stearns v. Peidy*, 33 Ill. App. 246; 135 Ill. 119.

Workman unable to see the danger himself, may rely on his master's assurances. *Watson Cut-Stone Co. v. Small*, 181 Ill. 366; aff'g s. c., 80 Ill. App. 328.

Conductor was not negligent *per se* in obeying a direction to change cars at an unusual place without noticing the presence of stones by the side of the track. *North Chicago Street R. Co. v. Dudgeon*, 184 Ill. 477; aff'g s. c., 83 Ill. App. 528.

Transfer from a place of safety to one of danger without notice, avoids any assumption of risk. *Banks v. Effingham*, 63 Ill. App. 221.

Carpenter of an electric light company relied on its foreman's statement that wires in the vicinity of his work, not obviously dangerous, were safe. Was not negligent. *Chicago Edison Co. v. Hudson*, 66 Ill. App. 639.

Servant is not, as matter of law, relieved from all care of inspection, where a foreman tells him that a scaffold is all right. *Bannon v. Sanden*, 68 Ill. App. 164.

Continuance under a threat of discharge does not prevent recovery where it is pursuant to an assurance of safety. *Morris v. Pfeffer*, 77 Ill. App. 516.

McArthur Bros. Co. v. Nordstrom, 87 Ill. App. 554.

Employé was not negligent in obeying a direction to go to the bottom of a shaft while the elevator was in operation in reliance upon the foreman's following his usual custom of notifying the elevator man. *Kirk v. Senzig*, 79 Ill. App. 251.

Servant was justified in relying on master's assurance that a boiler repaired would be ready at a certain time. *Kewanee Boiler Co. v. Erickson*, 78 Ill. App. 35.

No risk is assumed in obeying an order as to the manner of doing the work where it would not be absolutely imprudent. *Pagels v. Meyer*, 88 Ill. App. 169.

Stuart v. New Albany Man. Co., 15 Ind. App. 184; *Plefka v. Knapp-Stout Lumber Co.*, 72 Mo. App. 309.

Otherwise where the danger is obvious to an ordinary person. *Stuart v. New Albany Man. Co.*, 15 Ind. App. 184.

Christainson v. Pacific B. Co., 27 Wash. 582.

Information that a work train was on the track but would be kept out of the way did not make an "extra" train negligent in strictly obeying its order. *Louisville &c. R. Co. v. Heck*, 151 Ind. 292.

That the new work was more hazardous does not make it negligent to obey an order therefor. *Clark County Cement Co. v. Wright*, 16 Ind. App. 630.

Plaintiff was negligent *per se* in attempting to turn a very slippery nut with a wrench so near a cog wheel that any slip would throw his hand into the cogs, notwithstanding the master's direction not to stop the machinery in doing so. *Gorman v. Des Moines Brick Man. Co.*, 99 Iowa, 257.

Car inspector is not concluded by his consent to the removal of cars where the yard foreman assured him that none would be returned on his track. *Canon v. Chicago &c. R. Co.*, 101 Iowa, 613.

Brakeman was not negligent in obeying a direction to walk along a train where those in charge of engines on the adjoining track are required to give warning of their approach. *McLeod v. Chicago &c. R. Co.*, 104 Iowa, 139.

Foreman with knowledge that mine roof was cracked ordered miner to pick hole in side of entrance to insert supporting timber. Miner did not assume risk. *Wahlquist v. Maple Grove Coal &c. Co.*, (Iowa) 89 N. W. Rep. 98.

Plaintiff was not negligent *per se* in riding on freight elevator with defective cable on superintendent's assurance that it was safe. *Stomne v. Hanford Produce Co.*, 108 Iowa, 137.

Servant may rely on the master's assurance unless the danger is not so obvious as to deter an ordinarily prudent man from incurring the risk. *Wake v. Price*, (Ky.) 58 S. W. Rep. 519.

See, also, *Lasch v. Stratton*, 101 Ky. 672.

Where plaintiff has had but little experience at logging he was not negligent *per se* in obeying an order to get on a timber being moved edges up. *Gagnon v. Seaconnet Mills*, 165 Mass. 221.

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Employé was not negligent *per se* in obeying an order to steady a stone being lowered by a derrick. *Crowley v. Cutting*, 165 Mass. 436.

Employé did not assume the risk of obeying a direction to feed a furnace, which was outside his usual duties, where the danger of the furnace door being blown open was not an obvious one. *La Fortune v. Jolly*, 167 Mass. 170.

Direction to work "quick" is no excuse for subjecting oneself to an obvious risk. *Ruchinsky v. French*, 168 Mass. 68.

Plaintiff was not negligent in jumping into a bin at the direction of a superintendent who assured him that it was all right. *O'Brien v. Nute-Hallett Co.*, 177 Mass. 422.

Command to perform an act is no excuse for failing to use care. *Meunier v. Chemical Paper Co.*, 180 Mass. 109.

Where an employé does not know what rate of speed of a grindstone is dangerous, he may rely upon the superintendent's statement in regard thereto. *Helpenstein v. Medart*, 136 Mo. 595.

Employé was negligent in obeying an order of a foreman, where he not only knew that the lumber piled on the dock was unsafe but was told by another vice-principal not to work there. *Soderstrom v. Holland & Co. Lumber Co.*, 114 Mich. 83.

Workman was justified in relying on the foreman's assurance of safety of a machine that could be inspected without taking it apart, which it was the foreman's duty to do. *Burnside v. Novelty Man. Co.*, 121 Mich. 115.

Where the danger of working in a trench was not obvious to a laborer, plaintiff was not negligent in working thereon under a foreman's directions. *Laporte v. Cook*, 21 R. I. 158.

Servant may obey an order without risk where the task is dangerous only when it calls for immediate action. *Electric R. Co. v. Lawson*, 101 Tenn. 406.

Louisiana &c. R. Co. v. Carstens, 19 Tex. Civ. App. 190; *Stucke v. New Orleans R. Co.*, 58 La. Ann. 188; *Millard v. West-End Street R. Co.*, 173 Mass. 512; *Chicago &c. R. Co. v. McCarty*, 49 Neb. 475.

Conductor was justified in relying on a construction of company's rule established by custom on the part of employés without objection on the part of the company. *Texas &c. R. Co. v. Johnson*, (Tex. Civ. App.) 34 S. W. Rep. 186.

That an order seems to a servant to be dangerous does not deprive him of the right to rely on the superior knowledge of the master. *Gulf &c. R. Co. v. Duvall*, 12 Tex. Civ. App. 349.

Larson v. Center Creek Min. Co., 71 Mo. App. 512.

Recovery denied where the car plaintiff was ordered to couple not only

had the usual mark "bad order" but he was expressly notified of its condition. *Gulf &c. R. Co. v. Mayo*, 14 Tex. Civ. App. 253.

Employé did not assume the risk in attempting to tie a bolt in a running machine as directed. *Greenville Oil & C. Co. v. Harkey*, 20 Tex. Civ. App. 225.

Order by a foreman to climb a pole held not to relieve a servant of the risk of negligence of fellow servants in improperly guying it. *Greene v. Western &c. Teleg. Co.*, 72 Fed. Rep. 250.

Section hand need not obey an order of a foreman to rescue hand car where it involves an obvious danger. *Wright v. Southern R. Co.*, 80 Fed. Rep. 260.

Whalley v. Macon &c. R. Co., 104 Ga. 764.

An employer's improperly timbering a mine and a miner's relying on foreman's implied assurance of safety held to present a question of negligence and contributory negligence for the jury. *Frank v. Bullion Beck &c. Co.*, 19 Utah, 35.

Deceased was not charged with a failure to put a "dead head" in a digester to stop the injection of steam gas, etc., before entering it, where his associate was ordered not to. *Hoadley v. International Paper Co.*, 72 Vt. 79.

Brakeman was not negligent in obeying a direction to couple by hand, where he believed it would be safe if he used extra care. *Norfolk &c. R. Co. v. Ampey*, 93 Va. 108.

Assurances of safety in response to communication of suspicions prevented assumption of risk. *Faulkner v. Mammoth Min. Co.*, 23 Utah, 437.

That a motorman was assured that a railroad track was seldom used does not excuse his crossing it without looking. *Goodrich v. Chippewa &c. R. Co.*, 108 Wis. 329.

(f). EFFECT OF CHOICE OF METHODS, MATERIALS, &C.

If the master has placed in the hands of the servant and under his control, an effectual method of protecting himself from injury, which would have saved him from harm, the master is not liable for such injury. *Bahn, as Administratrix v. N. Y. C. & H. R. R. Co.*, 80 Hun, 116.

Employé undertook to clean running machinery. He did so at his peril. *Graves v. Brewer*, 4 App. Div. 327.

Fitzhenry v. Lanison, 19 App. Div. 54.

Servant is negligent in choosing an obviously defective appliance instead of a good one. *Parento v. Taylor &c. Co.*, 26 App. Div. 518.

Henry Wrape Co. v. Huddleston, 66 Ark. 237.

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Yardman finding no "push stick" on the engine applied a timber found near by. Negligent. *Garrison v. McCullough*, 28 App. Div. 467.

While moving heavy girders plaintiff placed his iron bar in a dangerous, instead of a safe place. He was negligent. *Vincent v. Alden*, 45 App. Div. 627.

See, also, *Olsen v. Starin*, 43 App. Div. 422.

Servant assumes the risk in unnecessarily going to the assistance of another over a platform not intended for use while machinery is in motion and in spite of warnings. *Di Pietro v. Empire Portland Cement Co.*, 70 App. Div. 501.

Plaintiff's negligence in going over a trestle when he knew a hand car was due was for the jury. *Central &c. R. Co. v. Lamb*, 124 Ala. 172.

Electric car conductor was not negligent in standing between tracks in turning a switch instead of in a place of greater safety. *Gier v. Los Angeles &c. R. Co.*, 108 Cal. 129.

Employé took his own risk in requesting a fellow servant to give warning of the starting of an elevator. *Mann v. O'Sullivan*, 126 Cal. 61.

Master is exempt, where the servant provides his own tools or place to work. *Donovan v. Harlan & Hollingsworth Co.*, 2 Penn. (Del.) 190.

Brakeman was negligent where he picked up and used a manifestly insufficient appliance. *Maul v. Queen Anne's R. Co.*, 1 Penn. (Del.) 561.

Employé is not negligent *per se* because the method he selects is more dangerous than others where it is one universally adopted. *Florida &c. R. Co. v. Mooney*, 40 Fla. 17.

Employé is negligent in voluntarily adopting an obviously dangerous method instead of a safe one. *Walker v. Atlanta &c. R. Co.*, 103 Ga. 820.

Star Elevator Co. v. Carlson, 69 Ill. App. 212; *Gibson v. Burlington &c. R. Co.*, 107 Iowa, 596; *Atchison &c. R. Co. v. Tindall*, 57 Kan. 719; *Carrier v. Union P. R. Co.*, 61 id. 447.

Simply because it is easier. *Penwell v. Harvey*, 78 Ill. App. 278.

Employé was negligent in walking on a wooden guard rail, which he knew was unsafe instead of on the ties between. *Southern R. Co. v. Harbin*, 110 Ga. 808.

Brakeman was negligent in boarding a flat car in a dangerous manner, where proper facilities were provided. *Quirouet v. Alabama &c. R. Co.*, 111 Ga. 315.

Servant was not bound to adopt another method because an over cautious person would have chosen it. *Taylor v. Felsing*, 164 Ill. 331; aff'g s. c., 63 Ill. App. 624.

That good buckets were at hand did not make it negligent to use de-

fective ones actually in use. *Morton v. Zwierzykowski*, 192 Ill. 328; aff'g s. c., 91 Ill. App. 462.

Engineer not precluded by an error of judgment in adopting a mode of repair for a defective engine. *Illinois R. Co. v. Creighton*, 63 Ill. App. 165.

There is no excuse for not adopting such precautions as are known. *Lehman v. Bagley*, 82 Ill. App. 197.

Experienced boy of 19 was negligent in not waiting a moment for a safe passage instead of going past dangerous machinery. *Wabash Paper Co. v. Webb*, 146 Ind. 303.

That the platform of a freight car was the safest place available did not excuse riding there. *Coyle v. Pittsburg &c. R. Co.*, 155 Ind. 429.

Plaintiff was not precluded by taking a longer route than necessary where no danger was to be apprehended. *Lauter v. Duckworth*, 19 Ind. App. 535.

Where the rail is a light one it was not negligence to carry it on one's shoulder instead of on a hand car. *Atchison &c. R. Co. v. Vincent*, 56 Kan. 344.

That a flying switch is not the safest method in use does not make it negligent *per se*. *St. Louis &c. R. Co. v. French*, 56 Kan. 584.

Choosing a dangerous method prevents recovery. *Jenkins v. Maginnis Cotton Mills*, 51 La. Ann. 1011.

Salt Lake Gas & Electric Light Co., 19 Utah, 493.

Employé attempted to adjust a set screw without adopting precautions to insure safety. Recovery was denied. *Carrierre v. McWilliams*, 104 La. 678.

Granted that it is the employer's duty to furnish safe material to his employés, he would not be liable if an error in judgment on their part directly contributed to the injury; as where plaintiff used two blocks, insecurely fastened together, given him by his employer as a fulcrum for raising a heavy weight. *Robinson v. Blake Man. Co.*, 143 Mass. 528.

See *Duffy v. Upton*, 113 Mass. 544.

Where wooden lever broke and plaintiff's intestate was killed as a consequence, no recovery was allowed, because (1) no defect in the lever was proved to have existed, and (2) it was deceased's place as foreman to have provided sound tools. *Allen v. Smith Iron Co.*, 160 Mass. 557.

See *La Pierre v. Chicago &c. R. Co.*, 58 N. W. (Mich.) 60.

Servant was negligent in driving an ugly and vicious horse with an old and rotten harness, where there was a "good" new one in the stable. *Levesque v. Janson*, 165 Mass. 16.

Assistant on a baling machine takes his own chances in selecting

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material out of a pile provided for the work. *Maloney v. United States Rubber Co.*, 169 Mass. 347.

Unnecessarily riding in a dangerous place instead of a safe one precludes recovery. *Powers v. Boston &c. R. Co.*, 175 Mass. 466.

Posey v. Texas &c. R. Co., 102 Fed. Rep. 236.

Where the work is done in the usual manner, as directed it is not *per se* negligent because dangerous. *Burnside v. Novelty Man. Co.*, 121 Mich. 115.

Where proper materials are at hand employés take their chances in their selections, where defects may be seen. *Shanke v. United States Heater Co.*, 125 Mich. 346.

When servant selected obviously defective tool, although other tools in proper condition was furnished and available, and servant was injured, master was not liable. *Hefferen v. R. Co.*, 45 Minn. 471.

Rawley v. Collian, 90 Mich. 31.

Boy was not negligent *per se* in not using a scoop to clean out boot in a sand elevator where there was apparently no risk in using the hand. *Hess v. Adamant Man. Co.*, 66 Minn. 79.

Employé takes his own chances in walking in the dark over a tank on a tender, which he knows to be dangerous, instead of going where it was safe. *Chicago &c. R. Co. v. Cowles*, 54 Neb. 269.

Where one engaged to take down a building, exercises his own judgment as to how to perform the work the risk is his own. *Nourie v. Theobald*, 68 N. H. 564.

Plaintiff was not negligent in performing work in presence of foreman without appliances, superintendent told him to take. *Orr v. Southern Bell Teleph. &c. Co.*, 130 N. C. 627.

Deceased was himself negligent, where, instead of rejecting the defective car, as he had power to, he retained it in the train. *Cameron v. Great Northern R. Co.*, 8 N. D. 618.

Plaintiff was negligent in taking a dangerous passage between a car and a door where there was a safe one. *Collins v. Second Ave. T. Co.*, 7 Pa. Super. Ct. 318.

Method adopted was not negligent *per se* because there happened to be a safer one. *Houston &c. R. Co. v. Smith*, (Tex. Civ. App.) 39 S. W. Rep. 582.

Defendant was not liable for the negligent way a plank furnished was placed by plaintiff or a fellow servant. *Galveston &c. R. Co. v. Butchek*, (Tex. Civ. App.) 66 S. W. Rep. 335.

Risk of choosing sound blocks of wood with which to stop cars is not assumed, where they are so soiled as to make it difficult to tell and the

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circumstances require quickness of choice. *Lehigh Valley Coal Co. v. Wavrek*, 84 Fed. Rep. 866.

Fireman for his own convenience cleaned his engine before it was inspected. He did so at his own risk. *Patton v. Texas &c. R. Co.*, 179 U. S. 658.

So, where employé chose to clean windows by suspending himself on the outside by ropes. *Erskine v. Chino-Valley Beet-Sugar Co.*, 71 Fed. Rep. 270.

So, where engineer put his hand on the only dangerous part of a wheel. *McCain v. Chicago &c. R. Co.*, 76 Fed. Rep. 125.

Or where, plaintiff, instead of going back for a lantern, chose to grope in the dark along a passage he knew contained open hatches. *The Saratoga*, 87 Fed. Rep. 349.

Servant was negligent in failing to use the means at hand to make skids secure before unloading rails. *McKenna Steel Working Co. v. Lewis*, 111 Fed. Rep. 320.

Brakeman, without necessity, passed over a lumber car. He assumed the risk. *Harris v. Chesapeake &c. R. Co.*, (Va.) 23 S. E. Rep. 219.

A conductor attempted to make repairs while crossing a bridge instead of waiting till he passed it. His negligence was for the jury. *Norfolk &c. R. Co. v. Mann*, 99 Va. 180.

Employé was negligent in putting his arm under a sleeve in a machine, a dangerous position, instead of adopting a safe method of which he knew. *Rysdorp v. Pankratz Lumber Co.*, 95 Wis. 622.

(g). TRANSITORY DANGERS IN COURSE OF WORK.

Employé was not chargeable with notice of a defect in appliances he was not bound to repair. *Mayer v. Liebmann*, 16 App. Div. 54.

Where the defect in machinery which caused injury was one liable to appear at any time, and was obvious and easily remedied by the employé, he cannot shift the responsibility for its existence or the failure to remove it upon the master.

Plaintiff was injured while in the employ of defendant by having her hand drawn between the rollers of a mangle at which she was at work. The accident was caused by a wrinkle in the covering of the lower roller. It appeared that the machine itself was not dangerous, but that the covering of the roller became wrinkled from time to time, the remedy for which was to tighten the pressure, which was done by the employés, or, if the wrinkles were very large, by cutting off the stretched portion at the wrinkled place, which was done once or twice a week. Held, that the defect in question was a detail in the performance of the work, to remedy which was a portion of the servant's duty; that it was obvious

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and the risk thereof was one assumed by the plaintiff. *Walsh v. The Commercial Steam Laundry Co.*, 11 Misc. 3.

A miner charged with the duty of timbering up or pulling down loose rock passed under one which he had failed to see was safe. He could not recover for its falling on him. *Pioneer Min. &c. Co. v. Thomas*, 133 Ala. 279.

See, also, *Coosa Man. Co. v. Williams*, 133 Ala. 606.

Workman must see to the safety of such appliance they or their fellow servants construct for their own convenience in the prosecution of the work. *Donovan v. Harlan Hollingsworth Co.*, 2 Penn. (Del.) 190.

As where servant had entire charge of the shifting of a movable staging to a building. *Arnold v. Eastman &c. Heater Co.*, 176 Mass. 135.

Though the materials therefor are furnished by the master. *Lambert v. Missisquoi Pulp Co.*, 72 Vt. 278.

Engineer cannot complain of negligence in the breaking of an elbow in a water main, which he helped put in. *Alexander v. Pennsylvania Water Co.*, 201 Pa. St. 252.

(h). EFFECT OF ACTING IN AN EMERGENCY.

Servant was not negligent because he did not run in a safe direction, where a foreman failed to warn him of a tree's fall in time for him to escape. *Postal Teleg. Cable Co. v. Hulsey*, 115 Ala. 193.

Brakeman, hurt while coupling, in throwing himself forward, fell in a faint upon another track. Was not negligent. *Louisville &c. R. Co. v. Thornton*, 117 Ala. 274.

Where plaintiff was justified in apprehending danger and jumped he was not prevented from recovering because it turned out that he need not have done so. *St. Louis &c. R. Co. v. Tuohey*, 67 Ark. 209.

Reed v. Missouri &c. R. Co., (Mo. App.) 68 S. W. Rep. 364.

Where a brakeman, when injured, involuntarily let go his hand hold and placed his foot on a drawhead to save himself, he was held not negligent. *Baltimore &c. R. Co. v. Elliot*, 9 App. D. C. 341.

Fear produced by sudden danger may excuse disobedience of rules. That baggage master in imminent fear of collision jumped, against order of conductor, was not a defense. *Ga. &c. R. Co. v. Rhodes*, 56 Ga. 645.

Where an emergency is created by his own acts, a servant is not excused for imprudent action. *Quirouet v. Alabama &c. R. Co.*, 111 Ga. 315.

Plaintiff, a drayman assisting the conductor to push a freight car by hand, was directed by station agent to climb on car as quickly as he could to set brakes. Plaintiff knew car was higher and wider than

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ordinary cars, and went up the ladder without looking to see how near the car came to the roof of the station, and was hit by the roof. He was negligent and did not recover. *Platt v. Railroad Co.*, 84 Iowa, 694.

Magee v. Chicago &c. R. Co., 82 Iowa, 249; *Muldowney v. Ill. C. R. Co.*, 36 id. 462.

Engineer was not negligent *per se* in failing to jump on suddenly seeing a machine stuck on the crossing. *Atchison &c. R. Co. v. Henry*, 57 Kan. 154.

Plaintiff was negligent in jumping to avoid an injury which there was no reason to apprehend. *Ford v. Robinson-Pettett Co.*, (Ky.) 65 S. W. Rep. 793.

Allison v. Southern R. Co., 129 N. C. 336; *Baumler v. Narrangansett Brew. Co.*, (R. I.) 51 Atl. Rep. 203; *Atchison &c. R. Co. v. Van Belle*, (Tex. Civ. App.) 64 S. W. Rep. 397; *Gulf &c. R. Co. v. Knott*, 14 Tex. Civ. App. 158.

Employé was not negligent *per se* in running ahead of a train on a bridge instead of trying to climb down between the ties. *Olsen v. Andrews*, 168 Mass. 261.

Failure of an inexperienced hand to try and stop his hand car on seeing another rapidly approaching was not *per se* negligence. *Christianson v. Chicago &c. R. Co.*, 67 Minn. 94.

See, also, *Winczewski v. Winona &c. R. Co.*, 80 Minn. 245; *Omaha &c. R. Co. v. Krayenbuhl*, 48 Neb. 553.

Brakeman is not chargeable with an error of judgment due to excitement upon discovering a defect likely to cause injury. *Cincinnati &c. R. Co. v. Bradshaw*, 10 Oh. C. C. 645.

Higgins v. Williams, 114 Cal. 176.

Negligence will not be excused in the absence of any emergency calling for hasty action. *Sullivan v. Nicholson*, 21 R. I. 540.

Negligence will not be imputed where employé's failure to escape was due to fright upon discovering the sudden approach of a car. *Southern R. Co. v. Pugh*, 97 Tenn. 624.

Section hand was not negligent in jumping off ahead of his hand car on suddenly discovering a train, where he was passing a culvert at the side. *Houston &c. R. Co. v. Rodican*, 15 Tex. Civ. App. 556.

Servant was not negligent in attempting to protect his life and property by throwing off a box containing dynamite, which has caught fire. *Schwartz v. Shull*, 45 W. Va. 405.

(i). YOUTHFUL AND INEXPERIENCED SERVANTS.

If an infant, who is *sui juris*, know by experience or observation the

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nature of machinery and the danger to be apprehended from it, he cannot recover for injury upon the ground that the employer omitted to instruct him in the use of the machinery, although section 11, chap. 462, Laws 1887, amending chap. 409, Laws 1886, requires guards to be placed upon all gearing and belting in a factory, in which women and children are employed. Where an infant employé, knowing of the absence of the guards, voluntarily meddled with the machinery and was injured, the employer was not liable.

A boy of thirteen (13), employed in a safe place in a factory at the request of another employé, pulled out with one hand a lever to start the machinery, and placed the other hand on the cogs or wheels belonging to the machinery, and was injured. There were no guards or covering to the gearing and the plaintiff knew it; therefore the defendant was not liable. *White v. Witteman Lithographic Co.*, 131 N. Y. 631, aff'g 58 Hun, 381, and judg't for pl'ff.

Plaintiff, fifteen years of age, was engaged in the defendant's pulp factory in pushing, with a wooden pole, an iron pipe eight feet long and seven inches in diameter, over a series of vats discharging hot liquor into them. In doing this the whole weight of plaintiff's body rested on the pole, and while the plaintiff was standing upon certain pipes extending over these vats, his pole, the end of which had become spongy and saturated with the liquor, slipped, and he fell into a vat. The plaintiff assumed all the risk incident to his employment, except such as the defendant could, with reasonable care, protect him against, but he did not assume the risk, which his master should have protected him from, unless he was guilty of negligence in accepting the place of labor assigned to him, and it was for the jury to determine whether the risk of falling into the vat was not one for which the defendant was responsible. The fact, that the plaintiff knew, that the end of his pole had become soft did not, *per se*, constitute negligence. A youth of fifteen could not be expected to know, as well as his master, when appliances needed repair, and it was reasonable to have warned him in regard to the same. *Heavey v. Hudson R. Paper Co.*, 57 Hun, 339, rev'g judg't of nonsuit.

See, also, *Corning Steel Co. v. Pohlplotz*, (Ind. App.) 64 N. E. Rep. 476.

Employé, seventeen years of age, operating a freight elevator, stopped his elevator on an upper floor and went into a room through the door of the elevator well, which was but constructed with automatic fasteners, as required by section 8, chap. 462, Laws 1887; on returning he looked but did not see whether the elevator was there; turned around to speak to a person, and backed into the well, because the elevator was

not there, but had been loaded by defendant's engineer. Although the defendant was negligent, the plaintiff's negligence contributed to the injury. *Dieboldt v. U. S. Packing Co.*, 72 Hun, 403, rev'g judg't for pl'ff.

Ignorant boy of 14 at work only three days was not charged with notice of the danger of dipping heated spoons in turpentine. *Latorre v. Central S. Co.*, 9 App. Div. 145.

So, in case of a boy of 15, as to the danger of catching his sleeve in a pulley made of rags. *Dood v. Bell*, 15 App. Div. 258.

But a boy of 17 was charged with knowledge of the danger in greasing a cable revolving on a wheel. *Monzi v. Friedline*, 33 App. Div. 217.

Boy of 16 was negligent in going into obvious danger in passing between machinery and a post but 16 inches away. *Skendahl v. Hayes*, 10 App. Div. 487.

Girl of 14 was not negligent in failing to see the liability of cloth catching her hand and drawing it into the machinery, she was working at. *Fitzhenry v. Lamson*, 19 App. Div. 54.

Employer was not bound to anticipate that a child would molest machinery not connected with its duties or place of work. *Byrne v. Nye & Co.*, 46 App. Div. 479.

Boy of 15 was not *per se* charged with notice of the effect of the generation of electricity by rollers on paper he was directed to remove from them. *Wyman v. Orr*, 47 App. Div. 136.

Boy of 15, familiar with the machinery knew it would keep going as long as he kept his foot on the gearing lever. Danger was obvious. *Wahl v. Chatellon*, 56 App. Div. 554.

Work may be more dangerous to a boy than a man because of the instincts and dispositions incident to adolescence. *Marbury Lumber Co. v. Westbrook*, 121 Ala. 179.

Inexperienced servant of 19 pushed boards toward a saw with his hand instead of a stick as was the usual method of operation. His negligence was for the jury. *Mansfield v. Eagle Box & Co.*, 136 Cal. 622.

See, also, *Crocker v. Pacific Lounge & Co.*, (Wash.) 69 Pac. Rep. 359.

Where a boy of eleven years employed in a factory was injured by being caught in machinery which it was claimed ought to have been covered, the question of his capacity to understand the hazards was for the jury.

Every employer has a right to judge for himself how he will carry on his own business, and workmen having knowledge of the circumstances must judge for themselves whether they will enter the service. *Hayden v. Smithville Man. Co.*, 29 Conn. 548.

Priestly v. Fowler, 3 Mees. & Wels. 1; *Seymour v. Maddox*, 5 Eng. L. & Eq.

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265; *Williams v. Clough*, 3 Hurlst. & Norm. 258; *Mad River &c. Co. v. Barber*, 5 Ohio St. 541; *Coon v. Utica &c. R. Co.*, 6 Barb. 231; *Farwell v. Boston &c. R. Co.*, 4 Metc. 49; *Hayes v. Western R. Co.*, 3 Cush. 270; *Albro v. Agawam &c. Co.*, 6 id. 75.

Boy was negligent in allowing his attention to be diverted by passing girls while he was engaged at dangerous machinery. *Adams v. Clymer*, 1 Marv. (Del.) 80.

Where the duty, though beyond the scope of employment, is within the apparent scope of authority of the party ordering it a young and inexperienced servant is not *per se* negligent in obeying. *Camp v. Hall*, 39 Fla. 535.

To charge a minor with negligence which will defeat his recovery for master's negligence in providing defective machinery, he must have had equal opportunity with the master of discovering the defect, taking into consideration his age and ability. *Manchester Man. Co. v. Polk*, 115 Ga. 542.

See *Boyd v. Blumenthal*, (Del.) 52 Atl. Rep. 330.

Where minor would not have been injured had he used the care due from one of his age he cannot recover. *Roberts v. Porter Man. Co.*, 110 Ga. 474.

Morewood Co. v. Smith, 25 Ind. App. 264.

Though of full discretion and judgment, a minor was not held, without warnings, to assume the risk of putting a belt upon a pulley near running circular saws to which he is not accustomed. *Nelson Man. Co. v. Stoltzenburg*, 59 Ill. App. 628.

Larson v. Knapp &c. Co., 98 Wis. 178.

An ordinary laborer directed to assist in raising an iron tank by means of a tackle did not assume the risk of the beam supporting it, breaking, causing the tackle to fall and throw him to the ground where he was unaccustomed to the use thereof. *Fraser v. Collier*, 75 Ill. App. 194.

Misrepresentation as to age is no excuse to the employer for being negligent. *Chicago &c. R. Co. v. Pettigrew*, 82 Ill. App. 33.

Boy of nineteen, in wiping machinery, caught his hand in cog-wheels. Both parties had equal knowledge of the danger, and plaintiff did not recover.

Contributory negligence of a minor will defeat his right to recover for an injury precisely as in the case of an adult. (*Chicago &c. R. Co. v. Harney*, 28 Ind. 28; *Umback v. Lake Shore &c. R. Co.*, 83 id. 191; *Brazil &c. Co. v. Cain*, 98 id. 282). *Atlas Engine Works v. Randall*, 100 Ind. 293.

Distinguishing Hill v. Gust, 55 Ind. 45; *Coombs v. New Bedford R. Co.*, 102 Mass. 572, following *Shanny v. Androscoggin Mills*, 66 Me. 420.

Rule that servant assumes the risk of employment does not embrace risks of which by reason of immaturity and inexperience he is ignorant, as the employer knows, or by his exercise of reasonable care might have known beforehand; nor such as the latter knows that an inexperienced servant cannot appreciate or avoid without instructions or warning. *Louisville &c. R. Co. v. Frawley*, 110 Ind. 18.

An inexperienced electric light "trimmer," held not chargeable with notice of the defectiveness of climbing spurs not obvious to an experienced person. *Indiana Natural &c. Co. v. Marshall*, 22 Ind. App. 121.

Unless it can be said that the work involves only the exercise of ordinary skill and judgment an inexperienced servant is not chargeable as to the safety or suitability of the appliances or place of work furnished. *Anderson v. Illinois Central R. Co.*, 109 Iowa, 524.

Master not liable to boy of 16 voluntarily oiling machine after warning of danger. *Floyd v. Kentucky Lumber Co.*, (Ky.) 66 S. W. Rep. 501.

See, also, *Cleveland &c. R. Co. v. Carr*, 95 Ill. App. 576; *Green v. Brainerd*, 85 Minn. 318.

No recovery where a boy of 14 officiously meddled with machinery. *Daly v. Haller Man. Co.*, 48 La. Ann. 214.

A new conductor was not chargeable with negligence in failing to notice that a single pole on a line was closer to the car than others. *Pikesville &c. R. Co. v. State*, 88 Md. 563.

An inexperienced hand was not negligent in making a second attempt after a request for instruction was refused. *Bjbjian v. Woonsocket Rubber Co.*, 164 Mass. 214.

A girl of near fifteen was negligent in allowing a box on a machine to strike her, where she was familiar with its movements. *Gardner v. Cohanet Mills*, 165 Mass. 507.

Foreman's statement that it was unnecessary to use a split stick to feed paper between revolving cylinders was not an assurance to a boy of fifteen that there was no danger to avoid in using his hands. *Lowcock v. Franklin Paper Co.*, 169 Mass. 313.

A bright boy of 17 assumed the risk of getting his hand caught in a roller. The danger was obvious and not complicated. *O'Connor v. Whittall*, 169 Mass. 563.

McCarthy v. Mulgrew, 107 Iowa, 76; *Gref v. Brown*, 7 Kan. App. 394.

A boy used to riding horses assumed the risk of a possible defect in a

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stirrup strap, upon being satisfied by the result of a test. *Davis v. Forbes*, 171 Mass. 548.

See, also, *Smith v. King*, 77 N. Y. Supp. 3.

An inexperienced servant who did not know of the danger of explosion in removing dynamite from a charge with a spoon was not negligent in remaining in its vicinity. *Grimaldi v. Lane*, 177 Mass. 565.

Boy of twelve and one-half, aware of the danger, not allowed to recover for falling into the cogs of a machine in plain sight during a scuffle with another boy. Violation of statute forbidding the employment of boys under 14 without the permission of their parents, did not aid him. *Borck v. Michigan &c. Works*, 111 Mich. 129.

No recovery had where deceased, a bright boy of 15 was not required to go near a dangerous shaft, but was expressly told to keep away. *Monforton v. Detroit Pressed Brick Co.*, 113 Mich. 39.

Where a saw revolved so rapidly as to make its teeth invisible, an inexperienced boy of 15 was not charged with negligence in allowing his hand to come in contact therewith. *Barg v. Bousfield*, 65 Minn. 355.

An inexperienced employé not knowing of the necessity of having a carriage attachment to a "bolting saw," did not assume the risk in using it for three weeks without it. *Olmscheid v. Nelson-Tenney Lumber Co.*, 66 Minn. 61.

An inexperienced hand was not negligent in attempting to adjust a defective hood over the blower of a machine. His clothing was caught by being sucked in. *Jaroszeski v. Osgood &c. Man. Co.*, 80 Minn. 393.

Danger of working near a revolving shaft without removing clothing liable to catch thereon held apparent even to the inexperienced. *Norfolk Beet-Sugar Co. v. Preuner*, 55 Neb. 656.

Where one's experience was not sufficient to enable him to appreciate the danger in trying to push an old and worn-out belt on a defective driving pulley, or warrant the master in thinking he did, did not assume the risk. *Demars v. Glen Man. Co.*, 67 N. H. 404.

Minors are chargeable with the risk of such dangers as their youth and inexperience may permit them to comprehend from observation and instruction. *Carrington v. Mueller*, 65 N. J. L. 244.

See, also, *Alabama M. R. Co. v. Marcus*, 115 Ala. 389; *Nelson Man. Co. v. Stoltzenburgh*, 59 Ill. App. 628; *Chicago &c. R. Co. v. Eggman*, 59 Ill. App. 680; *Youll v. Sioux City R. Co.*, 66 Iowa, 349; *Curran v. Merchants' Man. Co.*, 130 Mass. 374; *Houston &c. R. Co. v. Miller*, 51 Tex. 270; *Carrierre v. R. McWilliams*, 104 La. 678; *Omaha Bottling Co. v. Theiler*, 59 Neb. 257; *Dunn v. McNamee*, 59 N. J. L. 498; *Sheetram v. Trexler Stave & Lumber Co.*, 13 Pa. Super. Ct. 219; *Fick v. Johnson*, id. 378; *Bonnet v. Galveston &c. R. Co.*, 89 Tex. 72.

Minor representing himself to be of age is only entitled to the care

due such servants. *Lake Shore &c. R. Co. v. Baldwin*, 10 Oh. C. D. 333.

Where a boy of seventeen was set to cleaning a woolen mule, an occupation dangerous to an adult, the question whether boy had received proper instructions was for the jury.

That a servant is a minor is not material, unless the occupation be dangerous. If boy obeyed order from fear to disobey, or because he thought the foreman knew better, he may recover. *Tagg v. McGeorge*, 155 Penn. St. 368.

Distinguishing *Zurn v. Tetlow*, 134 Penn. 213; *O'Keefe v. Thom.* 24 N. W. 379; *Chopin v. Badger Paper Co.*, 83 Wis. 192; *Kehler v. Schwenk*, 151 Penn. St. 505, where boy of fourteen, physically weak, was ordered to do work and objected and went reluctantly and without instruction, the master took the risk in this case to drive a dump car, which was a dangerous employment, following *Rummel v. Dilworth*, 131 Pa. St. 509.

The risk incident to stepping upon grating over machinery was obvious to a boy who knew the conditions surrounding him so as to impose on him the assumption of risk in so doing. *Wojciechowski v. Spreckles' Sugar Ref. Co.*, 177 Pa. St. 57.

Boy of 17 with five months' service was sufficiently experienced to know the danger of trying to remove a piece of flesh from a machine without stopping it. *Betz v. Winter*, 195 Pa. St. 346.

Boy of 20, held chargeable with the obvious danger of catching his coat in a projecting set screw on the collar of a revolving shaft. *Dillman v. Hamilton*, 14 Mont. Co. L. Rep. 92.

Choice by reason of youth and inexperience of the more dangerous of two methods does not *per se* impose the assumption of risk thereof. *Sheetram v. Trexler Stave &c. Co.*, 13 Pa. Super. Ct. 219.

A father consenting to his son's employment in a dangerous business cannot complain of his death due to his unfitness to work at it. *Missouri &c. R. Co. v. Evans*, 16 Tex. Civ. App. 68.

Where an inexperienced minor was suddenly called to perform an act of danger without time to consider, he did not assume the risk. *Waxahachie Cotton Oil Co. v. McLain*, (Tex. Civ. App.) 66 S. W. Rep. 226.

Inexperienced hand did not assume the risk of starting machinery as he had seen others do in the absence of instructions or warnings of the dangers involved. *Gulf &c. R. Co. v. Newman*, (Tex. Civ. App.) 64 S. W. Rep. 790.

A boy of 15 was charged with risk of danger from unprotected cog wheels on a machine he was employed to feed. *Higgins Carpet Co. v. O'Keefe*, 79 Fed. Rep. 900.

Inexperienced servant held not to have assumed the ordinary risks of

CONTRIBUTORY NEGLIGENCE NO DEFENSE TO WANTON OR WILLFUL NEGLIGENCE. a dangerous occupation he had represented himself to be competent in, where master had actual knowledge to the contrary and failed to warn or instruct him. *Louisville &c. R. Co. v. Miller*, 104 Fed. Rep. 124; *Felton v. Girardy*, id. 127.

Age and experience are elements of consideration in determining contributory negligence. *Hill v. Southern P. Co.*, 23 Utah, 94.

A child does not by consenting to undertake a dangerous occupation, assume the risks thereof where he is, by reason of his immaturity, incapable of discriminating promptly as to the work required of him. *Hayes v. Colchester Mills*, 69 Vt. 1.

See, also, *Foley v. California Horseshoe Co.*, 115 Cal. 184; *Galveston &c. R. Co. v. Hitzfelder*, (Tex. Civ. App.) 66 S. W. Rep. 707.

An ordinarily intelligent girl of 16 held to have enough sense to appreciate the danger of continuing in service in a kitchen where the boards covering a steam pipe slant upwards to a point five inches above the floor. *Herold v. Pfister*, 92 Wis. 417.

Otherwise as to a boy of 16, held as to the danger of oiling the gearing of machinery in motion at night surrounded by shadow and almost beyond his reach, where his ordinary duties had been confined to times when the machinery was not in motion. *Kucera v. Merrill Lumber Co.*, 91 Wis. 637.

Fan was protected by a wire screen and servant's duties did not require him to go near the opening through which he put his hand. Lad of 18, with two years' experience in the work, denied recovery for injury from it. *Schiefelbein v. Badger Paper Co.*, 101 Wis. 402.

Boy of 17 with two years' experience and knowing that a cable might become dangerous was negligent in turning his back to it in spite of warnings. *Youngbluth v. Stephens*, 104 Wis. 343.

(j). CONTRIBUTORY NEGLIGENCE NOT A DEFENSE TO WANTON OR WILLFUL NEGLIGENCE.

Defendant cannot set up deceased's negligence where it was itself willfully negligent. *Wabash R. Co. v. Zerwick*, 74 Ill. App. 670.

Louisville &c. R. Co. v. York, 128 Ala. 305.

Contributory negligence is a complete defense in the absence of willfulness by master. *Chicago &c. R. Co. v. Myers*, 95 Ill. App. 578.

Where deceased, knowing of defendant's gross or wanton negligent practices, puts himself within reach of it, recovery is barred. *Beal v. Atchison &c. R. Co.*, 62 Kan. 250.

Failure to furnish modern appliance for safety (safety couplers)

MODIFICATION OF THE RULE BY CONTRACT.

renders defendant liable whether plaintiff is contributorily negligent or not. *Troxler v. Southern R. Co.*, 124 N. C. 189.

Contributory negligence was no defense, where defendant, could notwithstanding by the exercise of ordinary care, have detected his peril and prevented injury. *Snyder v. Cleveland &c. R. Co.*, 60 Oh. St. 487.

Ft. Worth &c. R. Co. v. Bowen, (Tex.) 67 S. W. Rep. 408.

Contributory negligence was no defense where defendant's negligence arose after discovering his peril. *White v. Houston &c. R. Co.*, (Tex. Civ. App.) 46 S. W. Rep. 382.

(k). MODIFICATION OF THE RULE BY CONTRACT.

A brakeman was killed while trying to set a brake, four out of six of the spokes of which were broken at the time of the accident. The defendant had experts to examine the machinery, and it did not appear that the deceased knew anything about machinery, and there was evidence that the defect was not easily discernible. The deceased had, upon being employed, signed an agreement that before using a car he would examine it to ascertain its condition and soundness; that he would be allowed sufficient time to do this and he might refuse to obey an order which would expose him to danger. It was held that the brakeman's duty was to be vigilant to discover defects in machinery and to refrain from using such as he knew were defective; that the agreement was not sufficient to constitute a defence to the corporation. The question of the deceased's negligence was properly submitted to the jury. *Pratt v. L. S. & M. C. R. Co.*, 63 Hun, 616, aff'g judg't for pl'ff.

Railroad may by rule require trainmen to inspect their own cars. *Joyce v. Rome, &c. R. Co.*, 92 Hun, 107.

Or require a number clerk in a switch yard to keep out of the way of the switch crew. *East St. Louis &c. R. Co.*, v. *O'Hare*, 59 Ill. App. 649.

That a brakeman has agreed to make examination for his own safety does not require him to examine cars in the dark, which he is justified in believing have already been examined. *Lake Shore &c. R. Co. v. Ryan*, 70 Ill. App. 45.

Assumption of the risks of an express business embraces the risks incident to railroad carriage, imposed by the railroad company on the express company. *Pittsburg &c. R. Co. v. Mahoney*, 148 Ind. 196.

Where there is a rule of the company imposing the duty of inspection on brakeman they must obey it. *Pittsburg &c. R. Co. v. Ackworth*, 10 Oh. C. C. 583.

Master cannot exempt itself from its duty to furnish proper materials

PROXIMATE CAUSE.

by compelling servants to select suitable material from a lot furnished. *McDonald v. Postal Tel. Co.*, 22 R. I. 131.

Master cannot by contract shift its duty of furnishing safe appliances, upon the servant. *Missouri &c. R. Co. v. Wood*, (Tex. Civ. App.) 35 S. W. Rep. 879.

(1). PROXIMATE CAUSE.

Contributory negligence is no defense where the same result would have happened without it. *Kuhn v. Delaware &c. R. Co.*, 92 Hun, 74.

To prevent recovery employé's negligence must contribute to his injury. *Southern R. Co. v. Baston*, 99 Ga. 798.

Hamby v. Union Paper-Mills Co., 110 Ga. 1.

A shock which operated on heart disease to cause death was the proximate cause thereof. *O'Fallon Coal Co. v. Laquet*, 89 Ill. App. 13.

Plaintiff repairing skylight put too much pressure on frame while in dangerous position. He was not allowed to recover. *Saunders v. Eastern &c. Brick Co.*, 63 N. J. L. 554.

Plaintiff injured by short circuit while in contact with wire was not presumed to be in the exercise of due care. *Judge v. Narraganset &c. Lighting Co.*, 21 R. I. 128.

Though a fellow servant was negligent in leaving a hammer lying where it might be struck by a passing train, failure of the foreman charged with duty of cleaning track, to see and remove it was the proximate cause of injury. *Texas &c. R. Co. v. Carlin*, 111 Fed. Rep. 777.

Switchman's attempt to couple cars, notwithstanding his knowledge that they were negligently loaded, did not contribute to the injury. *Houston &c. R. Co. v. Kelley*, 13 Tex. Civ. App. 125.

IX. Injury to Servant by Third Person.

A switch tender, employed by defendant, a railroad company, on a portion of its track upon which it permits another company to run trains, is not a servant of the latter; and an engineer of the latter, injured by the negligence of such switch-tender, may maintain an action against the switch-tender's employer.

The engineer was as much a stranger to the defendant as any passenger on the train run by him, and entitled equally to protection against the negligence of the defendant or its servants. *Smith v. N. Y. & Harlem R. Co.*, 19 N. Y. 127, aff'g judg't for pl'ff.

The plaintiff was hired by the master of a barge, employed to lighten a ship, and was hurt by the negligence of one, on the ship, discharging

the cargo. The answer admitted that the defendant owned and controlled the ship. The defendant was liable. *Svenson v. A. M. S. Co.*, 57 N. Y. 108, aff'g judg't for pl'ff.

"A. & S. Co." owned the track which the defendant crossed with its track, under an agreement that the first company should have the right of way, and the defendant should stop before crossing. "L." was the depot agent of "A. & S.," and operator and flagman of the defendant.

The defendant's train slowed up for crossing, and "L." waved it on with a white flag; it moved on and collided at the crossing with "A. & S." train which "L." had discovered and given the red signal, but which, if seen, was disregarded. The engineer of "A & S." train was killed. In an action for his death it was held, that the question of the defendant's negligence and the deceased person's contributory negligence were for the jury, and that "L." was the defendant's servant.

Held, that the defendant's rules were evidence of its negligence. *Wood v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 195, aff'g judg't for pl'ff.

A tub attached to a derrick, used to discharge a cargo from a boat into the defendant's cars, fell and injured plaintiff. The pier and railroad track, over which the defendant ran its cars, were owned by other parties, and the loading and unloading of cars was carried on by other parties. Defendant was not liable. *Derrenbacher v. Lehigh Valley R. Co.*, 87 N. Y. 636, rev'g 21 Hun, 612, and judg't for pl'ff.

An ashman, a servant of the Erie Co., was injured by servants of the defendant, while the latter was using the turn table of the Erie Co. The ashman and the defendant's servants were not co-servants, and the defendant was liable. *Sullivan v. Tioga R. Co.*, 112 N. Y. 641, aff'g 44 Hun, 304 and judg't for pl'ff.

Johnson v. Netherlands Am. Steam Nav. Co., 132 N. Y. 576, aff'g judg't for pl'ff. See "Agency," when principal is liable for the negligence of his agent.

The plaintiff, in the employ of R. & W. Co., was repairing cars on his master's track and put out a flag on a car to protect himself. The defendant's servant sent a car down upon the track unattended and injured him. The defendant was liable. *Murphy v. N. Y. C. & H. R. R. Co.*, 118 N. Y. 527; 44 Hun, 242.

The plaintiff, the servant of a stevedore, was aiding in loading a ship from the store house of defendants. The servant negligently managed the hoisting apparatus and the plaintiff was hurt. The defendant's liability was upheld. *Sanford v. Standard Oil Co.*, 118 N. Y. 571, aff'g judg't for pl'ff.

Citing with approval *Sullivan v. Tioga R. Co.*, 44 Hun, 304, aff'd 112 N. Y. 643.

Although it is the duty of consignees to unload a vessel, yet, if by cus-

tom, the captain handles the guy rope negligently or confides it to another, who is negligent in its use, so that a stevedore is injured, the owner of the boat is liable. *Kilroy v. D. & H. C. Co.*, 121 N. Y. 22, aff'g 21 J. & S. 138, and judg't for pl'ff.

The conductor of a car recovered against the owner of a truck for injuries received in a collision between the car and the truck, although the driver of the car was negligent. *Seaman v. Koehler*, 122 N. Y. 646, aff'g judg't for pl'ff.

Employé of a company, whose tracks are used by another company, may presume that the latter will conform to the rules of the first company. *Roll v. Northern Cent. R. Co.*, 15 Hun, 496, aff'g judg't for pl'ff.

Pilot of a tug boat was injured in a collision with the defendant's boat. He was not affected by the negligence of the employés of the tug; but owner of tug would have been. *Perry v. Lansing*, 17 Hun, 34, aff'g judg't for pl'ff.

From opinion.—"In the *Arctic Ins. Co. v. Austin*, 69 N. Y. 470, it is held that the owner of a cargo in a canal boat, being transported for hire by a carrier, cannot recover against a third party for loss occasioned by his act, where the carrier is guilty of contributory negligence. The reason given for this decision plainly distinguishes it from cases of injury to innocent third persons, as to whom no opinion is expressed. In *Robinson v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 11, a female sustains an action against the defendant for an injury caused by its negligence, though the person with whom she rides by invitation was guilty of contributory negligence. The negligence of the driver is not imputed to the passenger. To the same effect are *Chapman v. New Haven R. Co.*, 19 N. Y. 341; *Webster v. H. R. R. Co.*, 38 id. 260; *Colegrove v. New Haven and N. Y. & H. R. R. Co.*, 20 id. 492; *Metcalf v. Baker*, 11 Abb. N. S. 431; affirmed in Com. of Ap., Apl. 1874, 57 N. Y. 662. An intimation to the contrary, in *Brown v. N. Y. C. R. Co.*, 32 id. 602, is *obiter* and explained in *Robinson v. N. Y. C. & H. R. R. Co.*, *supra*. The Case of *Armstrong v. Lancashire & C. R. R. Co.*, 12 Eng. Rep. (Moak's) 508; Law Rep. 10 Ex. 47, is decided on the authority of *Thorogood v. Bryan*, 8 C. B. 115. But this latter case is questioned in its important aspect in *Webster v. H. R. R. Co.*, and in *Chapman v. N. H. & C. supra*; *Sher. & Red. on Neg. sec. 46, n. 5*. So far as *Armstrong's Case* conflicts with our own authorities above cited we cannot follow it. After all it was in effect decided that the defendant in that case was not guilty of negligence upon which the action could be sustained."

From dissenting opinion.—"The court ruled in effect that negligence on the part of the crew of the *Bliss*, other than the personal negligence of the plaintiff himself, or of *Sickles*, whom he put in charge of the helm, would not defeat the plaintiff's action; so in furtherance of this ruling the jury were instructed, in effect, that a different rule of law would control the case from what would prevail, if the action were brought by the owners of the *Bliss* to recover for injuries to the vessel growing out of the collision, and the learned judge added, in substance, that in such case the owners would probably be responsible for any negligence on the part of those having the *Bliss* in charge. The ruling that negligence on the part of those in charge of the *Bliss*, other

than the plaintiff and Sickles, would not defeat the plaintiff's action, although contributing to the injury, is challenged as erroneous. Had the plaintiff been a mere passenger on the Bliss the ruling would be vindicated by numerous decisions. *Chapman v. The New Haven R. Co.*, 19 N. Y. 341; *Colgrove v. The N. Y. & N. H., and N. Y. & Hartf. R. Co.*, 20 id. 492; *Webster v. H. R. R. Co.*, 38 id. 260; *Barrett v. Third Ave. R. Co.*, 45 id. 628. There are other cases of similar report with those cited. The decision in *Mooney v. H. R. R. Co.*, (28 N. Y. Supr. C. R. [5 Rob.] 548), is doubtless unsound. There have been cases holding that passengers on a stage coach could not recover for an injury resulting from the negligence of a third party, in case the negligence of the driver of the coach contributed to the injury. It was so ruled at the circuit in *Brown v. N. Y. C. R. Co.*, 32 N. Y. 597, 601; but the point was taken from the case by the finding of the jury that there was no negligence imputable to either the plaintiff or the driver of the coach. The question was somewhat discussed by Davis, J., in this case, and he remarked that he could see no difference whatever between the case of a passenger by a stage coach and a passenger on a train of cars. It was then added, however, quite significantly, that a majority of the judges were of the opinion that the true rule in the case of a passenger by stage coach was laid down at the circuit in that case. The opinion, I think, has not yet been adopted as settled law. In speaking of this case, Church, C. J., remarked in *Robinson v. N. Y. C. & H. R. Co.*, 66 N. Y. 11, that the opinion said to have been expressed in *Brown's Case*, *supra*, had not the weight of authority. The principle recognized and adopted in the *Robinson* case seems in hostility to such opinion. The decision in *Beck v. East River Ferry Co.*, 29 N. Y. Supr. Ct. R. (6 Rob.) 82, was vindicated on the ground that the plaintiff, with others in the boat, were engaged in a joint enterprise, and therefore he was responsible for the negligence of his associates. In *Massoth v. The D. & H. C. Co.*, 64 N. Y. 524, the plaintiff's intestate was riding on a load of hay with his employer Smith at the time of the injury. In referring to the point under consideration, Allen, J., remarked, page 529: 'Were it necessary to pass upon the question, I should hesitate, as did the learned justice upon the trial, in holding that the consequences of Smith's negligence could be visited upon the plaintiff and defeat the action.' The case of *Dyer v. The Erie R. Co.*, 5 W. D. 430, recently decided in the court of appeals, seems precisely that of the *Robinson Case*, *supra*. The syllabus in *Dyer's Case* is this: That where the plaintiff was injured while riding in a wagon by permission of the owner, who was driving, negligence of such owner is no bar to an action for the injury. See, also, *Metcalf v. Baker*, 34 N. Y. Supr. Ct. R. (2 J. & S.) 10, 12, *Knapp v. Dagg*, 18 How. 165; *per contra*, *Payne v. C., R. I. & P. R. Co.*, 39 Iowa 523. In this connection, mention should be made of the case of *Armstrong v. The Lancashire & Yorkshire Ry. Co.*, 10 Eq. 47; also reported in 12 Eng. Eq. Rep. (Moak's Notes), 508. In this case the plaintiff was a traveling inspector of the carriage and wagon department of the London & Northwestern Railway Company, and was traveling on a pass from this company in one of its cars, when a collision occurred between the train in which he was riding and some loaded wagons in motion on defendant's road. The jury found that the accident was caused by the joint negligence of the two companies. It was held that the plaintiff was so far identified with the company carrying him that he could not recover. This decision was based on the case of *Thorogood v. Bryan*, 8 Com. Bench Rep. 115, which case has been greatly criticised, and which it is quite possible may be ultimately over-

ruled in our own courts; in which case it will carry with it *Armstrong's Case*. Without special examination of these cases here, or attempting to collate them with the decisions in our own State, it will suffice to say that if sound they are favorable to the defendant in this case, if not decisive of the question under examination. But it seems that the question before us may be determined without the benefit of those cases."

See "Contributory Negligence of Third Persons," *ante*, p. 722.

Intestate was unloading gravel from defendant's cars in charge of a person, who signaled the engine to back the train, whereby the deceased was thrown from the car and killed. Plaintiff offered to prove that the defendant was negligent in not having adopted proper system for warning employes of intended movement of cars; improperly rejected. *Campbell v. N. Y. C. & H. R. R. Co.*, 35 Hun, 506, rev'g nonsuit.

The defendant was employed to hoist a cargo of sugar from a ship and lower it into a lighter, when the lighter crew received it. One bag was so negligently secured on the hoisting apparatus that it slipped, and falling on the defendant employed by the lighter, injured him. Defendant liable. *Giese v. Hall*, 37 Hun, 440, aff'g judg't for pl'ff.

Defendant furnished cars of coal to another railway company to be transported over its road by its servants, etc. Brakeman of latter company was injured by the breaking of a brake rod. Defendant owed him no duty. The car upon which the plaintiff was working at the time of the accident was operated and run by the defendant, and had been delivered, with thirteen others, to the New York & Oswego Company under an agreement by which the latter undertook and agreed to transport over its road and branches the coal of the defendant at a stipulated price per ton per mile, and upon the further consideration of receiving a certain portion of the net proceeds of the coal.

Held, that the agreement did not make the two roads liable as partners, but that the New York & Oswego road was simply employed by the defendant to transport its coal, and that as there was no privity of contract between the plaintiff and the defendant, the latter owed him no duty and was not liable for the injury he had sustained. Plaintiff knew about the road and the manner of its construction. He took the risk. *Wright v. Prest. D. & H. C. Co.*, 40 Hun, 343, aff'g nonsuit.

Plaintiff, passenger on N. J. & N. Y. Co.'s train, running over the defendant's track, was injured by the defendant's switch, which the defendant assumed to keep in repair and maintain, the first company contributing to the expenses of a switchman. It was the duty of the defendant to keep the switch in repair as regards the plaintiff. Defective switch was dangerous to human life. Evidence of switchman having at some former time committed error at the switch was regarded as not harmful. *Stodder v. N. Y., L. E. & W. R. Co.*, 50 Hun, 221, aff'g judg't for pl'ff.

Defendant's buildings were on either side of a railroad track and connected by a bridge passing over same. A brakeman, newly engaged, was, without his fault, struck by it; it was erected and enlarged by the railroad's consent; it had not been, although ordered to be, removed by the railroad company. Held,

(1). That it was a nuisance;

(2). That the consent of the railroad company to erect it was no defence to the action, and the fact that the railway company did not own the land was no defence. *Dukes v. Eastern Distilling Co.*, 51 Hun, 605, aff'g judg't for pl'ff.

Defendant contracted to build for plaintiff a station platform for its elevated railway, and "to assume all liability and to indemnify the company against all loss, costs, or damage, etc., arising from injuries sustained by mechanics, laborers or other parties by reason of accidents or otherwise." A laborer, while in the employ of contractor, was injured by company's engine and received \$1,000 therefrom from the railway company. Stipulation did not impose upon contractor obligation to protect plaintiff against negligence of company's employes and no recovery was allowed against the contractor. *M. R. Co. v. Cornell*, 54 Hun, 292, ordering judg't for def't.

An employé of coal dealers while, by their direction, climbing upon a platform of a car to see how much coal there was left in it, was injured by the defendant's bringing other cars in contact with such car without knowledge of the plaintiff's presence. The railroad company owed him no duty the failure of which caused the accident. No negligence of defendant was shown. It seems that the plaintiff was not doing any act connected with the unloading. *Murphy v. N. Y., L. E. & W. R. Co.*, 62 Hun, 587, rev'g judg't for pl'ff.

Distinguishing *Barton v. N. Y. Cent. R. Co.*, 1 T. & C. 297, aff'd, 56 N. Y. 660; *Newson v. N. Y. Cent. R. Co.*, 29 N. Y. 83; *Stinson v. Same*, 32 N. Y. 333.

Plaintiff's intestate, in the employ of a contractor with the Delaware & Hudson Canal Company, while shoveling coal upon one of defendant's cars into a bucket on the Canal company's trestle, was killed by another of defendant's cars running into the place where he was. The defendant's car could not be stopped on account of a defective brake. The car had been inspected, but the defect was of such character to indicate that such inspection was negligent. *Kowalewska v. New York, Lake Erie & Western R. Co.*, 72 Hun, 611; aff'g judg't for pl'ff.

When, in an action brought by an employé of the owner of an elevator to recover from a railroad company the damages resulting from a personal injury alleged to have been caused by the defendant's negligence, the evidence justifies the jury in finding that the plaintiff received from

the defendant's brakeman, apparently in charge of the train, cars consigned to his employer, and that while the plaintiff was lawfully engaged in moving the cars for unloading, having told the brakeman that he would do so, the defendant backed its train down upon him without any signal or warning, the question of the defendant's negligence should be submitted to the jury.

When, in such an action, it appears that the plaintiff had notified the defendant's servant in charge of the train of his intention to move the detached car, it cannot be said, as a legal conclusion, that the plaintiff under the circumstances was bound to watch for trains backing up against the car where he was at work, or that it was negligence not to anticipate the approach of the train which injured him. *Conlan v. The New York Central & Hudson River Railroad Co.*, 74 Hun, 115.

Where a contractor, being short of laborers, borrows a gang of men from a third party, and under the orders of the foreman of such third party one of such laborers is put in a dangerous place where he receives injuries, an action to recover the damages resulting therefrom is maintainable against the contractor and also against the third party. *Rook v. New Jersey & Pennsylvania Concentrating Works*, 76 Hun, 54.

The tracks of the defendant extend to a wharf and down onto a floating bridge, which rises and falls with the tide. On this bridge the defendant stationed an employé, to hand the hawser to an incoming float for the purpose of having the float drawn to the bridge. The float was held in position so that the tracks upon it would connect with the tracks on the bridge by four steel keys, about seven feet long, permanently attached to the bridge, and which were run out onto the float when the latter was drawn into position, and into boxes or grooves on its deck. When the barge was ready to leave the keys were shoved upon the bridge until another float came.

The plaintiff was a floatman on the float of another company which went to the bridge of the defendant, but found another float lying alongside of the bridge. It became necessary to pull the other float away. This was done. The plaintiff, whose duty it was to receive the hawser on the side of his float, took his position for that purpose, and, as the float approached the bridge, one of the steel keys, which had not been drawn back when the other float was pulled from the bridge, struck him, breaking one of his legs.

It was evening, and testimony was conflicting as to whether the lights on the bridge were sufficient to enable the plaintiff to see.

Floats were in the habit of approaching the bridge at all hours of the day and night, and the bridge was always manned for them, and it was not an unusual thing for an incoming float to remove one at the wharf.

Defendant's bridgeman stood with the hawser in his hand ready to hand it to the floatman of the float upon which the plaintiff was. The keys could have been pulled back within two minutes, and between fifteen and twenty minutes elapsed between the time when the empty float was drawn away and the bridge was reached by the float upon which the plaintiff was stationed.

The negligence charged against the defendant consisted in the fact of its permitting these keys to project beyond the bridge when the float upon which the plaintiff was engaged approached it. Nonsuit, error. *Hart v. D., L. & W. R. Co.*, 76 Hun, 296.

Employés who are at work in the construction of a building, if servants of different masters, are not co-employés within the rule respecting the negligence of fellow-servants.

A pile of brick rested upon a platform supported upon the beams of the first story of a building in process of construction; it had remained in the same position for about two weeks and was surrounded and supported by a wall of brick eight inches in thickness and laid up dry, and the platform extended outside of the wall of brick about the width of two planks; bricks fell from this pile into the cellar of the building and injured the plaintiff at a time when servants of the defendant were moving a derrick post at the southeast corner of the pile.

There was no reason to suppose or believe that the bricks would have fallen without interference, and there was no disturbing cause present when they fell, except the derrick, and the rational conclusion was that the defendant's men in moving the derrick caused it to strike against the pile of brick and displaced and precipitated the bricks into the cellar and caused the injury complained of and that a proper case had been made out for presentation to the jury. *Reilly v. Atlas Iron Construction Co.*, 83 Hun, 196.

Connecting lines were both liable to the servant of one line in the following instances:

Collision of car and engine which plaintiff was running. *Ind. &c. R. Co. v. Barnhardt*, 13 W. (Ind.) 425.

But where tracks of private railroad crossed those of defendant company, defendant was not liable for the negligence of the other. *Bunting v. Penn. R. Co.*, 118 Penn. 204.

Where two masters had relations, one was liable to the servant of the other for negligence in the following instances:

Two railroad companies using the same tracks. *In re Merrill*, 54 Vt. 200.

S. P. Nugent v. Boston &c. R. Co., 4 N. E. (Me.) 865; *Ill. &c. R. Co. v. Frelka*, 110 Ill. 498.

Railroad companies must use ordinary care to provide reasonably safe cars or it will be liable to the servant of another company using the same and injured thereby. *Roddy v. Mo. &c. R. Co.*, 104 Mo. 234.

Moon v. N. P. R. Co., 48 N. W. (Minn.) 679.

See liability of lessor for negligence of lessee. *Clark v. Chicago &c. R. Co.*, 92 Ill. 43.

Where company, with notice of a defective car, transfers it to another company, whose brakeman is thereby injured, the first company is liable. *Moon v. Northern P. R. Co.*, 46 Minn. 106.

X. Liability of Servant to Third Person.

The defendant, Nathan Wait, was driving a pair of horses attached to a wagon, which came in collision with the plaintiff, prostrated him and passed over his body. The horses and wagon belonged to the defendant, William Wait, in whose employment, and whose son, the other defendant was. *Phelps v. Wait*, 30 N. Y. 78, aff'g judg't for pl'ff.

A servant is liable, as well as the master, to a third person, when the injury is caused by the servant's misfeasance, although committed in the master's business; but when it is the result of nonfeasance on his part, he is not, as a general rule, liable, save to the master damaged thereby. *Murray v. Usher*, 117 N. Y. 542, aff'g 46 Hun, 404, and judg't for pl'ff.

From opinion.—"The agent or servant is himself liable as well as the master, where the act producing the injury, although committed in the master's business, is a direct trespass by the servant upon the person or property of another, or where he directs the tortious act. In such a case, the fact that he is acting for another does not shield him from responsibility. The distinction is between misfeasance and nonfeasance. For the former the servant is, in general, liable; for the latter, not. The servant, as between himself and his master, is bound to serve him with fidelity and to perform the duties committed to him. An omission to perform them may subject third persons to harm, and the master to damages. But the breach of the contract of service is a matter between the master and servant alone, and the non-feasance of the servant causing injury to third persons is not, in general, at least, a ground for a civil action against the servant in their favor. *Lane v. Cotton*, 12 Mod. 488; *Perkins v. Smith*, 1 Wils. 328; *Bennett v. Bayes*, 5 H. & N. 391; *Smith's Mas. and Serv.* 216, and cases cited."

"A." contracted to build a bridge and employed the defendant, a skillful builder, and gave him the sole management and control of the work and of the manner of carrying it on, all the other employes being in all respects subject to his orders. Under defendant's direction and supervision a scaffold was erected, secured by stay-laths, upon which laborers worked and materials were placed. Some of these laths were removed by direction of defendant, the plaintiff aiding in so doing. Subsequently the scaffold fell, and plaintiff was injured thereby.

An action could be maintained against the principal or the defendant, or against both jointly. *Fort v. Whipple*, 11 Hun, 586; granting new trial.

From opinion.—"Now if it here be admitted, as I think it must be, that Shipman, the principal, was bound to exercise proper care to prevent the accident which occasioned the injury complained of, and that he delegated the duty he owed to his employés to the defendant, then the latter represented Shipman as agent, and both were liable alike for the culpable negligence of the latter to the injury of the employés, under the rules of law applicable to this class of actions. In that case an action would lie against either or both jointly for the injury. *Suydam v. Moore*, 8 Barb. 358; *Phelps v. Wait*, 30 N. Y. 78. There was, therefore, no insuperable difficulty in law growing out of the relation of the parties to each other as co-employés.

We are not called upon to decide the question whether an action may or may not be maintained for negligence by one employé against another, where both are engaged in the same service under a common employer, in a case where the latter would not be liable. Of course an action would lie in such case for a direct injury as a trespass, but, perhaps, there might be a question whether an action would lie in such case for a mere nonfeasance or simple neglect of duty. See remark of Denio, J., in *Blackstock v. N. Y. & E. R. Co.*, 20 N. Y. 50, 51. But this question is not necessarily before us in this case, in the view above taken of it."

A laborer was killed by the falling in of the bank of a sewer in the course of construction, and an action therefor was brought against the foreman of the work, who was in general charge of the men. The negligence alleged against the defendant was in failing to warn the workman of the danger of working where he did, or not to work there. It seems that beyond general directions to do the work, the foreman did not order the laborer to the dangerous place, nor apparently intend that he should work there. *Burns v. Pethcal*, 75 Hun, 437, rev'g judg't for pl'ff.

From opinion.—"As to the relation existing between the plaintiff's intestate and the defendant, there can be no doubt. That they were both employés and servants of Mr. Matthews, the contractor, is established and not denied. Hence, the question is presented whether this action could be maintained by the plaintiff to recover for the death of her intestate against the defendant, who was a co-employé. * * * * *

The English authorities upon the question of the liability to third persons of a servant or agent for an act or omission performed or omitted by him, while engaged in the business of his master, are to the effect that the servant is liable for misfeasance, though the act be in obedience to the master's order, but that for mere nonfeasance or omission of duty, he is not liable to third persons, but only to the master, who alone is answerable to third persons for the servant's neglect. *Smith's Law of Mast. & Serv.* 415, and cases cited.

We think it may be safely said that the English rule prevails generally in this and other states, notwithstanding the broad declarations of some judges and text writers to the effect that a servant is liable to third persons, injured by his negligence, either alone or jointly with his master. *Murray v. Usher*, 117 N. Y.

543; *Blackstock v. N. Y. & E. R. Co.*, 20 id. 48, 50; *Fort v. Whipple*, 11 Hun, 586; *Denny v. The Manhattan Co.*, 2 Denio 115, aff'd 5 id. 639; *Carey v. Rochereau*, 16 Fed. Rep. 87; *Delaney v. Rochereau & Co.*, 34 La. Ann. 1123; *Reid v. Humber*, 49 Ga. 207; *Henshaw v. Noble*, 7 Ohio St. 226, 231; *Colvin v. Holbrook*, 2 N. Y. 126; *Montgomery County Bank v. Albany City Bank*, 7 id. 459; *Feltus v. Swan*, 62 Miss. 415; *Stephens v. Bacon*, 7 N. J. L. I.; *Labadie v. Hawley*, 61 Tex. 177; *Brown Paper Co. v. Dean*, 123 Mass. 267; *Bell v. Josselyn*, 3 Gray (Mass.) 309, 311. The conflict in the authorities upon this question is more apparent than real. It has arisen to a great extent from a failure to observe clearly the distinction between misfeasance and nonfeasance, and from an omission to point out the fact that while a servant is liable in the one case, he is not in the other. Disregarding this distinction, some judges and authors have stated in general terms that a servant is liable for his own negligence to a person injured thereby. Such a statement is inaccurate and misleading. Nonfeasance is the omission of an act which a person ought to do. Misfeasance is the improper doing of an act which a person might lawfully do. If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes to his principal or master, and the master alone is liable. While if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable. That such is the doctrine in this state, and that when applied to the case before us, it requires us to hold that this action cannot be maintained, is rendered quite manifest, we think, by an examination of the case of *Murray v. Usher*, *supra*."

A servant cannot be made liable as for a conversion of chattels of which he has the custody at the hands of his employer, and which he refuses to surrender at the demand of a stranger, even where he may have reason to believe that the stranger has a good title to the chattels.

Plaintiff's vendor placed certain printing forms in the possession of the New York *Herald*, under a contract for printing made through defendant, as superintendent of the *Herald*. Thereafter, a demand for said forms was made of defendant, who replied that a deposit would be required as a condition for their return. Held, that defendant was not in possession of the goods, and that his failure to return them on demand could not be made the basis of an action for conversion against him. *Hensley v. Howland*, 10 Misc. 756.

Servant was not negligent where he simply followed the custom of his master to leave valuables in the office safe, unlocked. *Whisten v. Brengal*, 16 Misc. 37.

An agent, in undertaking the execution of a particular work, must use reasonable care in executing it, so as not to cause injury to a third person, which may be the natural consequence of his acts, and cannot by abandoning its execution and leaving things in a dangerous condition, exempt himself from liability to a third person who suffers injury by reason of his having so left them without proper safeguard. *Baird v. Shipman*, 33 Ill. App. 503; s. c. aff'd, 132 Ill. 16.

S. P. Suydam v. Moore, 8 Barb. 358; Phelps v. Wait, 30 N. Y. 78; Osborne v. Morgan, 130 Mass. 102; Meecham on Agency, sec. 572; Lottman v. Barnett, 62 Mo. 159; Martin v. Benoist, 20 Ill. App. 263; Harriman v. Stowe, 57 Mo. 93; Bell v. Joselyn, 3 Gray 309; Kelly v. Met. Ry., 1 Q. B. 944.

Delaney v. Rochereau, 34 La. Ann. 1123.

From opinion.—"An agent is liable to his principal only for mere breach of his contract, but even in the performance of the duties imposed upon him by contract with his principal, he must have due regard to the rights and safety of third persons. He cannot in all cases find shelter behind his principal. If, in the course of his agency, he is entrusted with the operation of a dangerous machine, to guard himself from personal liability, he must use proper care in its management and supervision so that others in the use of ordinary care will not suffer in life, limb or property. Suydam v. Moore, 8 Barb. 358; Phelps v. Wait, 30 N. Y. 78.

It is not his contract with the principal which exposes him to, or protects him from liability to third persons, but his common law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable. Delaney v. Rochereau, 34 La. Ann. 1123.

If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he can not, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to a third person who suffers injury by reason of his having so left them without proper safeguard. Osborne v. Morgan, 130 Mass. 102.

A number of authorities charge the agent, in such cases, on the ground of misfeasance, as distinguished from nonfeasance. Mechem, in his work on Agency, section 572, says, 'Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for the injuries sustained by them because he did not undertake the performance of some duty which he owed to his principal and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve, also, to some extent, the idea of not doing; as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do, under the circumstances; does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing; it is not the not doing of that which is imposed upon the agent merely by virtue of his relations, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation.' To the same effect are Lottman v. Barnett, 62 Mo. 159; Martin v. Benoist, 20 Ill. App. 263; Harriman v. Stowe, 57 Mo. 93; Bell v. Joselyn, 3 Gray, 309.

A case parallel to that now in hand is Campbell v. Portland Sugar Co., 62 Me. 552, where agents of the Portland Sugar Company had the charge and management of the wharf belonging to the company, and rented the same to tenants, agreeing to keep it in repair. They allowed the covering to become old, worn

and insecure, by means of which the plaintiff was injured. The court held the agents were equally responsible to the injured person with their principals.

Wharton, in his work on Negligence, section 535, insists that the distinction, in this class of cases, between nonfeasance and misfeasance, can no longer be sustained; that the true doctrine is, that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such things, though the hurt is remotely due to the agent's negligence, the reason being that the causal relation between the agent and the person hurt is broken by the interposition of the principal, as a distinct center of legal responsibilities and duties, but that wherever there is no such interruption of causal connection, and the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury, then such stranger can recover from the agent damages for the injury. The rule, whether as stated by Mechem or Wharton, is sufficient to charge appellants with damages under the circumstances disclosed in this record."

For an injury resulting from the carelessness or negligence of a servant, while in the performance of his master's business, to a third person, the master is liable, and also the servant, and they may be joined as defendants in an action to recover damages for the injury.

The injury arose from the negligent blasting in a mine of a quarry, whereby a person passing on the highway was injured. *Wright et al. v. Compton*, 53 Ind. 337.

If a servant knowingly violates the law in selling liquor without a license, he will not be protected, as authority from the master for the wrongful act will not be implied. *State v. Walker*, 16 Me. 241.

So where husband, as agent of wife, negligently constructed a trap door, and plaintiff sustained injuries in consequence. *Harriman v. Stowe*, 57 Mo. 93.

One is liable to his fellow servant for his negligence about his work, except when done at the master's personal direction. *Atkins v. Field*, 89 Me. 281.

The superintendent and director of the corporation had permitted a tackle and block and chains to be left in a shop in an unsafe condition so that they fell on a fellow servant and injured him. For this injury the plaintiff brought action, and demurrer to complaint was overruled. *Osborne v. Morgan*, 130 Mass. 102; 137 id. 11.

From opinion.—"It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it so as not to cause an injury to third persons which may be the natural conse-

quence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liabilities to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, or doing it improperly. * * * In the case at bar, the negligent hanging and keeping by the defendants of the blocks and chain in such a place and manner as to be in danger of falling upon persons underneath, was misfeasance or improper dealing with the instruments in the defendant's actual use or control, for which they are responsible to every person lawfully in the room and injured by the fall and who is not prevented by his relation with the defendant from maintaining the action."

* * * "So far as we are informed, there is nothing in any other reported case, in England, or in this country, which countenances the defendant's position except in *Southcote v. Stanley*, 1 H. & N. 247; S. C., 25 L. J. (N. S.) Ex. 339; decided in the Court of Exchequer in 1856, in which the action was against the master, and Chief Baron Pollock and Barons Alderson and Bramwell severally delivered oral opinions at the close of the argument. According to one report, Chief Baron Pollock uttered this dictum: 'Neither can one servant maintain an action against another for negligence while engaged in their common employment.' 1 H. & N. 150. But the other report contains no such dictum, and represents Baron Alderson as remarking that he was 'not prepared to say that the person actually causing the negligence' (evidently meaning 'causing the injury,' or 'guilty of the negligence,') 'whether the master or servant would not be liable.' 25 L. J. (N. S.) Ex. 340. The responsibility of one servant for an injury caused by his own negligence to a fellow servant was admitted in two considered judgments of the same court, the one delivered by Baron Alderson four months before the decision in *Southcote v. Stanley*, and the other by Baron Bramwell eight months afterwards. *Wigget v. Fox*, 11 Exch. 832, 839; *Degg v. Midland Railway*, 1 H. & N. 773, 781. It has since been clearly asserted by Barons Pollock and Huddleston. *Swainson v. Northeastern Railway*, 3 Ex. D. 341, 343. And it has been affirmed by direct adjudication in Scotland, in Indiana, and in Minnesota. *Wright v. Roxburgh*, 2 Ct. of Sess. Cas. (3d series) 748; *Hinds v. Harbou*, 58 Ind. 121; *Hinds v. Overacker*, 66 id. 547; *Griffiths v. Wolfram*, 22 Minn. 185."

An agent negligent in admitting water into pipes in a building without first seeing that they were in a proper condition, was guilty of misfeasance and liable to a tenant injured thereby. *Bell v. Joselyn*, 3 Gray, 309.

From opinion.—"Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person may lawfully do. And malfeasance is the doing of an act which a person ought not to do at all. The defendant's omission to examine the state of the pipes in the house before causing the water to be let on, was a nonfeasance. * * * But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance or misfeasance. As the facts are, the nonfeasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly, from the act done, which was no less a misfeasance by being preceded by a nonfeasance."

Servant, as well as master, is liable for an apparent wrong done to

third person; but where servant, under master's directions, shut the gate in a dam, and the dam broke, flooding plaintiff's land, the servant is not answerable. *Hill v. Caverly*, 7 N. H. 215.

Managing superintendent of a mine was individually liable for his personal acts. *Kindson v. Markle*, 171 Pa. St. 138.

See, also, *Kenney v. Lane*, 9 Tex. Civ. App. 150.

Where a steamboat is stopped by the bank of a river, when the water is very high, and the boat is not moored, but is kept in place merely by the revolution of her wheel, and, a stage plank being run out, the deck hands are ordered to land the freight, and while doing so one of them falls into the river and is drowned, by reason of a movement in the stage plank, the owners of the boat are liable for his death, since it was caused by their negligence in attempting to land freight without mooring the boat. The master of the boat is not, in such case, jointly liable with the owners in the absence of proof of any willful or malicious act on his part. *Cheatham v. Red River Line*, 56 Fed. Rep. 248.

XI. Medical Attendance.

It is the duty of owners of a vessel to under seamen to provide medical aid, if the circumstances will permit.

In an action against the owners, therefore, for neglect of the master in the performance of such duty, it is not a defense that the neglect was that of a fellow servant. *Scarff v. Metcalf*, 107 N. Y. 211, aff'g 36 Hun, 202, and judg't for pl'ff.

From opinion.—"The maritime law is sensitive to the rights of seamen and sedulous for their protection. When sick or injured they are entitled to be cared for and cured at the expense of the ship, and not to be turned adrift in strange lands without adequate provisions. They are exposed to hardship, confronted with dangers, and grow occasionally reckless by their very familiarity with peril. The master's authority is quite despotic and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited. That which on land would be contributory negligence the maritime law scarcely recognizes and readily excuses (*The City of Alexandria*, 17 Fed. Rep. 390, 395), and in many ways throws its protection around the seamen. When he falls sick and suffers injury the owners owe to him the duty of rendering such care and medical aid as circumstances permit, and in the performance of that duty the master stands as the agent and representative of the owners and his negligence is theirs. *Petersen v. Swan*, 50 N. Y. Supr. Ct. 46; *The City of Alexandria*, *supra*; *Reed v. Canfield*, 1 Sumner 195; *Harden v. Gordon*, 2 Mason 541, 543. The last case cited considers the effect of the act of Congress requiring the ship to be supplied with a suitable medicine chest, and holds that such duty does not subvert the general duty imposed upon the owners by the maritime law, but merely regulates a single detail of its exercise. This duty the owners who remain at home and do not sail upon the ship can

only perform, beyond supplying the medicine chest, through the master, who becomes their agent for its performance. The mate, although an officer, is a seaman. *Holt v. Cummings*, 102 Penn. 212; *Ocean Spray*, 4 Sawyer 105; *Minna*, 11 Fed. Rep. 759. While both he and the master are servants of the owner and so fellow servants, they are not such in respect to the owner's duty to the seamen which the master performs in their behalf and as their representative, and the contention in this case that the master's neglect was that of a fellow servant cannot prevail.

Where the duty of the owner to the seamen is performed, the cost of nursing and medical attendance falls upon the ship (*North America*, 5 Ben. 486), and that has been ruled even where the patient has been removed to his own house. *Holt v. Cummings*, *supra*. But where that duty is not performed, and the seaman suffers injury from the neglect, the ship, in a proceeding *in rem.*, and the owners in a suit against them, are liable for the damages suffered. *Couch v. Steel*, 77 Eng. Com. Law Rep. 402; *Brown v. Overton*, 1 Sprague 463; *Mosely v. Scott*, 14 Am. Law Reg. 599; *Tomlinson v. Hewett*, 2 Sawyer 278; *Petersen v. Swan*, *supra*."

In the absence of special contract servant is not entitled to be furnished with medical aid. *Denver &c. R. Co. v. Hles*, 25 Colo. 19.

Davis v. Forbes, 171 Mass. 548.

But where master agrees as part of its contract to furnish a physician it must use reasonable care in his selection. *Wabash R. Co. v. Kelley*, 153 Ind. 119.

And fulfills such duty where it has done so and he is reasonably competent. *Maine v. Chicago &c. R. Co.*, 109 Iowa, 260.

In which case it is not liable for his mistakes. *Southern P. Co. v. Maudlin*, 19 Tex. Civ. App. 166.

Otherwise of course where he is positively unskillful. *Texas & P. Coal Co. v. Connaughton*, 20 Tex. Civ. App. 642.

In the absence of contract, a railroad is not bound to furnish food, shelter or transportation to and from home. *King v. Interstate Consol. S. R. Co.*, (R. I.) 51 Atl. Rep. 301.

Otherwise where the servant is permitted to enter one of its cars, under circumstances which permitted the inference that defendant had assumed the duty of taking care of him, including transportation. *Carll v. Interstate &c. R. Co.*, (R. I.) 51 Atl. Rep. 305.

Master undertook to take the injured servants home. He was liable for negligence of fellow servants in doing so. *Bresnahan v. Lonsdale*, (R. I.) 51 Atl. Rep. 624.

XII. Releasing Liability.

The plaintiff, defendant's employé, while in such employ signed a paper to the effect that the defendant should not in any case be liable to him for damages for injuries from defendant's neglect or that of its ser-

vants. Held, that there was no consideration for the contract and that as the plaintiff did not know the contents, it was not fairly presented to him. *Purdy v. R., W. & O. R. Co.*, 52 Hun, 267, aff'd 125 N. Y. 209.

Such contract, however, may be binding, except for criminal neglect of the master. *Western &c. R. Co. v. Bishop*, 50 Ga. 465.

Galloway v. Western &c. R. Co., 57 Ga. 512; *Fulton Bag &c. Mills v. Wilson*, 89 id. 318; *Cook v. Railroad Co.*, 72 id. 48; *W. & A. R. Co. v. Strong*, and *Hendricks v. Railroad Co.*, 52 id. 461, 467.

See Georgia doctrine approved 24 Alb. L. J. 383, and see in accord therewith; *Griffiths v. Earl of Dudley*, L. R. 9 Q. B. 357.

Employé agreed that acceptance of sick and death benefits in case of injury, towards the maintenance of which both master and servant contributed, should operate as a release of liability for such injury. Held valid. *Petty v. Brunswick &c. R. Co.*, 109 Ga. 666.

When servant was hired to run an elevator, he was told that the employer would not be responsible for any injury, and replied that he had run elevators and that there need be no fear. This did not relieve the master, nor constitute an agreement to do so. *Fairbanks Canning Co. v. Innes*, 24 Ill. App. 33, aff'd 125 Ill. 510.

A servant cannot release the master from liability for damages from injury by the latter's negligence, so as to preclude a recovery for the servant's death by the widow and next of kin. *Maney v. Chicago, Burlington & Q. R. Co.*, 49 Ill. App. 105.

The court said: "That exemption cannot be secured by contract against liability for the consequences of gross negligence or willful act, is well settled. *Arnold v. I. C. R. Co.*, 83 Ill. 273; *J. S. & E. R. Co. v. Southworth*, 135 Ill. 250."

It was held that gross negligence was not charged, but that nevertheless the action in behalf of the widow could not be barred by the servant.

In plaintiff's application for employment he agreed to make an examination of the premises to discover dangers. Agreement was valid under a statute forbidding contracts exempting employers from liability for negligence. *Quinn v. New York &c. R. Co.*, 175 Mass. 150.

Liability for injuries to servants by carelessness of other employés in control of them is founded upon considerations of public policy, and the company cannot make a valid stipulation with its employés at the time and as a part of their contract of employment, that such liability shall not attach to it. *Railroad Co. v. Spangler*, 44 Oh. St. 471.

The master and servant cannot, in advance, contract for a waiver and release of the statutory liability. The fact that the liability was created by statute controlled the decision. The Iowa statute provides "and no contract which restricts such liability shall be legal and binding." The Kansas statute was thought to have the same intendment. *Kansas P. R. Co. v. Peavey*, 29 Kas. 122.

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Same holding in *Johnson's Adm'r v. Railroad Co.*, 86 Va. 975; *Louisville &c. R. Co. v. Orr*, 91 Ala. 548; *Hissong v. R. Co.*, 9 id. 514.

As to inability of company to contract against the negligent performance of the duties owing by him to his servant.

See *Thompson on Negligence*, vol. 2, p. 1025; 1 *Central L. J.* 465; *Roesner v. Hermann*, 8 Fed. Rep. 782.

Company is not released by stipulation that employé must inform himself as to places of danger. *Gulf &c. R. Co. v. Darby*, 67 S. W. Rep. 446.

Release of liability for injuries while riding to and from work in consideration of employment, held valid. *Peterson v. Seattle T. Co.*, 23 Wash. 615.

XIII. Statutory Liability.

(a). WHAT LAW GOVERNS.

Servants' rights are determined by the relation sustained at the place of injury, though the contract of service was entered into in another state. *Kansas City &c. R. Co. v. Becker*, 67 Ark. 1.

Where law of the jurisdiction where accident occurred establishes the standard of duty. *Turner v. St. Clair Tunnel Co.*, 121 Mich. 616.

Statute of state where accident occurred affecting master with notice on proof of defect in appliances, held inapplicable in state where action is brought. *Jones v. Chicago &c. R. Co.*, 80 Minn. 488.

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Railroads:

Negligence.—An act to promote the safety of railway employes by compelling the equipment of freight cars with continuous power or air brakes, and locomotives with driving-wheel brakes. Chapter 543, Laws of 1893; amended by L. 1896, ch. 486; amended by L. 1900, ch. 549.

The people of the State of New York, represented in senate and assembly, do enact as follows:

Section 1. That from and after the first day of January, eighteen hundred and ninety-five, it shall be unlawful for any railroad company to use within the state on its line or lines any locomotive engine not equipped with a power driving-wheel brake and appliances for operating the train brake system.

Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, the use of cars known and designated as "coal jimmies" in any form shall be unlawful within the state, except upon any railroad whose main line is less than fifteen miles in length and whose average grade exceeds two hundred feet to the mile, under a penalty of one hundred dollars for each offense, said penalty to be recovered in an action to be brought by the attorney-general in the name of the people and in the judicial district where the principal office of

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the company within the state is located. This section shall not be construed to authorize the interchange of such "coal jimmies" with, and the use thereof upon, railroads of more than fifteen miles in length or whose average grade is less than two hundred feet to the mile.

Sec. 3. That on and after the first day of January, nineteen hundred and one, it shall be unlawful for any railroad or other company to haul or permit to be hauled or used on its line or lines within this state, any freight train that has not a sufficient number of cars in it not equipped with continuous power or air brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Sec. 49 (Chap. 565, L. 1890), Switches, warning signals, guard-posts, automatic couplers, automatic or other safety brake, tools in passenger car, water.—It shall be the duty of every railroad corporation operating its road by steam:

(1) To lay, in the construction of new and in the renewal of existing switches, upon freight or passenger main-line tracks, switches on the principle of either the so-called Tyler, Wharton, Lorenze, or split-point switches, or some other kind of safety switch, which shall prevent the derailment of a train, when such switch is misplaced or a switch interlocked with distant signals.

(2) To erect and thereafter maintain such suitable warning signals at every road, bridge or structure which crosses the railroad above the tracks, where such warning signals may be necessary, for the protection of employes on the top of the cars from injury.

(3) To place post-guards in the prolongation of the line of bridge trusses so that in case of derailment, the posts, and not the bridge trusses, shall receive the blow of the derailed locomotive or car. (Repealed by L. 1899 ch. 740.)

(4) To use upon every new freight car, built or purchased for use, couplers which can be coupled and uncoupled automatically, without the necessity of having a person to guide the link, lift the pin by hand, or go between the ends of the car. * * * * *

Every corporation, person or persons, operating such railroad, and violating any of the provisions of this section, except subdivision seven, shall be liable to a penalty of one hundred dollars for each offense, and the further penalty of ten dollars for each day that it shall omit or neglect to comply with any such provisions. For every violation of the provision of the seventh subdivision of this section, every such corporation shall be liable to a penalty of twenty-five dollars for each offense.

See, also, N. Y. Penal Code, sec. 424.

Chapter 544, New York Laws of 1893.—An act to promote the safety of railway employes by compelling the equipment of freight cars with automatic couplers.

Section 1. That from and after the passage of this act, every new freight car which is to be used in this state shall be equipped with couplers of the master car builders' type, which can be coupled automatically by impact, and which may, except in cases of accident, be uncoupled without the necessity of a person going between the cars.

Sec. 2. That from and after the passage of this act, in addition to such new freight cars, there shall be equipped each year with such couplers, by every company operating a line or lines of railroad within the state, at least twenty

per centum of all freight cars owned or operated by such companies, and used within the state, which are not now so equipped, except certain cars known and designated as "coal jimmies," and that on and after the first day of January, eighteen hundred and ninety-eight, the use of said "coal jimmies" in any form shall be unlawful within the state, under penalty of one hundred dollars for each offense, said penalty to be recovered in an action to be brought by the attorney-general in the name of the people, and in the judicial district where the principal office of the company within the state is located. (Certain short roads with steep grades excepted by L. 1896 ch. 485.)

Sec. 3. That on and after the first day of January, eighteen hundred and ninety-eight it shall be unlawful for any railroad or other company to haul, or permit to be hauled or used, on its line or lines within the state, any freight car not equipped with couplers of the master car-builders' type, and coupling automatically by impact, and which can be uncoupled, except in cases of accident, without the necessity of men going between the ends of the cars.

Sec. 4. That within sixty days from the passage of this act, every railroad or other company operating a line of railroad within this state, shall file with the board of railroad commissioners at its office in Albany, a verified statement of the total number of freight cars owned or operated by it, the number of such cars equipped with the automatic couplers and the number unequipped; and shall thereafter annually, and in the month of January, for the ensuing five years, file with said board a verified report of the number of cars so equipped in each year, and the number of cars, if any, remaining unequipped.

Sec. 5. That on and after January first, eighteen hundred and ninety-eight, any railroad or other company using, or permitting to be used, on its line or lines, any freight car not equipped with couplers as provided for in this act, shall be liable to a penalty of one hundred dollars for each and every violation, to be recovered in an action to be brought by the attorney-general, in the name of the people, and in the judicial district wherein the principal office of the company within the state is located; and it shall be the duty of the board of railroad commissioners of the state to notify the attorney-general of all such violations coming to its notice.

Sec. 6. That the board of railroad commissioners may, from time to time, after full hearing given and for good cause shown, exempt any company from the provisions of this act, as to the equipment of twenty per cent. of its cars in any particular year or years and may extend the time within which any company shall comply with the requirements of this act, not exceeding, however, five years from the first day of January, eighteen hundred and ninety-eight.

Sec. 7. All acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

N. Y. Penal Code.—Section 424. Guard-posts, automatic couplers.—All corporations and persons other than employes, operating any steam railroad within this state:

(1) Failing to cause guard-posts to be placed in the prolongation of the line of bridge trusses upon such railroad, so that in case of derailment, the posts and not the trusses shall receive the blow of the derailed locomotive or car; or,

(2) Failing after November first, eighteen hundred and ninety-two, to equip all of their own freight cars, run and used in freight or other trains on such railroad, with automatic self-couplers, or running or operating on such railroad any freight car belonging to any such person or corporation, without having the same

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equipped, except in case of accident or other emergency, with automatic self-couplers, and except within the extended time allowed by the board of railroad commissioners, in pursuance of law, for equipping such car with such couplers, is guilty of a misdemeanor, punishable by a fine of five hundred dollars for each offense.

A simple iron bar used by hand to align tracks with is not "machinery." *Clements v. Alabama &c. R. Co.*, 127 Ala. 166.

Switchman at the brake on the rear car of a train giving notice that it was about to back fulfilled the statutory requirement as to the posting of a brakeman thereat. *Chicago &c. R. Co. v. Maloney*, 77 Ill. App. 191.

Violation of ordinance as to speed was not a ground of recovery where contributory negligence was the proximate cause of injury. *Thompson v. Citizens' Street R. Co.*, 152 Ind. 461.

Temporary track for transporting gravel is a "railroad." *Coughlan v. Cambridge*, 166 Mass. 268.

Engine and car compose a "train." *Shea v. New York &c. R. Co.*, 173 Mass. 177.

Requirement of a guard when a structure crosses the track, held not to apply to a cornice one foot five inches therefrom. *Quinn v. New York &c. R. Co.*, 175 Mass. 150.

Act No. 174, Laws of 1883, p. 191, (3 How. Stat. sec. 3397a) requiring railroad companies to so adjust, fill or block frogs, switches and guard rails, as to prevent the feet of employes from being caught therein, will not, in case of failure to comply, make the company liable to the servant contributing by his negligence to his injury by trying to uncouple cars in motion. *Grand v. Michigan R. Co.*, 83 Mich. 564.

Citing *Mynning v. Railroad Co.*, 64 Mich. 93; *Malta v. Railroad Co.*, 69 Ind. 109; *Kwiatkowski v. Railroad Co.*, 70 id. 549.

Injury while repairing a car was not received in work incident to the operation of a road. *Holt v. Great Northern R. Co.*, 69 Minn. 524.

Obligation to receive another company's cars does not excuse a company's failure to inspect them. *Illinois C. R. Co. v. Price*, 72 Miss. 862.

Cars in use and not requiring general repairs prior to the taking effect of the statute as to automatic couplers need not have them. *Thompson v. Missouri P. R. Co.*, 51 Neb. 527.

Extension of time for complying with statute as to self-coupling apparatus from the interstate commerce commission, held no defense. *Greenlee v. Southern R. Co.*, 122 N. C. 977.

Lack of appliance has the same effect as if it had been furnished and allowed to become defective. *Crumley v. Cincinnati &c. R. Co.*, 12 Oh. C. C. 164.

Stones were carried on a flat car without side boards or ends. It was not a "defective" car. *Toledo &c. R. Co. v. Beard*, 20 Oh. C. C. 681.

Railroad must block its switches and guard rails. *Craig v. Lake Erie &c. R. Co.*, 35 Oh. L. J. 15.

Brakes must be placed on eight-wheeled flat cars. *Mew v. Charleston & S. R. Co.*, 55 S. C. 90.

Failure to maintain a statutory fence held not to render company liable for derailment caused by cattle on the track. *Newson v. Norfolk & W. R. Co.*, 81 Fed. Rep. 133; aff'g 78 id. 94; s. c., 35 L. R. A. 135.

Wis. L. 1893, sec. 220, held not to make railroads insurers as to risks incident to the service. *Andrews v. Chicago &c. R. Co.*, 96 Wis. 348.

Contributory negligence and assumption of risk.—The defense of assumption of risk, removed by statute. *Pearl v. Omaha &c. R. Co.*, (Iowa) 88 N. W. 1078.

Coley v. North Carolina R. Co., 129 N. C. 407; *Cogdell v. Southern R. Co.*, id. 398; *Thomas v. Raleigh &c. R. Co.*, id. 392; *Bodie v. Charleston &c. R. Co.*, 61 S. C. 468.

Where frogs and guard rails were unblocked, in violation of statute, continuing at work with knowledge thereof, constituted a waiver of the statutory liability. *Gillin v. Patten & S. R. Co.*, 93 Me. 80.

Cleveland &c. R. Co. v. Ullom, 20 Oh. C. C. 512. But, see, *Craig v. Lake Erie &c. R. Co.*, 35 Oh. L. J. 15; *Lake Erie &c. R. Co. v. Craig*, 73 Fed. Rep. 642; *Naramore v. Cleveland &c. R. Co.*, 96 id. 298.

Defendant employed no one to run its elevators. It did not violate an ordinance against employing incompetent elevatormen, because a servant in its general employ attempted to run it. *Stagg v. Edward Western &c. Co.*, (Mo.) 69 S. W. Rep. 391.

Removal of the defense of assumption of risk applies to injuries resulting from insufficiency of assistants. *Bodie v. Charleston &c. R. Co.*, 61 S. C. 468.

Removal of defense of an assumption of risk held not to effect the defense of contributory negligence. *Cleveland &c. R. Co. v. Baker*, 91 Fed. Rep. 224.

See, also, *Kilpatrick v. Grand Trunk R. Co.*, 72 Vt. 263.

Risk of injury from ladders on the side of freight cars, prohibited by statute is not assumed. *Kilpatrick v. Grand Trunk R. Co.*, (Vt.) 52 Atl. Rep. 531.

Nor that from switches within dangerous proximity to cars. *Morrisett v. Canadian P. R. Co.*, (Vt.) 52 Atl. Rep. 520.

Machines and machine shops:

Negligence.—Chapter 398 of the Laws of 1890 gives additional safe-

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guards to employes in factories, and casts upon the employer the duty of guarding machinery that is dangerous, and a failure on the part of an owner of a factory, whereby an injury results to another, is evidence of his neglect. *McRickard v. Flint*, 114 N. Y. 222.

Whether a set screw on a shaft out of reach except upon oiling, should have been guarded under an act, requiring "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description" "to be properly guarded," was for the jury. *Glens Falls &c. Co. v. Travelers' Ins. Co.*, 162 N. Y. 399; aff'g s. c., 11 App. Div. 411.

By chapter 398, L. 1890, in reference to the supplying of belt shifters to machinery by the owner of a manufacturing establishment, the necessity of supplying the same is left to the discretion of the factory inspector, but the provisions thereof in reference to guarding machinery are mandatory. In the absence of a direction by the factory inspector to furnish belt shifters, the failure to supply the same is not a violation of the statute, although the absence thereof bears upon the fact that the cleaning of certain machines was required to be done whilst they were in motion. *Knisley v. Pratt*, 75 Hun, 323, rev'g nonsuit.

Recovery allowed, where plaintiff was unfamiliar with the unguarded machinery, and he was not employed in connection with it. *Johanson v. Eastman's Co.*, 44 App. Div. 270.

Only those machines apt to cause injury need be guarded. *Byrne v. Nye &c. R. Co.*, 46 App. Div. 479.

Statutory duty to guard machinery held not to apply to machinery in process of installment. *Foster v. International Paper Co.*, 71 App. Div. 47.

Appliance for controlling the speed of a push car was held to be a part of "ways, works or machinery." *Central &c. R. Co. v. Lamb*, 26 South. Rep. 969.

Attention is called to *Spaulding v. Tucker, &c., Co.*, decided by the city court of Brooklyn (not yet reported). The action arose under New York Laws 1889, chap. 560, sec. 6, an act to regulate the employment of women and children in factories, &c., and requiring that "all * * * cogs * * * shall be properly guarded." It was held that the expression "properly guarded" required the machinery to be so guarded as to meet the demands of reasonable care, and that the provision devolved no greater duty upon the master than the common law did. The opinion states, however, "Of course, if this statute had prescribed that no cogs should be used except such as could be completely boxed in from sight and touch, then another question would be presented."

Statutory duty of guarding machinery cannot be shifted from the

owner to his chief inspector. *Buchner Chair Co. v. Feulner*, (Ind. App.) 63 N. E. Rep. 239.

See, also, *Arms v. Ayer*, 192 Ill. 601.

Unsuitableness of ways and works constitutes a defect. *Geloneck v. Dean Steam Pump Co.*, 165 Mass. 202.

Temporary dampness of moulds in an iron foundry held not a "defect." *Whittaker v. Bent*, 167 Mass. 588.

A "defect" may be remedied temporarily. Permanent repair at the time is not an absolute necessity. *Willey v. Boston Electric Light Co.*, 168 Mass. 40.

Truck used and fitted for a track in a repair shop held a part of the "ways, works and machinery" thereof. *Gunn v. New York & C. R. Co.*, 171 Mass. 417.

So is a temporary derrick in a stone yard. *McMahon v. McHale*, 174 Mass. 320.

But a pile of lumber in a lumber yard is not. *Campbell v. Dearborn*, 175 Mass. 183.

Mass. act as to the construction of floors held to have been complied with, though a self closing hatch left a depression in the floor, the depth of the flooring. *Hoard v. Blackstone Man. Co.*, 177 Mass. 69.

Planks temporarily placed are not "ways" or "works." *Morris v. Walworth Man. Co.*, (Mass.) 63 N. E. Rep. 910.

Boy was not allowed to recover for failure to guard cog wheels or post the statutory notice where his injury was due to his engaging in a scuffle in their vicinity. *Borck v. Michigan Bolt & C. Works*, 111 Mich. 129.

Gearing was not guarded as required by statute and plaintiff was set to work near it at night. Recovery was allowed. *Peterson v. Johnson-Wentworth Co.*, 70 Minn. 538.

Rapidly revolving machinery located dangerously near a beam on which plaintiff was obliged to pass, held to be dangerous, required by statute to be guarded. *Walker v. Grand Forks Lumber Co.*, (Minn.) 90 N. W. Rep. 573.

Master liable for not protecting an elevator shaft as required by ordinance. *Wendler v. Peoples' House Furnishing Co.*, 165 Mo. 527.

The increase of duty to guard dangerous machinery aimed at by statute in Missouri held not such as to make the master an insurer. *Colliot v. American Man. Co.*, 71 Mo. App. 163.

Statutory duty to guard "factory" machinery held to apply to a commercial ice house equipped therewith. *Rabe v. Consol. Ice Co.*, 113 Fed. Rep. 905.

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Contributory negligence and assumption of risk.—The question has arisen whether a statutory command to a master to provide certain appliance for the protection of a servant, renders the master liable, in case of injury from his failure so to do, when also the servant by his own negligence contributed to the injury. The rule seems to be that the servant's recovery will be defeated by his contributory negligence. It should be remembered that a defense founded on an assumption of the risk by the servant is quite distinct from the doctrine of contributory negligence. The statute at least becomes a part of the contract of hiring, and by the contract thus existing it would be the master's duty to provide the appliances pointed out by the statute, to the same extent at least as would be required if it were expressly stipulated between the parties. But suppose that upon entering the service the servant discover, or by the exercise of ordinary care should discover, that the master is carrying on his business, in disregard of such duty; for example, that the master, directed to cover cog-wheels, is carrying on his business with uncovered cog-wheels and inviting his servant to use the same. The usual rule is that, if a servant discover such a failure of duty and foresee its dangers, and thereafter remain in the service he assumes the risk of this very failure of his master. Hence, if the statute be considered *nothing more than* a provision of the contract, whereby the master's duty to do some specific act is established by statute, the servant would assume the risk resulting from the master's neglect to the same extent as, under circumstances where no statutory direction was laid upon the master. If, however, the statute be regarded as authoritative, as a public command, quite superior to and independent of the contract of hiring, and intended to provide for the safety of its citizens, it would be an exercise of the police power of the state, absolutely forbidding as a penal act the exposure of the servant to danger, and the servant would not be regarded as having waived the statutory protection, in any case not by mere passive acquiescence in the master's neglect to conform to its provisions. It might be well considered that a statute having for its motive the protection of children of tender years was based on the apprehension that by their age and inexperience they were not calculated to discover or apprehend the dangers, and therefore that the state commanded that they should not be subjected to such dangers, by enjoining the master to remove them. If such were the motive and purpose of a statute, the beneficiaries could not be regarded as assuming the risk, for a servant never assumes a risk that he is not presumed to know, or to be able to know by the exercise of ordinary care. It would, however, be a presumption unreasonable, if not impossible, that the legislature con-

sidered that an adult, or even a minor, unless of tender years, of ordinary capacity could not and would not by the exercise of ordinary intelligence appreciate the danger of uncovered cog-wheels, etc. It would be a more substantial speculation that the legislature, appreciating that the guarding of cog-wheels was not made by law a master's duty, intended to put upon him the primary duty of doing this, so that thereafter the doing of the same should be classed amongst the master's duties. If this were the purpose the statute would leave the law where it was before its enactment, save in the important modification that the master's disobedience of the statute, resulting in injury to a servant, would make the master at least presumptively negligent (see Evidence, Ordinance, Statutes), and the question of assumption of the risk by continuing in the employment with appreciation of the danger would be a matter of affirmative defense, and the doctrine of contributory negligence would be applicable as under other circumstances.

In *Cooke v. Lalance Grojean Mfg. Co.*, 33 Hun, 351, chapter 122, Laws 1876 (N. Y.) was involved, by which the employment of children under sixteen years of age, in any industrial occupation injurious to health or dangerous to life or limb, was forbidden. It was held that a child, in such case, did not take the risk. Such a statute presumes that a child under that age would be incapable of determining or appreciating the danger of such an employment and forbids the master to enter into any contract of hiring and renders the child incapable of such hiring. Hence, there could be no implication that the child took the risks because there could be no valid contract.

There would seem to be an allowable distinction between such a prohibition and a statute that prescribed the primary duty of a master to provide his servant with certain means of safety, perhaps not theretofore demandable.

In an action to recover damages for injuries received by an infant, who is *sui juris* from coming in contact with machinery while in defendant's employ, proof that the employer omitted to instruct the employé as to using the machinery, does not impose liability upon the former, provided the latter knew by experience or observation the nature of the machinery and the danger to be apprehended from it.

The absence of the guards required to be placed upon all gearing and belting, in a factory in which women and children are employed (sec. 11, chap. 462, Laws of 1887, amending chap. 409, Laws of 1886) imposes no liability upon the employer in a case where an infant employé, knowing of their absence, voluntarily meddles with the machinery and is injured.

Plaintiff, a boy thirteen years of age, was employed in defendant's

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manufactory. When in the discharge of his duty he was in a safe place exposed to no danger. At the request of another employé he pulled out a lever on the side of a machine not in motion in order to start it, and as he did this with one hand, he placed the other in the cogs or wheels belonging to the machine and was injured. There were no guards or covering to the gearing; this plaintiff knew. Held, that an action to recover damages was not maintainable. *White v. Whittemann Lithographic Co.*, 131 N. Y. 631, aff'g 58 Hun, 381, and judg't for def't.

See opinion *Freeman v. Co.*, 70 Hun, 531; 142 N. Y. 639.

Statute as to guarding cog machinery was not complied with, but the danger was obvious. No recovery. *Kinsley v. Pratt*, 148 N. Y. 372.

Servant did not assume the risk from machinery not guarded as provided by statute where his duties did not call upon him to be familiar with its actions. *Johanson v. Eastman's Co.*, 44 App. Div. 270; s. c. aff'd, 168 N. Y. 648.

Under chapter 673, Laws 1892, requiring cog-wheels, gearing, &c., to be properly guarded.

The court refused to charge that if the defendant failed to properly guard the cog-wheels, and the plaintiff knew it and still continued in the defendant's employ, he waived the provision of the statute in that regard and assumed such risks as were incident to the use of the machinery. The general term (Brown, P. J., dissenting) held that it was doubtless true that parties could waive statutory provisions for their benefit, and even make laws for themselves which the court were bound to administer; that such was not permitted when the question of public policy was involved, as was the case in question. *Simpson v. N. Y. Rubber Co.*, 80 Hun, 416.

But whatever may be said on the question of a defense founded on the assumption of the risk by the servant, the consensus of judicial opinion is that, statutes merely regulating the duty of the master, as regards some details of the appliances to be used by the servant, does not preclude the master from urging that the negligence of the servant concurred with that of the master in producing the injury.

This was held in *Freeman v. Glens Falls Paper Mill Co.*, 70 Hun, 531, aff'd, 142 N. Y. 639, where the defendant failed to maintain a trap-door as provided by New York Laws 1887, chap. 462, sec. 8.

From opinion.—"The duty prescribed by this statute is not more or greater than the common-law duty of an employer to his employés to provide a safe place in which, and proper machinery with which to work. And the defendant's liability to the person injured by reason of the statute not being complied with, is not an absolute one, but is subject to the same limitations and restrictions as is the common-law liability for not furnishing a safe place and proper machinery."

In *McRickard v. Flint*, 114 N. Y. 222, 227, where defendant failed to comply with New York Laws of 1874, chap. 547, requiring a substantial railing or trap-door to protect openings, the court said:

"The defendant's negligence alone will not support the plaintiff's recovery. The burden was with him to show that he was free from contributory negligence. And if he failed to make it appear that he was without fault in that respect, the plaintiff was not entitled to recover."

A girl waived benefit statute protecting her from danger of cleaning machinery in motion by doing so with full knowledge. *De Young v. Irving*, 5 App. Div. 499.

Fitzgerald v. Elsas Paper Co., 30 Misc. Rep. 438; *Higgins Carpet Co. v. O'Keefe*, 79 Fed. Rep. 900.

Defense of contributory negligence was not taken away by statutory requirement as to safety of "way, works, &c." *Southern R. Co. v. Harbin*, 110 Ga. 808.

Contributory negligence is still a defense under Miss. Const. 1890, sec. 193, but mere knowledge of a defect does not establish it. *Bucknew v. Richmond & D. R. Co.*, 72 Miss. 873.

Mines and excavations:

Negligence.—Illinois act in respect to "miners" expressly requires a willful violation of its provisions to enable a servant to recover. *Consolidated Coal Co. v. Carson*, 66 Ill. App. 434.

Failure to make the statutory inspection was not ground of recovery where it would not have revealed the defect. *Missouri & I. Coal Co. v. Schwalb*, 74 Ill. App. 567.

Missouri &c. R. Co. v. Schwalb, 77 Ill. App. 593.

Failure within a year to construct an escapement shaft as required by statute constituted "willful" negligence as therein described. *Carterville Coal Co. v. Abbott*, 81 Ill. App. 279.

Master is not "willfully" negligent where a competent inspector reports in good faith that the mine is safe. *Himrod Coal Co. v. Schroath*, 91 Ill. App. 234.

Compliance with statutory duty to supply timbers held not to relieve owner of duty to prop mine. *Consolidated Coal Co. v. Bokamp*, 181 Ill. 9; s. c. aff'd, 75 Ill. App. 605.

Mine owner was "willfully" negligent in "permitting" a miner to enter a mine when the record of examination did not show safety. *Pawnee Coal Co. v. Royce*, 184 Ill. 402; rev'g s. c., 79 Ill. App. 469.

The statutory meaning of "willful" omission held not to include *mala fides*, but consciousness as distinguished from inadvertence. *Odin Coal Co. v. Denman*, 185 Ill. 413; aff'g s. c., 84 Ill. App. 190.

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The refusal to furnish the props requested to a miner, held "willful." *Western Anthracite Coal &c. Co. v. Beaver*, 95 Ill. App. 95.

Act requiring ventilation of mines held to prescribe specific duties entailing liability for their non-performance though the act of itself prescribes no penalties for its violation. *Mosgrove v. Zimbleman Coal Co.*, (Iowa) 81 N. W. Rep. 227.

See, also, *Cerrilos Coal R. Co. v. Deserant*, 9 N. M. 49.

Contributory negligence and assumption of risk.—Miner may assume that he would not be permitted to enter the mine if it had not been properly inspected and made safe. *Carterville Coal Co. v. Abbott*, 81 Ill. App. 279; s. c. aff'd, 55 N. E. 131; *Pawnee Coal Co. v. Royce*, 184 Ill. 402; s. c., 79 Ill. App. 469.

Contributory negligence was no defense where the master willfully failed to perform his statutory duty. *Western Anthracite Coal Co. v. Beaver*, 192 Ill. 333; aff'g s. c., 95 Ill. App. 95.

Odin Coal Co. v. Denman, 185 Ill. 413.

Omission of statutory inspection did not permit recovery where a skilled miner had tested the place and was satisfied as to its safety. *Island Coal Co. v. Greenwood*, 151 Ind. 476.

Assumption of risk is no defense. *Boyd v. Brazil Block Coal Co.*, (Ind.) 50 N. E. Rep. 368.

See, also, *Sommer v. Carbon Hill Coal Co.*, 89 Fed. Rep. 54.

But the defense of assumption of obvious risk still exists. *Bodell v. Brazil Block Coal Co.*, 25 Ind. App. 654.

Building operations:

Contractor failed to comply with the statutory requirement to complete the flooring of a building as his work thereon progressed but failure did not contribute to the injury. No recovery. *Stewart v. Ferguson*, 34 App. Div. 515.

The safety of a scaffold as required by statute extends to subsequent repair as well as original condition. *Healy v. Burke*, 36 Misc. 792, aff'g s. c., 35 id. 384.

A vessel is a "structure" within the meaning of such law. *Chaffee v. Erie R. Co.*, 68 App. Div. 578.

Statutory remedy in case of a defective scaffold only applies to a completed one. *Pursley v. Edgemoor Bdg. Works*, 56 App. Div. 71.

And master cannot escape the duty of furnishing a safe scaffold by providing suitable material, without seeing to its construction. *McLaughlin v. Eidlitz*, 50 App. Div. 518.

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So, master is liable for negligence of his servant in improper construction where he delegates the duty. *Kuss v. Freid*, 32 Misc. 628.

See *Banzhaf v. Ladwig*, 28 Misc. 496; rev'g s. c., 27 id. 821.

Temporary staging for painters is not one of the "ways, or work" of a building. *Adasken v. Gilbert*, 165 Mass. 413.

McKay v. Hand, 168 Mass. 270.

So as to a staging for slaters of a roof. *Reynolds v. Barnard*, 168 Mass. 226.

An uncompleted building is not one of the "ways, works, etc." of the business of sub-contractor thereon. *Bieque v. Hosmer*, 169 Mass. 541.

Dangerous explosives:

Accident due to effect of a certain kind of rock upon an explosive was not due to a defect in "ways, works, etc." *Welch v. Grace*, 167 Mass. 590.

(c). EMPLOYER'S LIABILITY ACTS.

NEW YORK.—Laws 1902, Ch. 600. Section 1. Where, after this act takes effect, personal injury is caused to an employé who is himself in the exercise of due care and diligence at the time:

1. By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition;

2. By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence whose sole or principal duty is that of superintendence, or in the absence of such superintendent, of any person acting as superintendent with the authority or consent of such employer; the employé, or in case the injury results in death, the executor or administrator of a deceased employé who has left him surviving a husband, wife or next of kin, shall have the same right of compensation and remedies against the employer as if the employé had not been an employé of nor in the service of the employer nor engaged in his work. The provisions of law relating to actions for causing death by negligence, so far as the same are consistent with this act, shall apply to an action brought by an executor or administrator of a deceased employé suing under the provisions of this act.

§ 2. No action for recovery of compensation for injury or death under this act shall be maintained unless notice of the time, place and cause of the injury is given to the employer within one hundred and twenty days and the action is commenced within one year after the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing and signed by the person injured or by some one in his behalf, but if from physical or mental

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incapacity it is impossible for the person injured to give notice within the time provided in said section, he may give the same within ten days after such incapacity is removed. In case of his death without having given such notice, his executor or administrator may give such notice within sixty days after his appointment, but no notice under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place or cause of the injury if it be shown that there was no intention to mislead and that the party entitled to notice was not in fact mislead thereby. The notice required by this section shall be served on the employer or if there is more than one employer, upon one of such employers, and may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served. The notice may be served by post by letter addressed to the person on whom it is to be served, at his last known place of residence or place of business and if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post. When the employer is a corporation, notice shall be served by delivering the same or by sending it by post addressed to the office or principal place of business of such corporation.

§ 3. An employé by entering upon or continuing in the service of the employer shall be presumed to have assented to the necessary risks of the occupation or employment and no others. The necessary risks of the occupation or employment shall, in all cases arising after this act takes effect be considered as including those risks, and those only, inherent in the nature of the business which remain after the employer has exercised due care in providing for the safety of his employés, and has complied with the laws affecting or regulating such business or occupation for the greater safety of such employés. In an action maintained for the recovery of damages for personal injuries to an employé received after this act takes effect, owing to any cause for which the employer would otherwise be liable, the fact that the employé continued in the service of the employer in the same place and course of employment after the discovery by such employé, or after he had been informed of the danger of personal injury therefrom, shall not, as a matter of law, be considered as an assent by such employé to the existence or continuance of such risks of personal injury therefrom, or as negligence contributing to such injury. The question whether the employé understood and assumed the risk of such injury, or was guilty of contributory negligence, by his continuance in the same place and course of employment with knowledge of the risk of injury shall be one of fact, subject to the usual powers of the court in a proper case to set aside a verdict rendered contrary to the evidence. An employé, or his legal representative, shall not be entitled under this act to any right of compensation or remedy against the employer in any case where such employé knew of the defect or negligence which caused the injury and failed, within a reasonable time, to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer who had intrusted to him some general superintendence, unless it shall appear on the trial that such defect or negligence was known to such employer, or superior person, prior to such injuries to the employé.

§ 4. An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employé for personal injuries, for which compensation may be recovered under this act, or to any relief

society or benefit fund created under the laws of this state, may prove in mitigation of damages recoverable by an employé under this act such proportion of the pecuniary benefit which has been received by such employé from such fund or society on account of such contribution of employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

§ 5. Every existing right of action for negligence or to recover damages for injuries resulting in death is continued and nothing in this act contained shall be construed as limiting any such right of action, nor shall the failure to give the notice provided for in section two of this act be a bar to the maintenance of a suit upon any such existing right of action.

§ 6. This act shall take effect July first, nineteen hundred and two.

ALABAMA (Code, secs. 1749-1751).—"Section 1749. When a personal injury is received by a servant or employé in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employé as if he were a stranger, and not engaged in such service or employment, in the cases following:

First. When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer.

Second. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

Third. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employé at the time of the injury was bound to conform, and did conform, if such injuries resulted from his having so conformed.

Fourth. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.

Fifth. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal points, locomotives, engine, switch, car, or train upon a railway, or of any part of the track of a railway.

But the master or employer is not liable under this section if the servant or employé knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself, engaged in the service or employment of the master or employer, unless he was aware that the master or employer or such superior already knew of such defect or negligence.

Nor is the master or employer liable under subdivision 1 unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

§ 1750. Damages recovered by the servant or employé of and from the master or employer are not subject to the payment of debts or any legal liabilities incurred by him.

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§ 1751. If such injury results in the death of the servant or employé, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions."

See *Lyson v. R. Co.*, 61 Ala. 554; *Smoot v. R. Co.*, 67 id. 13; *ante*, p. 866.

CALIFORNIA (Civ. Code. Article II.)

Section 1969. An employer must indemnify his employé except as prescribed in the annexed section, for all that he necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employé, at the time of obeying such directions, believed them to be unlawful.

§ 1970. And an employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of the culpable employé.

§ 1971. An employer must in all cases indemnify his employé for losses caused by the former's want of ordinary care.

See *McLain v. Blue Point &c. Co.*, 51 Cal. 258, *ante*.

COLORADO.—Session Laws, 1893, Ch. 77. Section 1. Where, after the passage of this act, personal injury is caused to an employé who is himself in the exercise of due care and diligence at the time,—

(1). By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works and machinery were in proper condition; or

(2). By reason of the negligence of any person in the service of the employer entrusted with and exercising superintendence, whose sole or principal duty is that of superintendence;

(3). By reason of the negligence of any person in the service of the employer who has the charge or control of any switch, signal, locomotive engine, or train upon a railroad, the employé, or, in case the injury results in death, and the parties entitled by law to sue and recover for such damages, shall have the same right of compensation and remedy against the employer as if the employé had not been an employé of or in the service of the employer, or engaged in his or its work.

§ 2. The amount of compensation recoverable under this act, in case of personal injury resulting solely from the negligence of a co-employé, shall not exceed the sum of Five Thousand Dollars. No action for the recovery of compensation for injury or death under this act shall be maintained unless written notice of the time, place, and cause of the injury is given to the employer within sixty days, and the action is commenced within two years from the occurrence of the accident causing the injury or death. But no notice given under the provisions of this section shall be deemed invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of injury; provided it is shown that there was no intention to mislead and that the party entitled to notice was not in fact misled thereby.

§ 3. Whenever an employer enters into a contract, either written or verbal, with an independent contractor, to do part of such employer's work, or whenever such contractor enters into a contract with a sub-contractor to do all or a part of the work comprised in such contract or contracts with the employer, such contract or sub-contract shall not bar the liability of the employer for injury to the employes of such contractor or sub-contractor by reason of any defect in the condition of the ways, works, machinery, or plant, if they are the property of the employer or furnished by him, and if such defect arose, or had not been discovered or remedied, through the negligence of the employer, or of some person entrusted by him with the duty of seeing that they were in proper condition.

§ 4. An employé or those entitled by law to sue and recover under the provisions of this act, shall not be entitled under this act to any right of compensation or remedy against his employer in any case where such employé knew of the defect or negligence which caused the injury, and failed within a reasonable time to give or cause to be given information thereof to the employer, or to some person superior to himself in the service of his employer who had entrusted to him some general superintendence.

§ 5. If the injury sustained by the employé is clearly the result of the negligence, carelessness, or misconduct of a co-employé, the co-employé shall be equally liable under the provisions of this act with the employer and may be made a party defendant in all actions brought to recover damages for such injury. Upon the trial of such action the court may submit to, and require the jury to find a special verdict upon the question as to whether the employer or his vice-principal was or was not guilty of negligence proximately causing the injury complained of, or whether such injury resulted solely from the negligence of the co-employé; and in case the jury by their special verdict find that the injury was solely the result of the negligence of the employer or vice-principal, then and in that case the jury shall assess the full amount of plaintiff's damages against the employer and the suit shall be dismissed as against the employé; but in case the jury by their special verdict find that the injury resulted solely from the negligence of the co-employé, the jury may assess damages both against the employer and employé."

COLORADO.—Session Laws, 1901, Ch. 67. "Section 1. That every corporation, company or individual who may employ agents, servants or employes, such agents, servants or employes being in the exercise of due care, shall be liable to respond in damage for injuries or death sustained by any such agent, employé or servant, resulting from the carelessness, omission of duty or negligence of such employer, or which may have resulted from the carelessness, omission of duty or negligence of any other agent, servant or employé of the said employer, in the same manner and to the same extent as if the carelessness, omission of duty or negligence causing the injury or death was that of the employer.

§ 2. All acts and parts of acts in conflict herewith repealed; provided, however, that this act shall not be construed to repeal or change the existing laws relating to the right of the person injured, or in case of death, the right of the husband or wife, or other relatives of a deceased person, to maintain an action against the employer.

FLORIDA. (Laws of 1901, chap. 4071.)—"Section 1. A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars or other machinery of such company, or for damage

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done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence; the presumption in all cases being against the company.

§ 2. No person shall recover damages from a railroad company for injury to himself or his property when the same is done by his consent, or is caused by his own negligence. If the complainant and the company are both at fault, the former may recover; but the damages shall be increased or diminished by the jury in proportion to the amount of default attributable to him.

§ 3. If any person is injured by a railroad company by the running of locomotives or cars or other machinery of such company, he being at the time of such injury an employé of the company, and the damage was caused by the negligence of another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to a recovery. No contract which restricts such liability shall be legal or binding."

For statement of the law applicable to cases not covered by the statute, see *Parrish v. R. Co.*, 28 Fla. 251.

GEORGIA (Code of 1895; sec. 2297).—"Railroad companies are common carriers and liable as such. As such companies necessarily have many employés who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employés as to passengers, for injuries arising from the want of such care and diligence."

Code of 1895, sec. 2202.—"In case of railroad companies the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business."

§ 3030—The principal is not liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business. The exception in case of railroads has been previously stated.

As to contributory negligence, see § 2323.—"If the person injured is himself an employé of the company, and the damage was caused by another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

INDIANA.—Burns Indiana Rev. Stat., 1901; Acts 1893, Ch. 130, p. 294, sec. 7083. "That every railroad or other corporation, except municipal, operating in this state shall be liable for damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence in the following cases:

First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation or some person entrusted by it with the duty of keeping such ways, works, plant, tools, or machinery in proper condition.

Second. Where such injury resulted from the negligence of any person in the service of such corporation to whose order or direction the injured employé at the time of the injury was bound to conform and did conform.

Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation

or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

Fourth.—Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine, or train upon a railway, or where such injury was caused by the negligence of any person, co-employé, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employé, or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.

§ 7084. Neither an employé nor his legal representative shall be entitled under this act to any right of compensation or remedy against the corporation in any case where the injury results from obedience to any order which subjects the employé to palpable danger, nor where the injury was caused by the incompetency of the co-employé and such incompetency was known to the employé injured, or such injured employé, in the exercise of reasonable care, might have discovered such incompetency, unless the employé so injured gave, or caused to be given, information thereof to the corporation, or to some superior entrusted with the general superintendence of such co-employé and such corporation failed or refused to discharge such incompetent employé within a reasonable time, or failed or refused within a reasonable time to investigate the alleged incompetency of the co-employé or superior and discharge him if found incompetent.

§ 7085. The damages recoverable under this act shall be commensurate with the injuries sustained, unless death results from such injury, when in such case the action shall survive and be governed in all respects by the law now in force as to such actions; provided that where any such person recovers a judgment against a railroad or other corporation, and such corporation takes an appeal, and pending such appeal the injured person dies, and the judgment rendered in the court below be thereafter reversed, the right of action of such person shall survive to his legal representative.

§ 7086. In case any railroad corporation which owns or operates a line extending into or through the state of Indiana and into or through another or other states, and a person in the employ of such corporation, a citizen of this state, shall be injured, as provided in this act, in any other state where such railroad is owned or operated, and a suit for such injury shall be brought in any of the courts of this state, it shall not be competent for such corporation to plead or prove the decision or statutes of the state where such person shall have been injured as a defence to the action brought in this state.

§ 7087. All contracts made by railroads or other corporations with their employés, or rules or regulations adopted by any corporation releasing or relieving it from liability to any employé having a right of action under the provisions of this act are hereby declared null and void. The provisions of this act, however, shall not apply to any injuries sustained before it takes effect, nor shall it affect in any manner any statute or legal proceeding pending at the time it takes effect."

IOWA (Code, sec. 2071).—"Every corporation operating a railway shall be liable for all damages sustained by any person, including employés of such corporation, in consequence of the neglect of agents, or by any mismanagement of the

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engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineer, or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed; and no contract which restricts such liability shall be legal or binding."

This statute has been construed as affecting only those employed in the actual operation of the railroad at the time of the injury. *Stroble v. Chicago &c. R. Co.*, 70 Iowa, 555.

KANSAS (1 Gen. St., 1889, par. 1251).—"Every railroad company organized or doing business in this state shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by mismanagement of its engineers or other employes, to any person sustaining such damage"

MASSACHUSETTS (Rev. Laws 1902, ch. 106, section 71.—"If personal injury is caused to an employe, who, at the time of the injury, is in the exercise of due care, by reason of:

First. A defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his service who had been entrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; or,

Second. The negligence of a person in the service of the employer who was entrusted with and was exercising superintendence and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent, with the authority or consent of such employer; or,

Third. The negligence of a person in the service of the employer, who was in charge or control of a signal, switch, locomotive engine or train upon a railroad; the employe or his legal representatives, shall, subject to the provisions of the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employe, nor in the service, nor engaged in the work, of the employer.

A car which is in use by, or which is in possession of, a railroad corporation shall be considered as a part of the ways, works or machinery of the corporation which uses or has in its possession, within the meaning of clause one of this section, whether it is owned by such corporation or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause three of this section, and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine or train shall be deemed to be a person in charge or control of a signal, switch, locomotive engine or train, within the meaning of said clause.

§ 72. If the injury described in the preceding section results in the death of the employe, and such death is not instantaneous or is preceded by conscious suffering, and if there is any person who would have been entitled to bring an action under the provisions of the following section, the legal representatives of said employe may, in the action brought under the provisions of the preceding section, recover damages for the death in addition to those for the injury.

§ 73. If, as the result of the negligence of an employer himself, or of a per-

son for whose negligence the employer is liable under the provisions of section 71, an employé is instantly killed, or dies without conscious suffering, his widow or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.

§ 74. If, under the provisions of either of the two preceding sections, damages are awarded for the death, they shall be assessed with reference to the degree of culpability of the employer or of the person for whose negligence the employer is liable. The amount of damages which may be awarded in an action under the provisions of section seventy-one for personal injury to an employé, in which no damages for his death are awarded, under the provisions of section seventy-two, shall not exceed four thousand dollars. The amount of damages which may be awarded in such action, if damages for his death are awarded, under the provisions of section seventy-two, shall not exceed five thousand dollars for both the injury and the death, and shall be apportioned by the jury between the legal representatives of the employé and the persons who would have been entitled, under the provisions of section seventy-three, to bring an action for his death if it had been instantaneous or without conscious suffering. The amount of damages which may be awarded in an action brought under the provisions of section seventy-three shall not be less than five hundred dollars nor more than five thousand dollars.

§ 75. And no action for the recovery of damages for injury or death under the provisions of sections seventy-one to seventy-four, inclusive, shall be maintained unless notice of the time, place and cause of the injury is given to the employer within sixty days, and the action is commenced within one year, after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf; but if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed, and if he dies without having given the notice and without having been for ten days at any time after his injury of sufficient capacity to give it, his executor or administrator may give such notice within sixty days after his appointment. A notice given under the provisions of this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place or cause of the injury, if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby.

The provisions of section twenty-two of chapter fifty-one shall apply to notices under the provisions of this section.

§ 76. And if an employer enters into a contract, written or verbal, with an independent contractor to do part of such employer's work, or if such contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contractor's contract with the employer, such contract or sub-contract shall not bar the liability of the employer for injuries to the employé of such contractor or sub-contractor, caused by any defect in the condition of the ways, works, machinery or plant, if they are the property of the employer or are furnished by him and if such defects arose, or had not been discovered or remedied through the negligence of the employer or of some person entrusted by him with the duty of seeing that they were in proper condition.

§ 77. An employé or his legal representatives shall not be entitled under the provisions of sections seventy-one to seventy-four, inclusive, to any right of action

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for damages against his employer if such employé knew of the defect or negligence which caused the injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer, or to some person superior to himself in the service of the employer, who was entrusted with general superintendence.

§ 78. An employer who shall have contributed to an insurance fund created and maintained for the mutual purpose of indemnifying an employé for personal injury for which compensation may be recovered under the provisions of sections seventy-one to seventy-four, inclusive, or to any relief society formed under the provisions of sections seventeen, eighteen and nineteen of chapter 125, may prove in mitigation of the damages recoverable by an employé under the provisions of said sections, such proportion of the pecuniary benefit which has been received by such employé from any such fund or society on account of such contribution of said employer, as the contribution of such employer to such fund or society bears to the whole contribution thereto.

§ 79. The provisions of the eight preceding sections shall not apply to injuries caused to domestic servants or farm laborers by fellow employés."

See *Moynihan v. Hilts Co.*, 146 Mass. 586.

MISSISSIPPI (Statute, Code 1892 as amended by L. 1898, ch. 66, sec. 3559).—"Every employé of any corporation shall have the same rights and remedies for an injury suffered by him from the act or omission of the corporation or its employés as are allowed by persons, not employés, where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employé injured of the defective or unsafe character or condition of any machinery, ways, or appliances, or of the improper loading of cars, shall not be a defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. When death ensues from an injury to an employé an action may be brought in the name of the widow of such employé for the death of the husband or by the husband for the death of his wife or by the parent for the death of a child or in the name of the child for the death of an only parent for such damages as may be suffered by them respectively, by reason of such death, the damages to be for the use of such widow, husband or child, except that in case the widow should have children the damages shall be distributed as personal property of the husband. The legal or personal representatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons. In every such action the jury may give such damages as shall be fair and just with reference to the injury resulting from such death to the persons suing. Any contract or agreement, expressed or implied, made by an employé to waive the benefit of this section, shall be null and void, and this section shall not deprive an employé of a corporation, or his legal personal representative, of any right or remedy that he now has by law." *New Orleans &c. Co. v. Hughes*, 49 Miss. 258.

MONTANA (Civ. Code, sec. 905).—"That in every case the liability of the cor-

poration to a servant or employé acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employé not appointed or controlled by him, as if such servant or employé were a passenger.' See, also, Civ. Code, sec. 2660.

Laws of Montana, 1903, ch. 83. An act to determine the liability of employers in this state for damages to employes.

Section 1. Every railway corporation including electric railway corporations, doing business in this state shall be liable for all damages sustained by an employé thereof, within this state, without contributing negligence on his part, when such damages is caused by the negligence of any train dispatcher, telegraph operator, superintendent, master mechanic, yardmaster, conductor, engineer, motorman, or of any other employé who has superintendence of any stationary or hand signal.

§ 2. That every company, corporation, or individual, operating any mine, smelter or mill for the refining of ores shall be liable for all damages sustained by an employé thereof within this state, without contributing negligence on his part, when such damage is caused by the negligence of any superintendent, foreman, shift boss, hoisting or other engineer or cranimen.

§ 3. No contract of insurance, relief benefit, or indemnity in case of injury or death, nor any other contract entered into either before or after the injury, between the person injured and any of the employers named in this act shall constitute any bar or defense to any cause of action brought under the provisions of this act.

TEXAS.—Sayle's Tex. Civ. Stat. Ch. 12-B. Article 4560-f.—Every person, receiver, or corporation operating a railroad or street railway the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employé thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver, or corporation, by reason of the negligence of any other servant or employé of such person, receiver or corporation, and the fact that such servants or employes were fellow servants with each other shall not impair or destroy such liability.

Article 4560-g. All persons engaged in the service of any person, receiver, or corporation, controlling or operating a railroad or street railway the line of which shall be situated in whole or in part in this state, who are entrusted by such person, receiver or corporation with the authority of superintendence, control or command of other servants or employes of such person, receiver, or corporation, or with the authority to direct any other employé in the performance of any duty of such employé are vice-principals of such person, receiver, or corporation, and are not fellow servants with their co-employes.

Article 4560-h. All persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment and are doing the same character of work or service and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow servants with each other. Employes who do not come within the provisions of this article shall not be considered fellow servants.

Article 4560-i. And no contract made between the employer and employé based upon the contingency of death or injury of the employé and limiting the liability of the employer under this chapter or fixing damages to be recovered, shall be valid or binding.

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Article 4560-j. Nothing in this chapter shall be held to impair or diminish the defense of contributory negligence when the injury of the servant or employé is caused proximately by his own contributory negligence.

See *International Nav. Co. v. Ryan*, 82 Tex. 565.

WISCONSIN (Laws 1898, sec. 1816).—"Every railroad company operating any railroad which is in whole or in part, within this state, shall be liable for all damages sustained within the same by any of its employés without contributory negligence on his part:

1. When any such injury is caused by a defect in any locomotive, engine, car, rail, track, machinery, or appliance required by said company to be used by its employés in and about the business of their employment, when such defect could have been discovered by such company by reasonable and proper care, tests, or inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company.

2. When such injury is sustained by any officer, agent, servant, or employé of such company while engaged in the line of his duty as such, and shall have been caused by the carelessness or negligence of any other officer, agent, servant or employé while in the discharge of, or for failure to discharge, his duty as such provided such injury shall arise from a risk or hazard peculiar to the operation of railroads.

No contract, receipt, rule, or regulation between any employé and a railroad corporation shall exempt such corporation from the full liability imposed by this section."

Wear v. Am. Ex. Co., 82 Wis. 307.

(d). CONSTRUCTION OF EMPLOYER'S LIABILITY ACTS.

1. IN GENERAL.

Colorado act held not to affect common law rights of employés. *Colorado &c. Co. v. Mitchell*, 26 Colo. 284; aff'g s. c., 12 Colo. App. 277.

An employer's insurance is not an element of consideration in determining his liability. *Sawyer v. Arnold Shoe Co.*, 90 Me. 369.

Statutory notice to the city of the time, place and manner of accident held sufficient where each cause alleged is complete. *Coughlan v. Cambridge*, 166 Mass. 268.

2. LIABILITY TO A STRANGER'S EMPLOYÉES AS IF THEY WERE SERVANTS.

Defendant ran sidings from its tracks into the yards of plaintiff's employer. Plaintiff was injured by cars set in operation by defendant's servants. He could not recover under a statute, limiting recovery to cases in which he could have recovered as employé. *Weaver v. Philadelphia &c. R. Co.*, (Pa.) 52 Atl. Rep. 30; *Peplinski v. Pennsylvania R. Co.*, (Pa.) 52 Atl. Rep. 32.

See *Kelly v. Union Traction Co.*, 9 Pa. Dist. R. 69.

3. LIABILITY TO A MASTER'S EMPLOYÉES AS IF THEY WERE NOT SERVANTS.

Railroads:

Negligence.—The notice to the master required by the New York act, held a condition precedent to the right of action given thereby. *Gmaehle v. Rosenberg*, 80 App. Div. 541; rev'g s. c., 40 Misc. 267.

Citing *Mertz v. City of Brooklyn*, 33 N. Y. St. Rep. 577; aff'd, 128 N. Y. 617; *Curry v. City of Buffalo*, 135 id. 366; *Foley v. Mayor*, 1 App. Div. 586; *White v. Mayor*, 15 id. 440; *Krall v. City of New York*, 44 id. 259; *Reining v. City of Buffalo*, 102 N. Y. 308.

Where neither have authority over the other, fireman and engineer on the same engine are of the "same grade." *Kansas City &c. R. Co. v. Becker*, 63 Ark. 477.

Inspector of roundhouse under the supervision of the mechanical department of the road and a fireman under the supervision of the transportation department work at a "common purpose." *Kansas City &c. R. Co. v. Becker*, 67 Ark. 1.

Negligence of a fellow servant is no longer a bar. *Georgia &c. R. Co. v. Cosby*, 97 Ga. 299.

Liability for acts of fellow servants under Georgia act, applies to defective workmanship. *Southern R. Co. v. Johnson*, 114 Ga. 329.

The act removing the bar did not apply to receivers before the act of December 16, 1895. *Barry v. McGhee*, 100 Ga. 759.

The appliances referred to in Indiana act, as to liability of master for acts of fellow servants, held not to include a switch. *Baltimore &c. R. Co. v. Little*, 149 Ind. 167.

Act held not to apply to injuries outside the state. *Baltimore &c. R. Co. v. Read*, (Ind.) 62 N. E. Rep. 488; Same v. Jones, id. 994.

Car inspector held connected with the "use and operation" of a railway, where his duties carried him under cars in actual use. *Canon v. Chicago &c. R. Co.*, 101 Iowa, 613.

Duty of one at work on a bridge to set out a "slow" flag for trains crossing the bridge when necessary, so connects him. *Keatley v. Illinois C. R. Co.*, 103 Iowa, 282.

So, where an employé required to fill tenders with coal from an adjoining coal car pushed a plank from one to the other for that purpose. *Akeson v. Chicago &c. R. Co.*, 106 Iowa, 54.

It was held otherwise, however, as to the handling of a hoisting crane in coaling an engine. *Reddington v. Chicago &c. R. Co.*, 108 Iowa, 96.

Distinguishing *Akeson v. Chicago &c. R. Co.*, *supra*.

Operation of a hand car by section men is so connected. *Smith v. Chicago &c. R. Co.*, (Iowa) 80 N. W. Rep. 658.

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Car cleaner held a "fellow servant" of a hoister. *Jensen v. Omaha &c. R. Co.*, (Iowa) 88 N. W. Rep. 952.

Servants transferring rails from one car to another, held fellow servants. *Stebbins v. Crooked Creek R. Co.*, (Iowa) 90 N. W. Rep. 355.

Action of section hand in assisting in the replacing of a rail in a track connects him with the "operation" of the road. *Atchison &c. R. Co. v. Vincent*, 56 Kan. 344.

Otherwise as to a stone mason engaged in setting curbing around the depot office building. *Missouri &c. R. Co. v. Medaris*, 60 Kan. 151.

Act of co-employé in dropping his end of a firebox upon getting ashes into his eyes, held not such negligence as to invoke the statutory remedy. *Union P. R. Co. v. Mohaffy*, 4 Kan. App. 88.

Negligence need not be gross or willful to give the statutory remedy for act of a fellow servant. *Louisville &c. R. Co. v. Graham*, 98 Ky. 688.

See, also, *Edmonson v. Kentucky C. R. Co.*, (Ky.) 49 S. W. 220; s. c., rev'g, 46 S. W. Rep. 679.

Engine wiper in a roundhouse engaged in coaling and moving engines is "engaged in operating a railroad." *Mikkelson v. Truesdale*, 63 Minn. 137.

One obliged to step from a high platform onto moving cars and assist in pulling on the load held to be subject to a hazard peculiar to railroad business. *Leier v. Minnesota Belt Line R. & T. Co.*, 63 Minn. 203.

So as to the work of replacing ties, between the passage of trains. *Blomquist v. Great Northern R. Co.*, 65 Minn. 69.

Otherwise as to the putting a hose upon an engine tender. *Weisel v. Eastern R. Co.*, 79 Minn. 245.

Act in question applies to receivers. *Mikkelson v. Truesdale*, 63 Minn. 137.

Street car companies are not within such act. *Lundquist v. Duluth*, 65 Minn. 387.

A logging road is. *Schus v. Powers-Simpson Co.*, (Minn.) 89 N. W. Rep. 68.

"Other cars" include hand cars. *Benson v. Chicago &c. R. Co.*, 75 Minn. 163.

Hand cars were furnished by the company to employés gratuitously, and were exclusively within their control. It was held that they were not "engaged in the discharge of their duties." *Benson v. Chicago &c. R. Co.*, (Minn.) 80 N. W. Rep. 1050.

Wisconsin act as to a railroad's liability for acts of fellow servants held to apply to parties engaged in straightening a track, whom the rail-

road company have furnished work trains to. *Roe v. Winston*, (Minn.) 90 N. W. Rep. 122.

Exemption of master for acts of fellow servants is not effected by statute in Mississippi. *Farquhar v. Alabama &c. R. Co.*, 78 Miss. 193.

Missouri act held not to apply where the act was not done within the scope of a servant's authority. *Hamlett v. Chicago &c. R. Co.*, 80 Mo. App. 354.

Defense of act of fellow servant is removed by statute in North Carolina. *Kinney v. North Carolina R. Co.*, 122 N. C. 961.

Statute does not take effect retroactively, however. *Rittenhouse v. Wilmington Street R. Co.*, 120 N. C. 544.

Servant may waive the benefit of the act. *Coley v. North Carolina R. Co.*, 129 N. C. 407.

Engineer and brakeman on the same train are in the same "rank." *Hill v. Lake Shore &c. R. Co.*, 22 Oh. C. C. 291.

Employé may accept the benefits of a relief fund in exchange for a waiver of his statutory right. *Johnson v. Charleston &c. R. Co.*, 55 S. C. 152.

Switchman and switch engineer, members of a switching crew, having no authority over one another, are engaged in a "common employment." *Gulf &c. R. Co. v. Warner*, 89 Tex. 475.

The giving of signals by an engineer under a company's rule held not to prevent his being a brakeman's fellow servant. *Texas C. R. Co. v. Frazier*, 90 Tex. 33; rev'g s. c., 34 S. W. Rep. 664.

Section hand held not to be doing the same character of work as other section men, where he was carrying his tools alone, and they were carrying theirs together on a hand car. *Long v. Chicago &c. R. Co.*, (Tex.) 57 S. W. Rep. 802.

Station agent and train crew are not fellow servants. *Gulf &c. R. Co. v. Calvert*, 11 Tex. Civ. App. 297.

Boiler washer and hostler both under a round house foreman are. *Missouri &c. R. Co. v. Whitaker*, 11 Tex. Civ. App. 668.

Road engineer under the supervision of a train-master and a switchman under the supervision of a yardmaster are not. *San Antonio &c. R. Co. v. Hardina*, 11 Tex. Civ. App. 497.

Texas act does not embrace street railways. *Riley v. Galveston City R. Co.*, 13 Tex. Civ. App. 247.

That the injury occurred while working to another purpose is immaterial where the original act of the master continued as to such work. *Allen v. Galveston &c. R. Co.*, 14 Tex. Civ. App. 344.

Conductor and engineer of a train are fellow servants, though the former is employed by the superintendent and the latter by the master

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mechanic where both are subject to the superintendent. *Moore v. Jones*, 15 Tex. Civ. App. 391.

Brakeman on a road train about to start and employés on an idle switch engine are not. *Patterson v. Houston &c. R. Co.*, (Tex. Civ. App.) 40 S. W. Rep. 442.

So as to an engineer of such a train and members of a yard crew. *Missouri &c. R. Co. v. Whitlock*, 16 Tex. Civ. App. 176.

Night crew loading ties from one side of a stack, and day crew unloading them on the other side are not. *Texas &c. R. Co. v. Echols*, 17 Tex. Civ. App. 677.

Engineer on one switch engine and a fireman on another are not. *Masterson v. Galveston &c. R. Co.*, (Tex. Civ. App.) 42 S. W. Rep. 1001; s. c., 91 Tex. 383.

Known unfitness of a fellow servant invokes the statutory remedy. *Galveston &c. R. Co. v. Davies*, (Tex. Civ. App.) 45 S. W. Rep. 956.

Fireman and engineer to whose orders he is subject, are not fellow servants. *Houston &c. R. Co. v. Stuart*, (Tex.) 48 S. W. Rep. 799; s. c., 50 S. W. Rep. 333.

A statute exempting employer from liability to employé "for losses suffered by the latter in consequence of the ordinary risks of the business, in which he is employed," and negligence of co-employé, does not apply to negligence of employé of the same employer in another and not in the same general business, so brakeman can recover for negligence of officer charged with inspection of cars. *Northern Pac. R. Co. v. Herbert* 116 U. S. 642.

Shanny v. Androscoggin Mills, 56 Me. 420; *Macy v. St. Paul &c. R. Co.*, 35 Minn. 200; *Tierney v. Minn. &c. R. Co.*, 33 id. 311; *Fay v. Minn. &c. R. Co.*, 30 id. 231.

Foreman and section hand were held to be fellow servants. *Texas &c. R. Co. v. Smith*, 114 Fed. Rep. 728.

See, also, *Perez v. Texas &c. R. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 137.

Car cleaner exposed to the acts of a switching crew is exposed to hazards peculiar to railroading. *Mitchell v. Northern P. R. Co.*, 70 Fed. Rep. 15.

Statutory liability for acts of superior servants does not affect the exemption as to acts of mere fellow servants. *Fenwick v. Illinois Cent. R. Co.*, 100 Fed. Rep. 247.

A logging road is not a "pathway," under Minnesota act. *Williams v. Northern Lumber Co.*, 113 Fed. Rep. 382.

Special direction held not necessary to bring servant within the scope

of his employment within the Indiana act. *Cincinnati &c. R. Co. v. Thiebaud*, 114 Fed. Rep. 918.

Utah Act as to employer's liability for acts of fellow servants held constitutional. *Dryburg v. Mecur Gold Min. & M. Co.*, 18 Utah, 410.

A car repairer is not connected with the "operation" of the road. *Smith v. Chicago &c. R. Co.*, 91 Wis. 503.

One assisting in the separation of cars is engaged in the operation of a road. *Ean v. Chicago &c. R. Co.*, 95 Wis. 69.

A warehouseman of the road is not, though engaged in sealing the end door of a car ready to start. *Hibbard v. Chicago &c. R. Co.*, 96 Wis. 443.

Conductor may recover for injury while he is so engaged, though by co-employé while *they* are not so engaged. *Medberry v. Chicago &c. R. Co.*, (Wis.) 81 N. W. Rep. 659.

Contributory negligence.—Contributory negligence is a defense under Georgia Act. *Georgia R. &c. Co. v. Hicks*, 95 Ga. 301; *Walker v. Atlanta &c. R. Co.*, 103 Ga. 820.

So as to Indiana Act. *Baltimore &c. R. Co. v. Little*. 149 Ind. 167; *Eureka Block Coal Co. v. Wells* (Ind. App.) 61 N. E. Rep. 236; *Whitcomb v. Standard Oil Co.*, 153 Ind. 513.

So under the Missouri Act. *Hamlett v. Chicago &c. R. Co.*, 89 Mo. App. 354.

So as to North Carolina Act. *Hancock v. Norfolk &c. R. Co.*, 124 N. C. 222; *Coley v. North Carolina R. Co.*, 129 N. C. 407; s. c., 39 S. E. Rep. 43.

Mines and manufactures:

Negligence.—Carpenter enclosing an elevator shaft is engaged in the same general business with one operating the elevator. *Mann v. O'Sullivan*, 126 Cal. 61.

Failure of a foreman to notify a laborer in a tunnel of a blast, held to be the negligence of a fellow servant. *Donovan v. Ferris*, 128 Cal. 48.

Servants are fellow servants under Georgia Act, if they are under the same general control though they belong to remote departments. *Brush Electric Light &c. Co. v. Wells*, 110 Ga. 192.

But a night watchman and the employé in charge of the boiler to the mill are not. *McCosker v. Hilton &c. Lumber Co.*, 110 Ga. 328.

Negligence of a fellow servant is no defense to a violation of the Illinois mining act. *Spring Valley Coal Co. v. Rowatt*, 196 Ill. 156; aff'g s. c., 96 Ill. App. 248.

Act of superintendent in placing a car of powder in a dangerous posi-

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tion held not to be an act of "superintendence." *Riou v. Rockport Granite Co.*, 171 Mass. 162.

Liability of master for acts of fellow servants was extended to all corporations under Miss. Act of 1896. *Brooks v. Mississippi &c. Oil Co.*, 76 Miss. 874.

Chambermaid and an elevatorman in a hotel are fellow servants within Texas act. *Oriental Investment Co. v. Slone*, 17 Tex. Civ. App. 692.

Mine boss held a fellow servant with the miners under the West Virginia Act. *Williams v. Thacker Coal &c. Co.*, 44 W. Va. 599.

Contributory negligence.—Recovery to one "acting in obedience to rules" denied where disobedient act of fellow servant contributed. *Laughran v. Brewer*, 113 Ala. 509.

Contributory negligence is a defense under Florida Act. *Florida &c. R. Co. v. Mooney*, 40 Fla. 17.

So under Indiana Act. *Corning Steel Co. v. Bohlplotz*, (Ind. App.) 64 N. E. Rep. 476.

And under Minnesota Act. *Lundberg v. Shevlin-Carpenter Co.*, 68 Minn. 135; *Anderson v. Nelson Lumber Co.*, 67 Minn. 79.

Exemption of employer from acts of fellow servants applies in cases not covered by statute. *Peirce v. Oliver*, 18 Ind. App. 87.

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Railroads:

Engineer has "superintendence" over fireman. *Cluver v. Ala. &c. R. Co.*, 108 Ala. 330.

Employer held liable for act of foreman in failing to notify a tree chopper when a tree was about to fall. *Postal Tel. Cable Co. v. Hulsey*, (Ala.) 31 South. Rep. 527.

And for defective appliance furnished at his instance. *Illinois Car &c. Co. v. Walsh*, (Ala.) 31 South Rep. 470.

Foreman of switching crew having no power to employ, but having power to direct and report for discharge held to be a "vice-principal." *St. Louis &c. R. Co. v. Tuohey*, 67 Ark. 209.

So foreman of one switching crew and a member of another held not to be fellow servants. *St. Louis &c. R. Co. v. McCain*, 67 Ark. 377.

Foreman held to be one in authority under Indiana Act. *Louisville &c. R. Co. v. Wagner*, 153 Ind. 420.

Foreman was a servant bound to be obeyed under the Indiana Act though his duties required him to assist switching crew. *Terre Haute &c. R. Co. v. Rittenhouse*, (Ind. App.) 62 N. E. Rep. 295.

Kentucky constitution makes master liable for acts of a superior fellow servant. *Southern R. Co. v. Barr*, (Ky.) 55 S. W. Rep. 900.

An engine is not in the control of an engineer upon a railroad track while it is in the round house undergoing repairs. *Perry v. Old Colony R. Co.*, 164 Mass. 296.

Brakeman posted at brakes of a train being made up under the direction of a conductor was not "in charge" thereof. *Cameron v. Boston &c. R. Co.*, 164 Mass. 523.

But an engineer is "in charge" of a train. *Fairman v. Boston &c. R. Co.*, 169 Mass. 170.

So as to an engineer or brakeman. *Shea v. New York &c. R. Co.*, 173 Mass. 177.

A station agent who merely transmits orders to those that are in charge, is not. *Fairman v. Boston &c. R. Co.*, 169 Mass. 170.

Nor is one in charge of a switch. *Id.*

One required to move a switch upon signal held "in charge of" the switch. *Welch v. New York &c. R. Co.*, 176 Mass. 393.

A car shifter in getting a car ready for a trip is not a "superintendent" as to the motorman and conductor about to run it. *Whelton v. West End Street R. Co.*, 172 Mass. 555.

Section foreman held to be a vice-principal under Ark. Act, though operating a hand car with other employes. *Haworth v. Kansas City &c. R. Co.*, (Mo. App.) 68 S. W. Rep. 111.

Foreman while a fellow servant was held to be also in "authority." *Rutherford v. Southern R. Co.*, 56 S. C. 446.

Conductor of a train, except in certain contingencies, is a "superintendent." *Culpepper v. International &c. R. Co.*, 90 Tex. 627.

Ohio act as to liability of employer for acts of superior servants, applies to receivers. *Peirce v. Van Dusen*, 78 Fed. Rep. 693.

The act of such a servant thereunder need not be one due from the employer himself to permit recovery. *Id.*

Social or intellectual superiority, held not to make one a vice-principal. *Hunter v. Kansas City &c. R. Co.*, 85 Fed. Rep. 379.

Foreman of switching crew having no authority to direct or discharge, but only the duty of calling off the track on which cars were to run, held not to be a "superior" servant. *Fenwick v. Illinois Cent. R. Co.*, 100 Fed. Rep. 247.

Foreman, held to be a "servant in charge of any switch yard, shop," etc. *Charman v. Lake Erie &c. R. Co.*, 105 Fed. Rep. 449.

Foreman and a gang who are doing a distinct piece of work under his orders, held not a fellow servant with them under Texas Act. *Texas &c. R. Co. v. Carlin*, 111 Fed. Rep. 777.

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Any authority vested in one servant over another makes him a vice-principal under the Utah Act. *Southern P. R. Co. v. Schoer*, 114 Fed. Rep. 66.

That one employé erecting a scaffold was employed about the same general work was held not to make him a fellow servant. *Kuss v. Freid*, 32 Misc. 628.

Manufacturers and building operations:

Negligence.—Carpenter's duty to look after machinery held to intrust him with the "ways, works," etc., of the business, where his superintendent was also a salesman. *Copithorne v. Hardy*, 173 Mass. 400.

Superintendence held non-delegable. *Hodges v. Standard Wheel Co.*, 152 Ind. 680.

The injury need not be the outcome of a specific order, but may occur under general supervision. *Indianapolis Gas Co. v. Shumack*, (Ind.) 54 N. E. Rep. 414.

But a specific negligent act must concur with the injury and not be subsequent to it. See *McCabe v. Shields*, 175 Mass. 438.

Incidental labor here and there held not inconsistent with "superintendence." *Crowley v. Cutting*, 165 Mass. 436; *Reynolds v. Barnard*, 168 Mass. 226; *O'Brien v. Look*, 171 Mass. 36.

A painter doing the same work at the same pay, as others, held to be a superintendent within such act. *Adasken v. Gilbert*, 165 Mass. 443.

Details, such as setting up and inspecting moulds in an iron foundry, held not acts of "superintendence" though performed by a superintendent. *Whittaker v. Bent*, 167 Mass. 588.

Brittain v. West End Street R. Co., 168 Mass. 10.

But it has been held that the mere act of unwinding a rope from a drumhead while directing the lowering of a "fore and after" on a vessel cannot be separated from his duties as superintendent. *O'Brien v. Look*, 171 Mass. 36.

Mere failure to keep an employé out of the way of another having the use of a crowbar, was held not the act of a superintendent. *Fleming v. Elston*, 171 Mass. 187.

But the failure to prevent the lowering of an elevator on an employé who had inadvertently gotten in the way, was held to be. *Cavagnaro v. Clark*, 171 Mass. 359.

So as to the act of one whom the master allowed to direct the work in his absence, in giving a dangerous mould to a laborer. *McCabe v. Shields*, 175 Mass. 438.

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Otherwise as to the act of accidentally starting machinery while giving directions. *Joseph v. George C. Whitney Co.*, 177 Mass. 176.

Contributory negligence and assumption of risk.—Assumption of a risk under Mass. act held not to include risk of the negligence of the superintendent. *Murphy v. City Coal Co.*, 172 Mass. 324.

Mines:

Negligence.—Negligence of a mere fellow servant not intrusted with any “superintendence” does not charge employer under Ala. act. *Drennen v. Smith*, 115 Ala. 396.

Any authority vested in one servant over another makes the former a vice-principal under Colorado Act.

See *Carleton Min. &c. Co. v. Ryan* (Colo.) 68 Pac. Rep. 279; see *Rock Island &c. Works v. Pohlman*, 99 Ill. App. 670, as to the Illinois Act.

Where what little is done manually does not prevent the giving of necessary directions, acts are those of a “superintendent.” *Riou v. Rockport Granite Co.*, 171 Mass. 162.

Getting down on a bank to watch the work, held to be an act of “superintendence.” *McCoy v. Westboro*, 172 Mass. 504.

Miner and one employed to operate a cage in and out of the mine, and one employed to carry tools in and out, held not fellow servants under Utah act. *Jenkins v. Mammoth Min. Co.*, (Utah) 68 Pac. Rep. 845; *Stoll v. Daly Min. Co.*, 19 Utah, 271.

Contributory negligence.—Section hand does not assume the risk of the misdirection of his superintendent under Ala. act. *Woodward Iron Co. v. Andrews*, 114 Ala. 243.

Electrical appliances:

Recovery denied where superintendent was also a fellow servant, in which capacity he acted at the time of injury. *Flynn v. Boston Electric Light Co.*, 171 Mass. 395.

Recovery was denied though foreman was negligent, where deceased had assumed the obvious risk of defective insulation. *Chisholm v. New England Telephone &c. Co.*, 176 Mass. 125.

See, also, *Postal Teleg. Cable Co. v. Fuldsey*, 115 Ala. 193.

5. LIABILITY FOR EMPLOYMENT OF MINORS.

Dangerous machinery.—Use of dangerous machinery does not impute negligence. The use of a dangerous machine in a useful and productive

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business, does not alone render the employer liable under chapter 122, L. 1871, for injury to an infant employé. Negligence must be shown. *Hayes v. Bush & D. M. Co.*, 102 N. Y. 648; rev'g 41 Hun, 407, and judg't for pl'ff.

Violation of statute regulating labor of infants.—Chap. 122, L. 1876, forbidding the employment of a child under sixteen years of age, in any industrial occupation injurious to health or dangerous to his life or limbs, makes the employer violating it guilty of negligence. A child, in such a case, does not take the risk of business. Machinery under that act is dangerous, when it is of such strength or power as to render it improper to place a person of immature judgment to manage it.

The plaintiff worked in defendant's factory at a steam-power punching machine, and on June 30, 1882, the punch came down on his hand injuring his four fingers so badly that their complete amputation was necessary. He was then fifteen years of age, and he claimed in his suit that his employment was dangerous and that the machine was out of order at the time, to the defendant's knowledge. *Cooke v. Lalance Grosjean Man. Co.*, 33 Hun, 351, aff'g judg't for pl'ff.

Defendant held not liable for violation of act against employment of a child to run an elevator where the errand did not involve such work. *Young v. Dietzgen*, 76 N. Y. Supp. 123.

Violation of such a statute held negligence *per se*. *Ornamental Iron &c. Co. v. Green*, (Tenn.) 65 S. W. Rep. 399.

Mere violation held not negligence *per se*. *Kutchen v. Goodwillie*, 93 Wis. 448.

6. LIABILITY OF FELLOW SERVANTS.

Where the employé has no control over the entry or the roofs of the mine he was not chargeable with a misdemeanor in failing to securely prop it as required by statute. *Corson v. Coal Hill Coal Co.*, 101 Iowa, 224.

Ashland Coal &c. R. Co. v. Wallace, 101 Ky. 626, 644.

Nor guilty of contributory negligence. *Taylor v. Star Coal Co.*, 110 Iowa, 40.

Master and servant joined in action for negligence of latter by a fellow-servant. *Charman v. Lake Erie &c. R. Co.*, 105 Fed. Rep. 449.

MUNICIPALITY.

I. JUDICIAL ACTS.

- (a) Not liable in the exercise of powers public, legislative, or quasi-judicial.
- (b) But liable for negligent performance of ministerial duties.

II. POWERS AND DUTIES.

- (a) Degree of care required.
- (b) Streets.
 - 1. Duty respecting.
 - 2. To what it applies.
 - 3. Contributing cause.
- (c) Bridges.
 - 1. Who bound to maintain in condition of reasonable safety.
 - 2. What constitutes reasonable safety.
 - 3. Diligence required in remedying defects.
 - 4. Contributory negligence.
 - 5. Proximate cause.
- (d) Embankments, railings, etc.
 - 1. Necessity and sufficiency of guard rails at dangerous places.
 - 2. Contributory negligence.
- (e) Fires,—Defective buildings.
- (f) Awnings.
- (g) Sidewalks.
 - 1. Duty to use care in construction and repair.
 - 2. Duty to maintain in reasonably safe condition for ordinary use.
 - 3. What constitutes reasonably safe condition.
 - 4. Duty to maintain requires reasonable diligence in inspection.
 - 5. And reasonable diligence in repairing after notice, of the defect, actual or constructive.
 - 6. Contributory negligence.
- (h) Snow and ice.
 - 1. When a defect.
 - 2. Entitled to reasonable opportunity to remove it.
 - 3. After notice.
 - 4. Effect of statutes.

5. Contributory negligence.

6. Proximate cause.

(i) Sewers.

(j) Disorder on streets.

(k) Injury from mobs, &c.

(l) Objects calculated to frighten horses.

(m) Licensing of nuisances.

(n) Obstructions, excavations and other defects in streets and highways.

1. Duty to use due care in construction and repair.

2. Duty to maintain in reasonably safe condition for ordinary use.

3. What constitutes reasonably safe condition.

4. Duty of maintenance requires reasonable inspection and supervision.

5. And reasonable diligence in repairing after notice of the defect actual or constructive.

6. Contributory negligence.

7. Proximate cause.

(o) Dangerous places beyond the limits of the highway.

(p) Lighting streets.

(q) Purity of water.

III. PUBLIC IMPROVEMENTS.

(a) Not liable for merely consequential damages from public improvements.

1. Flow of surface water.

2. Effect of statutes requiring compensation.

(b) But liable if it constitutes invasion of a private property right, trespass or nuisance.

1. Collection and diversion of water.

2. Interference with natural streams.

3. Pollution of natural streams.

IV. PUBLIC OFFICERS, LIABILITY FOR ACTS OF.

(a) Quasi-municipal corporations.

(b) Municipal corporations not liable for negligence in exercise of public function.

1. Police.

2. Fire.

3. Health.

4. Highways, streets and sidewalks.

5. Waterworks.

6. Maritime law.

DISCRETION IN ADOPTING PLANS FOR PUBLIC IMPROVEMENT.

- (c) But liable for negligence in exercise of corporate functions.
 - 1. Highways, streets and sidewalks.
 - 2. Waterworks.
 - 3. Business quasi-private.
- (d) Construction of statutes imposing duties and liabilities.
- (e) Not liable for acts *ultra vires* the corporation.
- (f) But liable for authorized corporate acts within the power of the corporation.
- (g) And for acts of officers and employ  s within the scope of their authority.
- (h) Independent contractors.
- (i) Restitution.

V. PRESENTATION OF CLAIM.

- (a) Necessity of notice.
- (b) Sufficiency of notice.
- (c) Time and service of notice.

I. Judicial Acts.

Where the power is conferred upon public officers or a municipal corporation to make improvements, such as streets and sewers, and keep them in repair, the duty to make them is quasi-judicial or discretionary, and for a failure to exercise the power or an erroneous estimate of the public needs, no civil action can be maintained. But when the discretion has been exercised and the improvement made, the duty of keeping it in repair so as to prevent its being dangerous to the public is ministerial, and for a negligent omission to perform it an action by the party injured will lie. *Hines v. City of Lockport*, 50 N. Y. 236; *Urquhart v. City of Ogdensburg*, 97 N. Y. 238.

(a) NOT LIABLE IN EXERCISE OF POWERS, PUBLIC, LEGISLATIVE OR QUASI-JUDICIAL.

1. ACTS OF QUASI-JUDICIAL NATURE.

City not liable for the act of a mayor in requiring a larger bond than the law authorized. *Gray v. Griffin*, 111 Ga. 361.

The action of the mayor and council of a city of the third class as to the allotment of improvements. *State v. Neodesha*, 3 Kan. App. 319.

City not liable for collision of driver with shade trees set out by road commissioners under statutory authority. *Washburn v. Easton*, 172 Mass. 525.

2. DISCRETION IN ADOPTING PLANS FOR PUBLIC IMPROVEMENT.

Where power is conferred upon a municipal corporation to make local improvements, its exercise is *quasi-judicial* or discretionary, and for a

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failure to act or an erroneous estimate of the public needs, a civil action cannot be maintained against it.

Where, therefore, an accident was alleged to have been occasioned by an alleged defect in the plan upon which a sidewalk was constructed, *i. e.* that the slope was too great, the municipal corporation was not liable; also, the fact that the corporation did not, prior to the construction of the sidewalk, expressly adopt the plan upon which it was construed, did not impose such liability; the approval of the plan when completed was as much a judicial act as the design of it. *Urquhart v. City of Ogdensburg*, 91 N. Y. 69, rev'g judg't for pl'ff.

From opinion.—"The rule is well settled that where power is conferred on public officers or a municipal corporation, to make improvements, such as streets, sewers, etc., and keep them in repair, the duty to make them is *quasi* judicial or discretionary, involving a determination as to their necessity, requisite capacity, location, &c., and for a failure to exercise this power or an erroneous estimate of the public needs, no civil action can be maintained. But when the discretion has been exercised and the street or improvement made, the duty of keeping it in repair is ministerial, and for neglect to perform such a duty an action by the party injured will lie. *Hines v. City of Lockport*, 50 N. Y. 238; *Mills v. City of Brooklyn*, 32 id. 489; *Lansing v. Toolan*, 37 Mich. 152; *Marquette v. Cleary*, 37 id. 296; *Darling v. Bangor*, 68 Me. 112.

Cooley, Ch. J., in reversing the judgment in the Toolan Case says: 'In planning public works a municipal corporation must determine for itself to what extent it will guard against possible accident. Courts and juries are not to say it shall be punished in damages for not giving to the public more complete protection; for that would be to take the administration of municipal affairs out of the hands to which it has been intrusted by law. What the public have a right to require of them is that in the construction of their works, after the plans are fixed upon, and in their management afterward, due care shall be observed, but negligence is not to be predicated of the plan itself.'

This rule was held to be applicable as well to work done as to a design proposed. The approval of the plan when completed is as much a judicial act as the design of it. It is of no consequence that the judgment was exercised at different times so long as it comprehended the single plan. See *Lansing v. Toolan*, 37 Mich. 152."

A municipality is not liable for a defect in the original plan of a walk, nor for the plan of one already built, yet *there must be proper corporate action adopting such plan, or any change thereof.*

If the adjoining owner build a walk with a dangerous slope and the municipality take no action, it is liable for injuries resulting therefrom. The approval of a plan, when completed, is equivalent to the adoption of it prior to construction. *Urquhart v. City of Ogdensburg*, 97 N. Y. 238.

A street was graded up in one place about thirty feet above the adjoining land. No provision was made in the plan for a railing or fence on the

outer lines of the road at the top of the bank. The defect, if any, was in the plan and was not chargeable to the officers of the town. *Monk v. Town of New Utrecht*, 104 N. Y. 553, aff'g nonsuit.

In establishing the grade of a street and in adopting plans for improvements, the city acts judicially, and is not liable, if surface water is thrown on adjoining premises, if the discharge is not greater than it naturally should be. *Watson v. City of Kingston*, 114 N. Y. 88, aff'g 43 Hun, 367, and nonsuit.

See *Clemmence v. City of Auburn*, 66 N. Y. 334; *Saulsbury v. Village of Ithaca*, 94 id. 27.

Route and plan for sewer were reasonably safe. City was not liable for not adopting the best. *Uppington v. New York*, 165 N. Y. 222; aff'g s. c., 44 App. Div. 630.

If adjoining owner fixes the pitch of the sidewalk whereby one is injured, the municipality is not relieved, unless it appear that its officers have established or approved the grade. *Granger v. Village of Seneca Falls*, 45 Hun, 60, rev'g nonsuit.

A passenger upon a street may use a sidewalk, although knowing it to be in an unsafe condition, and if he is injured it is a question for the jury whether he was guilty of carelessness which contributed to the injury.

It was shown that the accident—a fall on the sidewalk—happened at the southeast corner of Henderson and Oak streets; that the occupant of the corner lot had built a new sidewalk on Henderson street upon a grade fixed by city engineer of the defendant. This sidewalk, where it stopped near the margin of the sidewalk of Oak street, was about a foot higher than the walk on Oak street, and the two were connected by a slant of earth about sixteen inches long.

The trial court refused to charge that if the condition of the walk was the result of an error of judgment in determining the plan of construction the plaintiff could not recover. No error. *Brown v. City of Syracuse*, 77 Hun, 411.

The evidence was such that the jury could have found that the defect in the sidewalk of the street which caused the death of the plaintiff's intestate existed in consequence of the neglect of the defendant's officers to make proper repairs thereon, or that the accident to the deceased was caused by the error or mistake of the common council of the defendant in the plan of the construction of the sidewalk.

It was error for the trial court to decline to instruct the jury that, if they should find that the death of the plaintiff's intestate was owing to the latter cause, the plaintiff could not recover. *Roach v. City of Ogdensburg*, 80 Hun, 467.

From opinion.—"The effect of this charge was to instruct the jury that the

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corporation was liable for the accident that caused the death of plaintiff's intestate, although occurring by reason of the defect of the plan of the crosswalk adopted by the common council of defendant, if such plan was not one that should be adopted by reasonably prudent and careful men. * * * We think the authorities do not sustain such a doctrine. In *Urquhart v. The City of Ogdensburg*, 91 N. Y. 67, it appeared that the accident which caused the injury to plaintiff, for which the action was brought, was owing to a defect in the plan adopted by the city in laying the sidewalk. The Court of Appeals held that the trial judge erred in refusing to charge that the defendant cannot be held liable for any fault in the plan of the work and hence was not liable for the steepness of the slope or incline from the platform to the curbstone. The Court of Appeals also held that the trial judge erred in denying defendant's motion for a nonsuit. The plan adopted in the case cited appeared to be dangerous; but, instead of determining that it should have been submitted to the jury to find whether it was such a plan as a reasonable and careful person should adopt, the court of appeals held that the dangerous slope in the street, which caused the injury, appearing to have been made pursuant to the plan of defendant's common council, a nonsuit should have been granted.

I am not aware that the case above cited has been doubted or overruled. See *Urquhart v. City of Ogdensburg*, 97 N. Y. 238; *Garrett v. Trustees of the Village of Canandaigua*, 135 id. 436, 442, 443; *Betts v. The Village of Gloversville*, 8 N. Y. Supp. 795.

The correct doctrine applicable to this case is ably stated in *Carr et al. v. Northern Liberties*, 35 Penn. St. 324-329, when the question of the liability of a municipal corporation for an injury resulting from a defective plan adopted by its common council was under consideration, as follows: "Municipal corporations have often been held liable for carelessness in the exercise of their functions; but if we undertake to correct the evil in such a case as this, on the ground of carelessness, we see not how to escape from the necessity of submitting the propriety of all acts of grading and draining in our towns, to the decision of juries; for even discretionary acts may be charged to have been ignorantly or carelessly resolved upon. Any street may be complained of as being too steep or too level; gutters as being too deep or too shallow, or as being pitched in a wrong direction; and there may be evidence that these things were carelessly resolved upon, and then a tribunal that is foreign to the municipal system will be allowed to intervene and control the town officers. And the end is not yet; for if a regulation be altered to suit the views of one jury, the alteration may give rise to another case, in which the new regulation will be likewise condemned. This theory is so vicious that it cannot possibly be admitted."

The above case was cited with approval and the same doctrine stated by Cooley, Ch. J., in *Detroit v. Beckman*, 34 Mich. 125-128, and the last-named case was followed by the same judge in *Lansing v. Toolan*, 37 Mich. 152, referred to and followed in *Urquhart v. City of Ogdensburg*, 91 N. Y. 71.

No liability where lamp posts were located in good faith. *Van Wie v. Mt. Vernon*, 26 App. Div. 330.

So, as to location of a sewer. *San Antonio v. San Antonio Street R. Co.*, 15 Tex. Civ. App. 1.

See, also, *Barger v. Hickory*, 130 N. C. 550; *Chicago v. Rustin*, 99 Ill. App. 47.

Curbing was left to the discretion of the city's engineer, no formal plan having been adopted by the city. Not defensible as an exercise of discretion by the city. *Collett v. New York*, 51 App. Div. 394.

A part of a plan for sewage which a city had adopted, it finally decided not to use. City was not liable. *Wilson v. Waterbury*, 73 Conn. 416.

City acts judicially in adopting plans, but ministerially in executing them. *Hession v. Wilmington*, 1 Marv. (Del.) 122.

Gift v. Reading, 3 Pa. Super. Ct. 359; *Chicago v. Seben*, 165 Ill. 371; aff'g s. c., 62 Ill. App. 248.

Where the expense of a sewer, was charged upon the abutting owners, the city was liable for its total failure to accomplish the result for which it was designed. *Litchfield v. Southworth*, 67 Ill. App. 398.

A city chose a certain standard of material for a walk, though there was in fact a better. No liability. *McQueen v. Elkhart*, 14 Ind. App. 671.

So, where city took the *bona fide* advice of competent engineers on the construction of a water box. *Taubert v. St. Paul*, 68 Minn. 519.

But where a Board of County Commissioners adopted plans for a bridge after it had been informed that they were inadequate for the purpose, city was liable. *Board of Com'rs &c. v. Vickers*, 62 Kan. 25.

Whether a steep incline of a step should be used at an alley crossing was within the discretion of the public officers. *Conlon v. St. Paul*, 70 Minn. 216.

In planning public works a municipal corporation must determine for itself to what extent it will guard against possible accidents. *Lansing v. Toolan*, 37 Mich. 152; *Marquette v. Cleary*, id. 296; *Darling v. Bangor*, 68 Me. 108.

Regulation of a fire department is a governmental function. *Peterson v. Wilmington*, 130 N. C. 76.

Municipality adopted a defective plan but had no notice that it was not reasonably safe. It was not liable. *Circleville v. Sohn*, 20 Oh. C. C. 368.

So, where the model furnished to board of county commissioners was defective. *Alexander v. Brady*, 61 Oh. St. 174.

Discretion in spending several years at grading, etc., instead of shortening the period, was not well exercised, but did not make city liable. *Ridge Avenue &c. R. Co. v. Philadelphia*, 181 Pa. St. 592.

Nor did an error of judgment in adopting plans. *Sullivan v. Pittsburg*, 5 Pa. Super. Ct. 357.

Augusta v. Little (Ga.) 41 S. E. Rep. 238; *Pressman v. Dickson City*, 13 Pa. Super. Ct. 236; *Beach v. Scranton*, 5 Lack. L. News, 25.

MUNICIPALITY NOT LIABLE TO INDIVIDUAL FOR FAILURE TO ABATE A NUISANCE.

3. ABUSE OF DISCRETION.

Municipality is liable where the discretion is palpably abused for the purpose of oppressing a private owner. *Atlanta v. Holliday*, 96 Ga. 546.

4. FAILURE TO EXERCISE A POWER.

It is within the discretion of the municipal authorities to make improvements in streets and avenues within their domain or to omit them, and where no sidewalk has been ordered or made, a failure to exercise the power to construct and regulate it gives rise to no cause of action. *McNish v. Peekskill*, 91 Hun, 324.

But exemption for failure to exercise power to improve, held not to apply to repair. *Birmingham v. Starr*, 112 Ala. 98.

See, also, *Guthrie v. Swan*, 5 Okla. 779; *Smook v. Anaconda*, 26 Mont. 128; see *May v. id.*, *id.*, 140.

So, a failure to pass an ordinance against riding bicycles on sidewalks, is not ground of action against municipality. *Tarbutton v. Tennile*, 110 Ga. 90.

Custer v. New Philadelphia, 20 Oh. C. C. 177; *Jones v. Williamsburg*, 97 Va. 722.

So as to failure to continue water service. *Sandusky v. Central City*, (Ky.) 58 S. W. Rep. 516.

Planters' Oil Mill v. Monroe Waterworks &c. Co., 52 La. Ann. 1243.

Or to construct levees as authorized. *Hamilton v. Ashbrook*, 62 Oh. St. 511.

Or to furnish drains to carry off surface water. *Jordan v. Benwood*, 42 W. Va. 312.

A municipal corporation is not liable for a failure to enforce its ordinance. *Dooley v. Sullivan*, 112 Ind. 451.

McDade v. Chester City, 117 Pa. St. 414.

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Pedestrian was run into and injured by a bicyclist riding on the sidewalk. Failure to pass ordinance forbidding it was not ground of action against city. *Howard v. Brooklyn*, 30 App. Div. 217.

Plaintiff was injured by rifle ball escaping into the street from an adjoining shooting gallery. Recovery from city denied. *Leonard v. Hornellsville*, 41 App. Div. 106.

By passing an ordinance forbidding a nuisance, a city does not insure

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to private persons compliance therewith. *Harman v. St. Louis*, 137 Mo. 494; *Butz v. Cavanaugh*, 137 id. 503.

A municipal corporation has no control over nuisances existing within its corporate limits except what is conferred upon it by its charter or the general law. *Martinowsky v. Hannibal*, 35 Mo. App. 70.

A city was not liable for the continuance of a nuisance. *Chattanooga v. Reid*, 103 Tenn. 616.

Though it has the power to abate it. *Greenville v. Britton*, 19 Tex. Civ. App. 79.

Unless its officers have been willful or grossly negligent, in failing to abate the nuisance. *Willetts v. St. Albans*, 69 Vt. 330.

So, of a failure to collect an assessment. *Pontiac v. Talbot Pav. Co.*, 94 Fed. Rep. 65; s. c., 96 id. 679.

(b). BUT LIABLE FOR NEGLIGENT PERFORMANCE OF MINISTERIAL DUTIES.

Chicago v. Seben, 165 Ill. 371; aff'g s. c., 62 Ill. App. 248; *Hession v. Wilmington*, 1 Marv. (Del.) 122; *Gift v. Reading*, 3 Pa. Super. Ct. 359.

The defendant, a commissioner of highways, came to the plaintiff as having been sent by the board of health, and said that he was about to turn off some water, of which complaint had been made to the board of health by the plaintiff. The defendant said that he should charge each of the persons to be benefited \$25 for making the necessary digging, and thereupon he dug out the ditch in such a negligent manner as to increase, rather than to remedy, the difficulty.

An action, the complaint in which charges that a person, while engaged in the discharge of his duties as street superintendent, under the direction of a town board of health, so negligently and carelessly dug a ditch, intending to carry off water from a highway, that the flooding of the premises of the complainant was increased rather than diminished thereby, is not an action upon contract.

It is an action for negligence, charging that a person, while engaged in a lawful business, was guilty of an omission of the duty which he owed the complainant, to perform the work in a reasonably skillful manner. *Fromm v. Ide*, 60 Hun, 322, rev'g nonsuit.

The execution of a plan adopted is a ministerial act. *Chicago v. Norton Milling Co.*, 97 Ill. App. 651; s. c., 196 Ill. 580.

The repairing of a fire alarm system is. *Wagner v. Portland*, 40 Ore. 389.

Construction of a sewer is. *Murphy v. Indianapolis*, 158 Ind. 238.

1. DUTY OF MAINTENANCE REQUIRES REMOVAL OF DEFECT DUE TO MISTAKE
IN ORIGINAL PLANS.

Plaintiff's evidence tended to show that a sidewalk had been laid at a grade fixed, that in consequence of the raising of an intersecting street a new grade was necessary and had been fixed by the common council. A portion of the walk was built upon the new grade, and where the old and the new walk came together there was a difference of several inches; the chairman of the street committee of the common council directed that a stone, to join the old and new walks, be laid at a slope of six inches, in about three feet and a half, an angle much greater than that on either side; upon this stone plaintiff slipped and fell. The stone had been suffered to remain several years; similar casualties had occurred, and the evidence tended to show that it was unsafe for persons passing over it, whose attention was not particularly called to the difference. The court directed a nonsuit on the ground that the common council acted judicially in establishing the grade, and the sidewalk having been built in conformity therewith, defendant was not liable. This was error.

It could not be assumed that the chairman of the street committee was authorized to change the grade, or that it was changed by direction of the common council; the injury was not in consequence of any action of the common council establishing a grade, but resulted from the manner in constructing the sidewalk in violation of the requirements of the common council, and the cause of action, if any, was for neglect to remedy the defect; if the walk was, in fact, in an unsafe condition, defendant was liable for injury to a person falling thereon, and the question was, upon the evidence, one of fact for the jury. *Clemence v. Auburn*, 66 N. Y. 334, aff'g 4 Hun, 386: and ordering judg't for pl'ff.

From opinion.—"The cases which hold that individuals are not entitled to compensation for incidental and consequential damages to property, resulting from public works constructed under authority of law and in the exercise of a discretion committed to public officers, are not necessarily decisive of the question as stated. Such are the cases relied upon by the counsel for the appellant. *Childs v. Boston*, 4 Allen 41; *Wilson v. Mayor &c. New York*, 4 Den. 595; *Radcliff's Exrs. v. The Mayor &c. Brooklyn*, 4 Com. 195; *Mills v. Brooklyn*, 32 Barb. 489. * * * The evidence comes far short of proving that the sidewalk, at the particular place of the injury was upon the grade up at an angle as fixed by the common council, but on the contrary it is very evident that it was laid at an entirely different angle and grade from that which had been ordered.

* * * * *

The case is directly within a large class of cases holding that for any neglect or omission of duty on the part of municipal corporations in keeping and maintaining the streets and sidewalks in safe condition for use, in the usual mode, by travelers, the corporation is liable for any injuries to individuals resulting therefrom. *Dillon on Munic. Corp.* 753; *Hutson v. New York* 5 Seld. 163; *Weet v. Brockport*, 16 N. Y. 161; *Rochester White Lead Co. v. Rochester*, 3 Com. 463;

Conrad v. Ithaca, 16 N. Y. 159; Barton v. Syracuse, 37 Barb. 292; aff'g 36 N. Y. 54; Chicago v. Robins, 2 Black. 418; Diveny v. Elmira, 51 N. Y. 506; Hines v. Lockport, id. 236."

Commissioners of sewage and assessment of the city of Brooklyn, in pursuance of the authority given them by statute, (Chap. 521, Laws of 1857; Chap. 136, Laws of 1861) established a drainage district, not theretofore drained over the lands of plaintiff, and a plan of drainage which contemplated the construction of a main sewer into which lateral sewers to be constructed from time to time should empty. The main sewer was built in 1868, and subsequently various lateral sewers. Soon after the completion of the main sewer, actual use demonstrated that it was insufficient to carry off the sewage turned into it, and at times this was forced through the man-holes and inundated plaintiff's premises, inflicting serious injury. These inundations increased in frequency as new lateral sewers were connected with the main trunk, and became well known to the municipal officers. Notwithstanding this the city continued to build and attach lateral sewers, increasing from year to year the evil produced by the defects in the original plan.

The city having by the exercise of its power created a private nuisance on plaintiff's premises, it incurred a duty of adopting such measures as should abate the nuisance, and having the power to perform it, its omission to do so rendered it liable. *Siefert v. City of Brooklyn*, 101 N. Y. 136, aff'g order rev'g nonsuit.

Distinguishing Mills of City of B. 32 N. Y. 489; *Smith v. Mayor &c.* 66 id. 295; *Wilson v. Mayor &c.* 1 Den. 595; *Lynch v. Mayor &c.*, 76 N. Y. 60. See, p. 968; *Paine v. Trustees and Inhabitants of Delhi*, 116 N. Y. 224, aff'g judg't for def't.

No liability attaches if after a proper plan has been adopted the work has been let to an independent contractor; but otherwise, if the plan is defective. *Seymour v. Cummings*, 119 Ind. 148.

That the original plans were defective is no excuse for continuing the existence of the defect after notice thereof. *Circleville v. Sohn*, 59 Oh. St. 285.

See, however, *Bealafeld v. Verona*, 188 Pa. St. 627.

The death of a child caused by failure of a city to keep in repair an embankment near one of its roads is actionable; the ground being that it was its ministerial duty to repair. *Gibson v. Huntington*, 38 W. Va. 177.

II. Powers and Duties.

When the duty of keeping a structure in repair is imposed upon a public officer or municipal corporation, a reasonable degree of watchfulness is required in ascertaining its condition from time to time and keeping it in

DEGREE OF CARE REQUIRED.

a reasonable state of repair; and if this be omitted a municipality is liable for injuries from defects of which it has notice or knowledge, or which, in the exercise of a reasonable and ordinary inspection, examination and care, it should have knowledge.

(a). DEGREE OF CARE REQUIRED.

When the duty of keeping a structure in repair is imposed on a public officer or a municipal corporation, it requires a reasonable degree of watchfulness in ascertaining its condition, from time to time, and, if this be omitted, the municipality is liable for injuries from defects, which the requisite examination would have revealed. Notice in such a case is unnecessary. *McCarthy v. Syracuse*, 46 N. Y. 194, aff'g judg't for pl'ff.

Plaintiff was driving along Railroad street in Cooperstown, on a stormy winter's day, when his cutter struck the stick of timber which was covered with snow; the cutter was upset and broken and plaintiff was injured. It did not appear who placed the timber in the street, or when, or under what circumstances, or that any of the village authorities or agents had any notice or knowledge of the obstruction before the injury; simply the fact that the timber was there at the time of the accident. Held, defendant was not liable. *Gorham v. Cooperstown*, 59 N. Y. 660, aff'g judg't for def't.

A municipality does not insure the citizen against damage from works of its construction. Its obligation and duty are measured by the exercise of reasonable care and vigilance. *Hunt v. Mayor &c.*, 109 N. Y. 134, aff'g 20 J. & S. 198 and judg't for def't.

Smith v. Mayor &c., 66 N. Y. 295; aff'g 4 Hun, 637, and judg't for def't; *Ring v. City of Cohoes*, 77 N. Y. 83, rev'g 13 Hun, 76 and judg't for pl'ff; *Kaveny v. Troy*, 108 N. Y. 571, rev'g judg't for pl'ff.

A municipality is not relieved because its officer reports that a defective condition, in this case a sunken stone in the cross-walk, is not dangerous. *Goodfellow v. Mayor &c.*, 100 N. Y. 15, rev'g judg't for def't.

Clemence v. Auburn, 66 N. Y. 334.

A hydrant, properly constructed and not shown to be out of repair, was removed in an unknown manner and the water from the main flowed on the plaintiff's land and did injury. There was no presumption that the water forced off the hydrant, and a recovery, without showing some negligence of the defendant, was improper. It seems that the burden was not on the defendant to account for the removal of the hydrant. *Jenney v. Brooklyn*, 120 N. Y. 164, aff'g 44 Hun, 371 and judg't for pl'ff.

A municipality does not perform its whole duty in respect to keeping its streets in a safe condition for travel by instructing its subordinates to ascertain the facts in regard to their condition and report thereon. *Kirk v. Village of Homer*, 77 Hun, 459.

Degree of care varies with the reasonable needs of the particular locality but the city is in no case an insurer. *Williams v. Brooklyn*, 33 App. Div. 539.

The duty of a city is to keep its streets in reasonably safe condition. It is not an insurer. *Denver v. Moewes*, 15 Colo. App. 28.

Worthington v. Morgan, 17 Ind. App. 603; *Aiken v. Philadelphia*, 9 Pa. Super. Ct. 502; *Smith v. Brunswick*, 61 Mo. App. 578; *Hannibal v. Campbell*, 86 Fed. Rep. 297; *Scott v. Provo City*, 14 Utah, 31; *Peake v. Superior*, 106 Wis. 403; *Van Pelt v. Clarksburg*, 42 W. Va. 218.

An obstruction must have been in existence long enough to enable the municipality through the use of reasonable care to discover and secure its removal. *Downs v. Smyrna*, 2 Penn. (Del.) 132.

Ransom v. Belvidere, 87 Ill. App. 167; *Kansas City v. McDonald*, 60 Kan. 481.

Commissioners of highways who have in good faith and to the best of their ability expended the means within their command where they seemed to them most needed have acted reasonably and no liability attaches. *Nagle v. Wakey*, 161 Ill. 387; aff'g s. c., 59 Ill. App. 198.

Where nails had projected from a stringer in a sidewalk for two months, negligence was for the jury. *Coffeen v. Lang*, 67 Ill. App. 359.

A municipality is not an insurer. *Rock Island v. Drost*, 71 Ill. App. 613.

Salem v. Webster, 192 Ill. 369; aff'g s. c., 95 Ill. App. 120.

Or bound to do everything that human energy and ingenuity can suggest. *Streator v. Liebendorfer*, 71 Ill. App. 625.

And the duty does not apply "at any and all times." *Magaha v. Hagerstown*, 95 Md. 62.

See, also, *Anderson v. Albion*, (Neb.) 89 N. W. Rep. 794.

Duty of reasonable repair of sidewalk applied to ordinary uses only; not to bicycle riding, though permitted by ordinance. *Lee v. Port Huron*, 128 Mich. 533.

But, where the walk was not reasonably safe for pedestrians, bicyclist recovered. *Gagnier v. Fargo*, (N. D.) 88 N. W. Rep. 1030.

The degree of care required in inspection of a bridge, known to be defective, held to be a critical examination by one competent for such a service. *Hardin County v. Coffman*, 18 Oh. C. C. 254.

For two years the ends of a sidewalk were loose and would tip up when stepped on, though apparently in good order. Reasonable care had not been used. *Matthews v. Toledo*, 21 Oh. C. C. 69.

DUTY RESPECTING STREETS.

Failure to discover a defect in a grate over a coal hole which could not have been detected without removing the cover, did not establish liability. *Duncan v. Philadelphia*, 173 Pa. St. 550.

Actual notice of such a defect is required. *Childs v. Crawford County*, 176 Pa. St. 139.

Same care is not due in respect to an alley as to a street. The measure of care is in proportion to its character and the public needs. *Musick v. Latrobe*, 184 Pa. St. 375.

Borough was not liable for accidental breakage of water hydrant; but liable for its direction to turn the water on to private property. *McHale v. Throop*, 13 Pa. Super. Ct. 394.

The duty of discovering defects in the sidewalk is greater upon the municipality than upon the party using them. *Lyman v. Green Bay*, 91 Wis. 488.

Where there was a defect such as was in fact liable to cause injury to one in the exercise of ordinary care, it was held that the city would be liable without regard to whether an ordinary man might reasonably expect that injury might occur. *Peake v. Superior*, 106 Wis. 403.

(b). STREETS.

Where a municipality is vested with power to perform the act done, omission to do it lawfully does not exonerate the corporation from liability for negligence, and so when it holds out to the public that the power exists and has been exercised and the public are invited to avail themselves thereof; as, where the authorities have treated a place as a public street, taking charge of it and regulating it. *Sewell v. City of Cohoes*, 75 N. Y. 45; *Mayor v. Sheffield*, 4 Wall. 189; *Houfe v. Town of Fulton*, 34 Wis. 608; *Stark v. Lancaster*, 57 N. H. 88; *City of Aurora v. Colshire*, 55 Ind. 484; *Phelps v. City of Mancato*, 23 Minn. 276.

But, as a municipality must act through its officers, if there be no authority whatever for such officers to do the act, and in the absence of the conditions above mentioned, the municipality will not be liable, although the public may avail itself of the existing conditions. *Carpenter v. City of Cohoes*, 81 N. Y. 21.

1. DUTY RESPECTING.

Must be reasonably safe for ordinary travel:

It is no defense that insufficiency is due to the forces of nature, where the effect would have been the same without them. *Lehmann v. Brooklyn*, 30 App. Div. 305.

As to natural defects left on opening street, see *Lamb v. Cedar Rapids*, 108 Iowa, 629.

Safety sufficient to meet the ordinary demands of the public is the

measure of the duty required. *Pierce v. Wilmington*, 2 Marv. (Del.) 306.

Kansas City v. Orr, 62 Kan. 61; *Vogelgesang v. St. Louis*, 139 Mo. 127; *Kossmann v. St. Louis*, 153 Mo. 293; *Guthrie v. Thistle*, 5 Okla. 517; *White v. Ballard*, 19 Wash. 284.

City liable for hole leading into a catch basin in a street left open and uncovered. *Chicago v. Seben*, 165 Ill. 371; aff'g s. c., 62 Ill. App. 248.

Willis v. Newburne, 118 N. C. 132; *Bowser v. Toledo*, 12 Oh. C. C. 631.

Duty to keep street in a reasonably safe condition applied to a child at play as well as to one using it for business. *Bath v. Blake*, 97 Ill. App. 35.

See, also, *Collins v. Janesville*, 111 Wis. 348.

Propriety in laying a main in dry loose earth without other foundation was for the jury. *Dammann v. St. Louis*, 152 Mo. 186.

So, as to sufficiency of culvert gradings. *Capitol Printing Co. v. Raleigh*, 126 N. C. 516; *Chau Sing v. Portland*, 37 Ore. 68.

City held liable for a pond formed in a street while grading and constructing a storm sewer. *Omaha v. Richards*, 49 Neb. 244.

Liability on account of "any public, state, or county road," does not include city streets. *Alexander v. Bradey*, 61 Oh. St. 174.

What is reasonable care does not depend on the number and nature of a municipality's other duties. *Cincinnati v. Frazier*, 19 Oh. C. C. 604.

A city owes the duty of ordinary care to a negligent person. *Ohliger v. City of Toledo*, 20 Oh. C. C. 142.

Reasonable care has been exercised only where a traveler may, by the exercise of ordinary care, avoid injury. *Murphy v. Dayton*, 8 Oh. S. & C. P. 354.

City need not bridge its gutters. *Heiss v. Lancaster*, (Pa.) 52 Atl. Rep. 201.

Wright v. Lancaster, (Pa.) 25 Atl. Rep. 245.

The duty extends to the protection of bicycle riders as much as to drivers of ordinary vehicles. *Laredo &c. R. Co. v. Hamilton*, (Tex. Civ. App.) 56 S. W. Rep. 998.

Ordinary care has been exercised where an ordinary horse may be driven thereon under ordinary circumstances with reasonable safety. *White v. Ballard*, 19 Wash. 284.

But not extraordinary conditions:

Injury occurred from that which, though a defect, was not, under ordinary circumstances likely to cause injury. No liability: *Grant v. Enfield*, 11 App. Div. 358.

DUTY RESPECTING STREETS.

A horse's hoof was caught in paving while hitched to an electric light pole. City was not liable as such pole was not intended as a hitching post. *Ryther v. Austin*, 72 Minn. 24.

Reasonable safety only includes provision for ordinary animals; not balky horses. *Cage v. Franklin*, 11 Pa. Super. Ct. 533.

Or runaways. *Hungerman v. Wheeling*, 46 W. Va. 761.

Reasonable care to prevent accident from necessary obstructions, excavations, &c.:

Where an excavation becomes necessary there is a duty to use reasonable care to guard it. *Carswell v. Wilmington*, 2 Marv. (Del.) 360.

To keep the public out of such area by barriers and warnings. *Guthrie v. Swan*, 5 Okla. 779.

Effect of statutes imposing duties as to maintenance:

Strict construction of statutory duty carrying a penalty excluded liability where the negligence of another contributed to the injury. *Bart-ram v. Sharon*, 71 Conn. 686.

When the grading of a street was not done by ordinance as prescribed by statute, liability attached to the corporation for damage to plaintiff's property. *Iowa v. Anamosa*, 76 Iowa, 538.

Under a statute defining duties as to highways, a "defective highway" was construed to include defects due to negligent construction as well as failure to repair. *Reading v. Telfer*, 57 Kan. 798.

Statutory liability for failure to repair, held to arise where the defect had been in existence long enough to give a reasonable opportunity to discover and repair it. *Handy v. Meridian*, 114 Mich. 454.

A statute imposing liability for failure to maintain in reasonable safety, passed before the use of bicycles, construed not to apply to safety of road for their use. *Leslie v. Grand Rapids*, 120 Mich. 28.

Statutory duty to remedy a defect or obstruction held ministerial and mandatory and to arise immediately upon reasonable notice thereof. *Circleville v. Sohn*, 59 Oh. St. 285.

Injury by failure to give notice of blasts to remove a defect, held not to arise from a "defect" within a statute imposing a liability therefor. *Downes v. Hopkinton*, 67 N. H. 456.

Power to tax for the purpose imposes duty to repair. *Guthrie v. Swan*, 5 Okla. 779.

Statutory duty to make a road "safe and convenient" construed to mean reasonably so, not absolutely. *McCloskey v. Moies*, 19 R. I. 297.

Diligence required in remedying defects: *

A city has a reasonable opportunity to repair after receiving notice of the existence of a defect. *Cunningham v. Denver*, 23 Colo. 18.

Not relieved by ordinance or agreement imposing the duty on others:

City cannot avoid responsibility for performance of the duty by passing an ordinance imposing it on abutting owners. *Lord v. Mobile*, 113 Ala. 360.

Davis v. Omaha, 47 Neb. 836.

A statute of similar purport did not have that effect. *Lincoln v. O'Brien*, 56 Neb. 761.

See, also, *Dallas v. Meyers*, (Tex. Civ. App.) 55 S. W. Rep. 742.

Statute relieving municipality of liability held constitutional. *Wilmington v. Ewing*, 2 Penn. (Del.) 66.

The contractual duty of a street railway to a city did not affect the latter's duty to the public. *Kansas City v. Orr*, 62 Kan. 61.

Peoria v. Gerber, 68 Ill. App. 255; s. c., aff'd, 168 Ill. 318; *Galveston & C. R. Co. v. White*, (Tex. Civ. App.) 32 S. W. Rep. 186.

City is primarily liable though the statute imposed the duty on adjoining owners. *Webster v. Beaver Dam*, 84 Fed. Rep. 280.

See, also, *Dallas v. Meyers*, (Tex. Civ. App.) 55 S. W. Rep. 742.

Nor by fact that means have been exhausted for other purposes:

The absence of necessary funds and of legal means to procure them, will excuse the neglect, but must be shown as a defense. *Hines v. City of Lockport*, 50 N. Y. 236, aff'g order granting new trial after judg't for def't.

Lack of moneys applicable to repairs was not a defense, as said trustees had power to raise the same. *Weed v. Village of Ballston Spa*, 76 N. Y. 329, aff'g judg't for pl'ff.

Although the trustees of a village incorporated under a general act, cannot appropriate moneys raised for highway purposes for repair of highways, yet, such trustees having been made highway commissioners by chapter 224, Laws of 1866, they must make repairs to a sidewalk out of the highway fund, when the same is dangerous to travelers, and the village is liable for default. The fact that the trustees have power presumes its exercise, and puts the burden on the village to show want of funds. *Ellis v. Village of Lowville*, 7 Lansing, 434, rev'g nonsuit.

Where, by charter, common council is a commissioner of highways, the city must keep the streets and walks in repair, and power to raise funds

*NOTE.—See following specific headings for full treatment in relation to the several subjects.

DUTY RESPECTING STREETS.

and not the funds in the treasury is requisite. *Peach v. City of Utica*, 10 Hun, 477, aff'g judg't for pl'ff.

Averment that town had money with which to perform the act imposed on it by statute is unnecessary, as where the allegation was, that the town neglected to repair the bridge and knowingly left it out of repair, etc. Where it is the duty of two towns to maintain a bridge, both or either may be sued for neglect. *Oakley v. Town of Mamaroneck*, 39 Hun, 448, rev'g nonsuit.

The bridge had been without guards for four years. As the commissioner of highways was elected in 1890, sufficient time had elapsed to create a presumption of notice to the town of the defect. It is a defense to the commissioner of highways that he was without the necessary funds to make the repairs and without the power to raise funds, but the burden is upon him to make out such a defense. *Bullock v. Town of Durham*, 64 Hun, 380, aff'g judg't for pl'ff.

Lack of funds at time of injury was no defense where defect existed for a year previous. *Whitlock v. Brighton*, 2 App. Div. 21.

Or where it does not appear that the commissioner has obtained from the town and used all the money which he was authorized to ask for. *Pelkey v. Saranac*, 67 App. Div. 337.

Exhaustion of funds is no defense where money was spent for purposes not necessarily requiring attention. *Lord v. Mobile*, 113 Ala. 360.

Or the expenditure of funds was within city's discretion. *Columbus v. Ogletree*, 102 Ga. 293.

Much less, where a city is provided with adequate means. *Baldwin v. Springfield*, 141 Mo. 205.

Or where it has the power to raise sufficient money for the purpose. *Lorence v. Ellensburgh*, 13 Wash. 341.

See, also, *Snook v. Anaconda*, 26 Mont. 128; *May v. Anaconda*, id. 140.

Nor by negligence of third party:

A city is primarily liable for a defective condition of a street from the construction of a railway, although it be the duty of the railway company to restore the street, or put, or keep it, in condition; but the company is liable over to the city for damages, but not for double damages, although the city has paid the same; nor for costs and expenses of the first action, unless defended at the request of the company. *Dillon's Munic. Corp.* 1037. *McDermott v. Kingston*, 57 How. Pr. (N. Y.) 196.

A city is liable to a person injured by the negligent construction of a line of street car tracks. *Clim v. Railroad Co.*, 41 La. Ann. 1031.

Negligence of municipality in failing to keep streets safe is not excused

TO WHAT DUTY RESPECTING STREETS APPLIES.

although the negligence of third party contributed to the injury to plaintiff. *Burl Turnpike v. Uncapher*, 117 Pa. St. 353.

2. TO WHAT IT APPLIES.

Whether it applies to whole of highway:

The duty extends in a populous part of the city to the extreme limits of the street. *Denver v. Stein*, 25 Colo. 125.

Odon v. Dobbs, 25 Ind. App. 522.

Otherwise where public necessity or convenience does not demand it. *Rankin v. Smith*, 63 Ill. App. 522.

See, also, *Magaha v. Hagerstown*, 95 Md. 62.

Pedestrian is not confined to crosswalks as the whole street must be kept in repair. *Glasgow v. Gillenwaters*, (Ky.) 67 S. W. Rep. 381.

Statute imposing duty to keep streets in repair construed to include sidewalks. *Hutchings v. Sullivan*, 90 Me. 131.

See, also, *Downend v. Kansas City*, 156 Mo. 60; aff'g s. c., 71 Mo. App. 529.

The duty does not *per se* extend throughout its width. *Guthrie v. Swan*, 3 Okla. 116.

But only the traveled portion. *Rhyner v. Manasha*, 97 Wis. 523.

Dedicated streets must be accepted before duty arises:

The duty does not arise where a dedicated street has not been accepted. *Cochran v. Sherherdsville*, (Ky.) 43 S. W. Rep. 250.

Nutting v. St. Paul, 73 Minn. 371; *Baldwin v. Springfield*, 141 Mo. 205; *Nellums v. Nashville*, 106 Tenn. 222.

Public user is insufficient. *Downend v. Kansas City*, 156 Mo. 60.

What constitutes acceptance:

Duty arose where not only had the public used the street for 20 years but the city had itself lighted it and laid water pipes in it. *Deufel v. Long Island City*, 19 App. Div. 620.

So, where the action of the city's predecessors not only made construction of the sidewalk necessary but its officers constructed it and for eight years thereafter maintained it in repair. *Hoyt v. Danbury*, 69 Conn. 341.

So, where a city recognized a walk built by a county and used by the public by curbing and guttering it. *Huntington v. McClurg*, 22 Ind. App. 261.

Or by cutting off weeds and filling holes. *Henderson v. White*, (Ky.) 49 S. W. Rep. 764.

TO WHAT DUTY RESPECTING STREETS APPLIES.

Otherwise, as to the occasional cleaning of a ditch and the expressed willingness of the city council to grant a request for a light. *Ogle v. Cumberland*, 90 Md. 59.

Statutory approval of a proposed plan of addition did not constitute an acceptance of the streets included therein. *Downend v. Kansas City*, 156 Mo. 60; aff'g s. c., 71 Mo. App. 529.

By inducing travel on a street by grading or otherwise improving it, a city assumes the duty. *Ord v. Nash*, 50 Neb. 335.

See *Borough of Lansdowne v. Hoffman*, 8 Del. Co. R. (Pa.) 149, where a mere roadway had been converted into a 50-foot street.

Otherwise, by merely taking a street within the city's corporate limits. *Nellums v. Nashville*, 106 Tenn. 222.

De facto roads, streets and sidewalks:

Where a village street has been open for public travel, the ministerial duty to keep it and its sidewalks in repair attaches. *Seymour v. Village of Salamanca*, 137 N. Y. 364, aff'g judg't for pl'ff.

A hole, about ten inches long and four to five inches wide, had existed for more than two months in a plank bridge, constructed over a ditch running beside the highway, in the defendant town. There was no evidence of actual knowledge of this on the part of the town officials. The plaintiff, who was injured at nine o'clock in the evening by her foot passing through the hole, properly testified as to the condition of the bridge the next morning at nine o'clock, as no change in the condition would be presumed to have happened in so brief a time. The evidence showed that the town officials were soon making repairs on the bridge six days after the accident, and it was properly received on the question as to whether the town had recognized or adopted the bridge. It was proper to show the muddy condition of the bridge. The liability of the town arose under section 1, chapter 700, Laws 1881, and it was no defence that the town supervisor had not paid the highway money to the commissioners for the purpose of making repairs. Where a crosswalk of such bridge had been commonly used by the inhabitants of the village for some years, the jury might determine whether the town had adopted it as a part of the worked highway, and was, therefore, bound to repair it. The town was liable if the commissioners did not exercise ordinary care. *Clapper v. Town of Waterford*, 62 Hun, 170, aff'g judg't for pl'ff.

The duty attaches where the street is required to be open and is in actual use as such, though it has not been formally opened. *Schafer v. New York*, 154 N. Y. 466; rev'g s. c., 12 App. Div. 384.

Kane v. Philadelphia, 7 Pa. Super. Ct. 109; see *Carpenter v. Rolling*, 107 Wis. 559.

By undertaking to keep a much used walk open, a city assumes the duty of repair. *Denver v. Cochran*, (Colo. App.) 67 Pac. Rep. 23.

That an abutting owner constructed the sidewalk does not relieve the city of liability for its defective condition. *Denver v. Hickey*, 9 Colo. App. 137.

Hutchings v. Sullivan, 90 Me. 131; *Kane v. Philadelphia*, 7 Pa. Super. Ct. 109; *McHugh v. Minocqua*, 102 Wis. 291.

Knowledge that a sidewalk is in use by the public imposed the duty. *Hogan v. Chicago*, 168 Ill. 551; rev'g s. c., 59 Ill. App. 446.

Where the city's acts warrant an inference that the walk is a public one, it cannot set up that it is private. *Chicago v. Baker*, 95 Ill. App. 413; s. c. aff'd, 195 Ill. 54; *Neal v. Marion*, 129 N. C. 345.

The duty attaches whether the street originally became such by being formally laid out or by public user. *Frankfort v. Coleman*, 19 Ind. App. 368.

No duty to repair a foot way over private property used by the public to cut off a bend in the road. *State v. Kent County*, 83 Md. 377; s. c., 33 L. R. A. 291.

Boundary dispute did not affect the duty, where the *locus in quo* was embraced in any event. *Holyoke v. Hadley, Water-Power Co.*, 174 Mass. 424.

Where no regular walk had been constructed, the duty applied to a beaten path. *Comiskie v. Ypsilanti*, 116 Mich. 321.

That only 60 feet of the 150 of the street was graded and the remainder was under the control of the city's park and boulevard commissioners, held no defence. *Burridge v. Detroit*, 117 Mich. 557.

City liable, if road in a park is a statutory highway as well as a parkway. *Blair v. Granger*, (R. I.) 51 Atl. Rep. 1042.

That the natural grade of a street had not been changed to the ordinance grade did not relieve city of duty to repair. *Meiners v. St. Louis*, 130 Mo. 274.

Where the city has recognized it as a thoroughfare. *Brabow v. Seattle Wash.*, 69 Pac. Rep. 365.

But the right to clear a dedicated street of a nuisance, does not depend on acceptance. *Winslow v. Cincinnati*, 6 Oh. N. P. 47.

Permission by a city to use its market building as a thoroughfare, raised the duty. *Toledo v. Nitz*, 23 Oh. C. C. 350.

Whether an alley has become a traveled public thoroughfare depends on the amount of use. *Musick v. Latrobe*, 184 Pa. St. 375.

Proof of opening and invitation or permission to use, raises a presumption against the city. *Kennedy v. Williamsport*, 11 Pa. Super. Ct. 91.

TO WHAT DUTY RESPECTING STREETS APPLIES.

Where city has assumed ownership and control it cannot set up want of title. *Still v. Houston*, (Tex. Civ. App.) 66 S. W. Rep. 76.

See, also, *May v. Anaconda*, 26 Mont. 140; *Winchester v. Carroll*, 99 Va. 727.

When corporation has treated lands as public street it owes it the duty of due care and cannot, in case of injury from its neglect, claim that it had not been legally opened. *Dillon's Munic. Corp.* 1009.

Railroad Crossings:

City is under duty of keeping an overhead crossing in condition. *Denver v. Baldasari*, (Colo. App.) 61 Pac. Rep. 190.

That the defects are within the railroad's right of way, at a crossing, is no excuse on part of the city for lack of repair. *Gage v. Pittsfield*, 120 Mich. 436; *Will v. Mendon*, 108 Mich. 251.

See, also, *Taake v. Seattle*, 18 Wash. 178.

Unfrequented streets:

That the locality in question is in the outskirts of the city and fronting on vacant lots does not relieve city of its duty to repair. *Seward v. Wilmington*, 2 Marv. (Del.) 189.

Mt. Morris v. Kanode, 98 Ill. App. 373.

Nor that it is less frequented than others. *Decatur v. Besten*, 169 Ill. 340; aff'g s. c., 69 Ill. App. 410.

Or is very little used. *South Omaha v. Powell*, 50 Neb. 798.

The duty in the outskirts held the same as that in the country. *Nudd v. Landsdowne*, 7 Del. Co. Rep. (Pa.) 170.

Where a hole is known to exist in a part of a street which is known to be in use as a pathway, city was bound to remedy it, though it had provided a safe walk across the way. *Neal v. Marion*, 129 N. C. 345.

Discontinued roads:

A highway, although properly laid out, if opened and worked for a part of the distance only, as described in the survey, after the lapse of more than six years, ceases, as to the part not opened, to be a highway for any purpose.

The requirement of the statute (1 R. S. 520, sec. 99, as amended by chap. 311, Laws of 1861), that a highway must be opened and worked within six years, implies that it must be made passable as a highway for public travel; it need not be made a first-class road, or be finished, but it must be worked sufficiently to enable the public to pass over it.

So, also, where a road has not been used and traveled as a highway for six years and has for that period been made impassable for conveyances

CONTRIBUTING CAUSE.

by being fenced off, or by excavations therein, its legal character as a highway is destroyed; and this, although in the beginning of the non-user the road was rendered impassable by a trespasser.

In an action to recover damages for injuries alleged to have been caused by defendant's neglect to keep one of its streets in repair, it appeared that the street in question was regularly laid out, and up to the intersection with another street, was opened and worked; but that portion where the accident happened was not worked and never had been used as a highway, and for more than six years had been closed by a fence across it, and there was no access thereto except from private property; also, that it had been rendered impassable for public travel by deep excavations therein, and that sand and clay were excavated therefrom and carried away by private parties, without hindrance from the town officials or the public. Plaintiff entered thereon from private property.

The *locus in quo* was not a highway; and so the plaintiff was not entitled to recover. *Horey v. Village of Haverstraw*, 124 N. Y. 273, rev'g 47 Hun, 356, and judg't for pl'ff.

The duty does not apply to roads which have been discontinued. *Nicodemo v. Southborough*, 173 Mass. 455.

Otherwise where one of the roads vacated was allowed to remain open without notice that it was not intended to be used, while its substitute was still in the course of construction. *D'Amico v. Boston*, 176 Mass. 599.

Road was discontinued, a railroad built an embankment along it and a no trespassing sign was posted. Continued use did not charge the city with duty to repair. *Kaseman v. Sunbury*, 197 Pa. St. 162.

Condemnation of road did not terminate city's duty, where, pending its relocation, the old road was left open. *Snyder v. Penn.*, 14 Pa. Super. Ct. 145.

3. CONTRIBUTING CAUSE.

A ditch along a business street only nine feet from a car track was the proximate cause of injury in turning a team off to let a car pass. *Denver v. Johnson*, 8 Colo. App. 384.

A contributing cause not a defence, provided the injury would not have happened but for the defect. *Langhammer v. Manchester*, 99 Iowa, 295. *Lincoln v. Koenig*, 10 Kan. App. 504; *Vogelgesang v. St. Louis*, 139 Mo. 127.

A city held liable where its negligence together with an intervening accident produced the injury. *Ownerson v. Grafton*, 5 N. D. 281.

(c). BRIDGES.

1. WHO BOUND TO MAINTAIN IN CONDITION OF REASONABLE SAFETY.

At common law:

A bridge not otherwise provided for held a public charge. *People v. Dover &c. Highway Comrs.*, 158 Ill. 197.

Counties:

The county, for a bridge erected by the court of county commissioners without taking the bond for guaranty required by statute. *Barks v. Jefferson County*, 119 Ala. 600.

In the absence of statute a county is not chargeable. *Davis v. Ada County*, (Id.) 47 Pac. Rep. 93.

County held not liable for negligence in failing to repair, though charged by statute with duty of repairing. *Johnson County v. Hemphill*, 14 Ind. App. 219.

Montgomery County v. Coffenberry, 14 Ind. App. 701; unless the statute imposes the liability expressly. *Kirtley v. Spokane*, 20 Wash. 111; *Hardin County v. Coffman*, 60 Oh. St. 527. As to liability of municipality for negligence of its officers, see *post*, p. 1967.

Though still in course of construction county was held liable for condition of bridge after its acceptance from the contractor. *Vickers v. Cloud County*, 59 Kan. 86.

Statutory liability of freeholders for neglect in regard to bridges which the statute makes it their duty to build or care for, held to apply to bridges over navigable streams. *Mattlage v. Hudson County*, 63 N. J. L. 583.

Town supervisors held agents of the county working on the approaches of the latter's county bridge. *Francis v. Franklin*, 179 Pa. St. 195.

Cities:

Unless the municipality had authority to build a bridge, it is not liable to one on whom it fell. *Mayor &c. of Albany v. Cunliff*, 2 N. Y. 165, rev'g judg't for pl'ff on trial.

Where a bridge within a city crossed the canal, on land of the State, and a horse slipped down the side of one of its approaches because it was unguarded, it was held that the *locus in quo*, being on State land, was not within the control of the city, and the city was not liable, although the place was used by the public. *Carpenter v. City of Cohoes*, 81 N. Y. 21, aff'g judg't for def't.

Distinguishing *Sewell v. City of Cohoes*, 75 N. Y. 45.

The statutory duty as to the maintenance of a bridge as part of the

highway held not to impose liability for an unguarded shaft used to open the draw. *Daly v. New Haven*, 69 Conn. 644.

City by extending its limits so as to take in a bridge undertook to keep it in repair. *Polk County v. Cedartown*, 110 Ga. 824.

Cascade County v. Great Falls, 18 Mont. 537.

That a bridge was within city limits was immaterial, where it was on private property and, though dedicated, never accepted. *Sandersville v. Hurst*, 111 Ga. 453.

Though beyond the limits, a city undertook the duty of repairing a bridge erected under a statute authorizing it on condition of assumption of such duty. *Brunswick v. Bath*, 90 Me. 479.

City bound to repair bridge on a city street and not on a state or county road. *Piqua v. Geist*, 59 Oh. St. 163.

Mooney v. St. Marks, 15 Oh. C. C. 446; *Brink v. Columbus*, 8 Oh. S. & C. P. 671.

City bound to repair a bridge within corporate limits. *Marshall v. McAllister*, 18 Tex. Civ. App. 159.

Towns:

A village appropriated a part of the State lands for a street, but did not place a railing along the wall, whereby injury resulted. The village was not liable for injury as it had no right to appropriate the land. *Veeder v. Village of Little Falls*, 100 N. Y. 343, rev'g judg't for pl'ff.

From opinion.—"The case of *Sewell v. City of Cohoes*, 75 N. Y. 45, does not control this case. In that case the city permitted a structure erected by a third person, to overhang the traveled path, rendering its use dangerous, and it was held that the fact that the city had not acquired title to the land which it had assumed to appropriate for a public street was not a defense to the action. In this case there was no defect in the roadway. The danger, if any, was extrinsic, and arose from a structure made by the state on its own land, over which the village had no control, and with which it had no right to interfere."

Town assumes the duty upon adopting private bridge by lighting it, constructing approaches to it and officially recognizing it as part of the highway. *Williams v. Petoskey*, 108 Mich. 260.

Duty as to a bridge between two townships devolved upon both. *Bigelow v. Brooks*, 119 Mich. 208.

Township was required to erect bridge over railway. *Dixon v. Butler*, 4 Pa. Dist. R. 754.

Gould v. Schermer, 101 Iowa, 582.

Approaches:

The duty of county extends to the repair of the approaches. *Johnson County v. Hemphill*, 14 Ind. App. 219.

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See, also, *Shaw v. Saline*, 113 Mich. 342; *Grant v. Brainerd*, (Minn.) 90 N. W. Rep. 307; *Taylor v. Lawrence County*, 17 Pa. Co. Ct. 396.

Especially where the road leading to it was necessary to its use and had always been repaired in connection with the bridge. *Attorney General v. Bay Co. Bridge Comm.*, 115 Mich. 622.

Bridges on or over a boundary line:

Duty as to a bridge connecting two towns, imposed a joint liability. *Shaw v. Potsdam*, 11 App. Div. 508.

See *Bigelow v. Brooks*, 119 Mich. 208.

So, where, by agreement, adjoining towns construct a bridge over a stream constituting the boundary line between them. *People v. Dover &c. Comrs.*, 158 Ill. 197.

So, where the boundary line of each county extends to the middle of the river which the bridge spans. *State v. Cass County*, 58 Neb. 244.

Statute regulating building of bridges over county line streams held not to apply to bridges over township lines. *Sheridan v. Palmyra*, 180 Pa. St. 439.

Bridges over railways:

Notwithstanding it be the primary duty of a railroad company to restore and maintain a portion of the public highway, in this case, a bridge, occupied by it, yet the municipality is not relieved from its duty to keep the street in repair, and so a city may have action against a railway for the sum it may be compelled to pay by failure of the railroad company to keep the bridge in repair. *Tierney v. City of Troy*, 41 Hun, 120, rev'g nonsuit.

Citing *Wilson v. City of Watertown*, 3 Hun, 508; *People ex rel. Markey v. City of Brooklyn*, 65 N. Y. 349.

See *People v. Troy & B. R. Co.*, 37 Hun, 427.

A statute denying recovery from a town to one who takes a load exceeding four tons over its bridges held available to railroad constructing an overhead bridge. *Lee v. Delaware &c. R. Co.*, 57 App. Div. 378.

No statutory authority being shown, to grade a street for the purpose of building a bridge at a railway crossing, a city is liable for damage to a person's property caused thereby. *Schneider v. Detroit*, 72 Mich. 240.

Railroad company held bound to repair a bridge over its tracks in a public highway. *Chesapeake &c. R. Co. v. Jennings*, 98 Va. 70.

See, also, *Dixon v. Butler*, 4 Pa. Dist. Rep. 754.

But where the bridge was constructed as required by the city and was accepted by it, the railroad company was discharged. *Smith v. Pennsylvania R. Co.*, 201 Pa. St. 131.

2. WHAT CONSTITUTES REASONABLE SAFETY.

Not bound to provide for unusual strains or extraordinary conditions:

A traction engine broke down the highway bridge. Held, that while a commissioner is required to construct and maintain a bridge of sufficient strength to insure the safety of vehicles commonly used, he was not required to provide for vehicles involving peculiar and special danger from unusual weight. *Clapp v. Town of Ellington*, 51 Hun, 58, rev'g judg't for pl'ff.

From opinion.—"In the case of *Gregory v. The Inhabitants of Adams* (14 Gray 242-248), damages were sought to be recovered for injury to an elephant which had broken through a bridge upon the highway.

Merrick, J., in delivering the opinion of the court, says that it was the duty of the town to keep the bridges 'in such condition that, having in view the common and ordinary occasion for their use, and what may fairly be required for the proper accommodation of the public at large in the various occupations which may from time to time be pursued, each particular way should be so wrought, prepared and maintained that it may justly be considered, for all the uses and purposes for which it was laid out and designed, to be reasonably safe and convenient.' * * * 'This is the measure and extent of the obligation of towns in reference to the support and maintenance of public highways. They are not required to make preparations for the safety or convenience of those who undertake to use those ways in an unusual or extraordinary manner, involving peculiar and special peril and danger, whether it be in respect to the kind of character of animals led or driven, or the magnitude or construction of carriages used, or the bulk or weight of property transported. And if any person undertakes to use or travel upon a public highway in an unusual or extraordinary manner, or with animals, vehicles or freight not suitable or adapted to a way opened and prepared for the public use in the common intercourse of society and in the transaction of usual and ordinary affairs of business, he then takes every possible risk of loss upon himself; and he can have no remedy against the town to recover recompense for injury sustained, although they be the direct result of defects and imperfections in a way, for which it would be responsible in case of injury to individuals in the lawful and proper use of it.' * * * * *

The Legislature has now provided that no town shall be liable for any damage resulting to a person or property by reason of the breaking of any bridge by a traction engine in crossing the same of the weight of four tons or over, while such person is engaged in transporting or driving such engine along or upon the highways of this state. Laws of 1887, chap. 526. In the future cases will have to be determined under the provisions of this act. The case of *McCormick v. Township of Washington*, 112 Penn. St. 185, is a case in point, and sustain the views expressed in the case of *Gregory v. Inhabitants of Adams*, *supra*."

An overseer was directed by the commissioner of highways to repair a bridge which had a rotten brace. Timber was procured for repairing the brace, and a time appointed for the work, the excavation of which was delayed however, and the overseer meanwhile, in driving over the bridge with a loaded wagon, was injured by a stringer breaking, in consequence of which the rotten brace gave way. Some repairs had been

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before the accident, and the commissioner had stated to the overseer that he thought the bridge was safe to draw potatoes across, and it appeared that loaded wagons had crossed it without accident. The overseer was only an employé working by the day for the commissioner, and the proximate cause of the accident was the breaking of the stringer, the defective condition of which the plaintiff had no knowledge of, as the commissioner had stated that he thought it was safe; the question of the plaintiff's negligence was for the jury; the commissioner practically asserted to the public that the bridge was safe by leaving it open to travel. *Taylor v. Town of Constable*, 57 Hun, 371, rev'g nonsuit.

Two vehicles were coupled together each weighing less than the statutory limit, four tons, but together weighing more. The bridge broke when only the front wheel of one had passed on it. Held not a transportation over it of a vehicle weighing over four tons. *Vandewater v. Wappinger*, 69 App. Div. 325.

Maintenance of a bridge known to be unable to sustain the statutory weight is negligence *per se*. *Heib v. Big Flats*, 66 App. Div. 88.

The duty does not extend to provision against unusual or extraordinary contingencies. *Murray v. Woodson County*, 58 Kan. 1.

A ten-horse traction engine with a full tank of water was a reasonable load. *Moore v. Hazleton*, 118 Mich. 425.

Question was for the jury in a similar case. *Hardin County v. Coffman*, 60 Oh. St. 527; rev'g s. c., 18 Oh. C. C. 254.

Where a bridge stood for three years with slight defect, city was not liable for its undermining by a flood. *Pearl v. Benton*, (Mich.) 91 N. W. Rep. 209.

Such loads as may fairly be anticipated is the test, not simply such as are usual. *Anderson v. St. Cloud*, 79 Minn. 88.

The duty does not extend to provisions against extraordinary vicious or fractious horses. *Bitting v. Maxatawny*, 177 Pa. St. 213.

Schillinger v. Verona, 96 Wis. 456.

Necessity and sufficiency of guard rails:

The bridge was proper as originally constructed and the danger occurred through the act of the village in widening the street, leaving unprotected places which the town had no control over. *Reiss v. Pelham*, 65 N. Y. Supp. 1033; aff'g s. c., 62 id. 607.

Guard rails held necessary, where there was a way under the bridge for the passage of cattle, which might frighten horses and the bridge itself was only 14 feet wide. *Gould v. Schermer*, 101 Iowa, 582.

Charge that there was no liability if the bridge was reasonably safe

“even though it did not cover the width of the road,” was held insufficient. *Commissioners &c. v. Ryckman*, 91 Md. 36.

Bridge without guard rails was defective, where horse was liable to slip and fall over the sides of the approach. *Shaw v. Saline*, 113 Mich. 342.

Question was for the jury, where the bridge was 16 feet wide, but was out of centre with the road, so that one wagon track was within 18 inches of its edge, which was shadowed by trees. *Lauder v. St. Clair*, 125 Mich. 479.

Township was not negligent where a bridge without guard rails was 14 feet wide, 10 long, and $3\frac{1}{2}$ high. *Bratfisch v. Mason*, 120 Mich. 323.

Or, where the bridge was only 12 feet wide. *Yoders v. Amswell*, 172 Pa. St. 447.

Or, where a bridge in a city was the full width of the road, only seven feet long and five feet high. *Auberle v. McKeesport*, 179 Pa. St. 321.

Otherwise, where the only semblance to a guard rail was along the edge. *Lazelle v. Newfane*, 69 Vt. 306.

The existence of a statue is not necessary to impose the duty. *Blakeley v. Laurens County*, 55 S. C. 422.

A plank placed over a hole in the bridge caused plaintiff's bicycle to veer against the guard log and he was thrown over the unguarded side. County was negligent. *Strader v. Monroe County*, 202 Pa. St. 626.

Carelessness in the process of repair:

It was for the jury to say whether partly closed gates with bar in front near ground was a proper warning of repairing a bridge. *Kane v. Yonkers*, 60 N. Y. Supp. 216.

Eginoire v. Union County, 112 Iowa, 558.

Whether a temporary approach, erected to replace one which had been washed out, was a part of the bridge, was for the jury. *Eginoire v. Union County*, 112 Iowa, 558.

Absence of protective superstructure, though removed for renewal, held a defect. *Atchison County v. Sullivan*, 7 Kan. App. 152.

See, also, *Einseidler v. Whitman County*, 22 Wash. 388; *Atchison County v. Sullivan*, 7 Kan. App. 152; *Eginoire v. Union County*, 112 Iowa, 558.

Carelessness in operation:

An accumulation of sweeping, including banana peels, etc., from upper steps was left on lower ones. Defendant was liable therefor. *Cooley v. New York & Brooklyn Bridge*, 46 App. Div. 243.

Negligence was for the jury, where expansion of trolley rails prevented

DILIGENCE REQUIRED IN REMEDYING DEFECTS.

opening a bridge and obstructed navigation. *Mattlage v. Hudson County*, 63 N. J. L. 583.

A single lock at one end of a draw held sufficient. *Chicago v. Wisconsin S. S. Co.*, 97 Fed. Rep. 107.

Inequalities in surface:

A bridge was not unsafe because there was a slant of one inch in sixteen feet of width or an incline of one foot in twenty of length, where the higher end joined a steep hill. *Perkins v. Delaware*, 113 Mich. 377.

3. DILIGENCE REQUIRED IN REMEDYING DEFECTS.

To fix liability there must be notice to the authorities of the defect, either actual:

Notice may be shown by admissions made in conversation showing knowledge of the facts. The fact that the commissioner in office at the time of the accident had no notice was immaterial, where the former commissioner had it but neglected to repair. *Shaw v. Potsdam*, 11 App. Div. 508.

Allen v. Allen, 53 N. Y. Supp. 800.

Negligence is not shown where the notice was given when it was apparently not defective. *Jones v. Walnut*, 59 Kan. 774.

Where commissioners employ contractor to erect a new bridge, they have notice of latter's removal of the superstructure. *Atchison County v. Sullivan*, 7 Kan. App. 152.

So, where the commissioners pursuant to advice, ordered it to be propped up. *Einseidler v. Whitman County*, 22 Wash. 388.

Notice to the builder was not notice to the town. *Moore v. Hazelton*, 118 Mich. 425.

In the absence of notice that a crack in the bridge would create such an appearance in a snow storm that it would frighten horses, defendant was not liable therefor. *White v. Riley*, 121 Mich. 413.

Notice to officers not charged with the repair is not notice to the city. *San Antonio v. Balt*, (Tex. Civ. App.) 66 S. W. Rep. 713.

Notice that a draw bridge binds is not notice that it needs repair. *Pettit v. Camden*, 91 Fed. Rep. 998.

Or constructive:

The defendant, commissioner of highways, was notified in June that a bridge was defective, without particularizing the defect. Within a short time thereafter an experienced and different bridge builder on each occasion carefully examined the bridge and found no defect. The next night

the bridge fell. The defect was in the center of timber and could only be found by cutting the timber in two. No negligence. *Hicks v. Chaffee*, 13 Hun, 294, aff'g judg't for def't.

A town is chargeable with knowledge of the defects a careful and thorough inspection would have revealed. *Boyce v. Shawangunk*, 40 App. Div. 593.

It is chargeable where the defect has existed for a long enough time to give a city an opportunity to discover it by the exercise of reasonable care. *Snyder v. Albion*, 113 Mich. 275.

City is not chargeable, where the defect was latent until two or three days before the accident. *Thomas v. Flint*, 123 Mich. 10; s. c., 47 L. R. A. 499.

Pettit v. Camden, 87 Fed. Rep. 768; *Minkley v. Springwells Twp.*, 113 Mich. 347.

Failure to discover upon reasonable inspection a latent defect did not charge the town with liability. *Hawks v. Chester*, 70 Vt. 271.

Question was for the jury, where the timbers had been in position for many years, and, when heavy vehicles went over it, the bridge shook. *Aben v. Ecorse*, 113 Mich. 9.

Municipality bound to reasonable care in inspection. *Bettys v. Denver*, 115 Mich. 228.

See *Grimm v. Washburn*, 100 Wis. 229, where the bridge had been in bad condition for five years.

Where a bridge was generally decayed, lack of knowledge of the specific defect was immaterial. *Green v. Nebagamain*, (Wis.) 89 N. W. Rep. 520.

Lentz v. St. Paul, (Minn.) 91 N. W. Rep. 256.

Notice held not imputable from a mere failure to inspect. *Pearl v. Benton*, 123 Mich. 411.

The testimony of a witness as to its general condition, held admitted. *Shafer v. Eau Claire*, 105 Wis. 239.

And opportunity to repair:

Knowledge that the bridge had been out of repair some time was sufficient. *Marshall v. McAllister*, 22 Tex. Civ. App. 214.

From 3 or 4 p. m. on the day before the accident to 9:30 or 10 p. m. on the morning following, held not unreasonable to repair a broken casting in a draw bridge. *Pettit v. Camden County*, 87 Fed. Rep. 768.

Effect of statutes requiring actual notice:

Twenty-four hours' actual notice of a defect must be served on some municipal officer under Mo. R. S. ch. 18 sec. 20. *Carleton v. Caribou*, 88 Me. 461.

4. CONTRIBUTORY NEGLIGENCE.

Right to act upon presumption that bridge is safe, in absence of notice to the contrary:

A traveler has the right to assume that a bridge is sufficient for ordinary purposes. *Hardin County v. Coffman*, 60 Oh. St. 527; s. c., 48 L. R. A. 455.

And is not negligent in allowing his attention to be diverted to other matters. *Mahnken v. Monmouth County Freeholders*, 62 N. J. L. 404.

Knowledge that a bridge was thrown open to travel and actually used is sufficient to warrant the assumption. *Jones v. Pennsylvania Canal Co.*, 178 Pa. St. 123.

Leaning against a railing was not contributory negligence *per se*. *Whitewright v. Taylor*, (Tex. Civ. App.) 57 S. W. Rep. 311.

Effect of knowledge of defect by one injured:

Plaintiff had given notice of an unsafe condition of a bridge in January or February. He was warranted in assuming that the bridge, being open for travel when he attempted to use it in April, had been repaired. *Boyce v. Shawangunk*, 40 App. Div. 593.

So the leaving of a bridge open warranted an assumption that a known defect was properly protected. *Hamerlynck v. Banfield*, 36 Ore. 436.

So where plaintiff knew hole was stopped up by a stone only a few days previous and did not know of a change in its condition. *Heisey v. Rapho*, 181 Pa. St. 561.

Deceased ran a traction engine weighing nearly the statutory limit over a bridge known to be weak and defective, when others ran them along the ground by the side of it or used planking. He assumed the risk. *Spencer v. Sardinia*, 42 App. Div. 472.

So, where plaintiff drove onto a bridge knowing it to be without guard. *Cooper v. Floyd County*, 112 Ga. 70.

Knowledge that a bridge was defective did not preclude use, where it might be done safely by using care commensurate with the known danger. Otherwise, where the danger could not have been avoided by the use of every care. *Falls v. Stewart*, 3 Kan. App. 403.

Plaintiff was negligent in proceeding in spite of notice of the danger, where he was in a position to withdraw. *Anderson v. St. Cloud*, 79 Minn. 88.

Knowledge that a bridge was shaky and dangerous did not make it negligent *per se* to go upon it with a mule, where it had been used by teams and heavy wagons. *Gibson v. Jackson*, (Miss.) 22 South. Rep. 891.

Where the danger was not such as would make it imprudent to use the bridge at all, plaintiff was not negligent *per se* in failing to go another way. *Houston &c. R. Co. v. Dunn*, 17 Tex. Civ. App. 687.

Hamerlynck v. Banfield, 36 Ore. 346.

Facts that should notify one in the exercise of due care of the existence of danger:

Deceased was not *per se* negligent in walking at night through gates to a bridge which had been opened before the draw had been closed, though others had noticed the fact and stopped. *Brennan v. Albany &c. Bridge Co.*, 61 App. Div. 279.

In leaving a bridge in process of repair for the night the gates were partly closed and a timber placed in front of them near the ground but no light was placed thereat. An instruction that if force was used to open the gates to pass through, plaintiff could not recover, was properly refused, it appearing that plaintiff had frequently before opened them and passed over in safety. *Kane v. Yonkers*, 43 App. Div. 599.

So, where plaintiff had passed over the bridge, the only convenient way of reaching her destination, an hour or two before so as to enable her to observe its defects. *Einseidler v. Whitman County*, 22 Wash. 388.

Boy of six or seven was not negligent in running off an open bridge in his efforts to escape a man running after him. *Chicago v. O'Malley*, 95 Ill. App. 355; s. c. aff'd, 196 Ill. 197.

Plaintiff rode at full speed in the dark toward an open draw, relying upon a chain usually placed across the way to warn him of danger. Recovery denied. *Benedict v. Port Huron*, 124 Mich. 600.

See *Stephani v. Manitowoc*, 101 Wis. 59.

Facts that show lack of due care on part of one injured:

City is not liable to one who knowing the defective condition of a bridge passes beyond the barricade and gets injured. *Kane v. Yonkers*, 169 N. Y. 392.

If commissioners of highways have begun to repair a bridge, the presumption is, that they had funds to meet such repairs. A horse was drowned in driving through a swollen stream on a dark night, because the bridge was undergoing repairs.

Plaintiff, who was well acquainted with the situation of the bridge and creek, attempted, on a dark night, to cross the stream, which was very much swollen by a sudden and severe storm, and in so doing his horse was drowned. He was guilty of negligence in attempting to cross the stream under the circumstances, and his injury did not result from the omission of the defendant to repair the bridge, in such a sense, and with

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such intimacy of connection, as to render the defendants liable therefor. *Day v. Crossman*, 1 Hun, 570, aff'd nonsuit.

Intoxicated driver ran off narrow unguarded bridge he was familiar with. No recovery. *Titus v. New Scotland*, 90 Hun, 468.

Ammerman v. Coal, 187 Pa. St. 326.

It was for the jury to say whether plaintiff was negligent in attempting to cross a bridge with an engine weighing three tons and a half trailing a separator weighing a ton and a half without inspecting its timbers. *Heib v. Big Flats*, 66 App. Div. 88.

He was negligent if he previously weakened the bridge by taking a vehicle over it weighing more than the statute allowed. *Whitewire v. Muncy Creek*, 17 Pa. Super. Ct. 399.

No recovery, where plaintiff was pushed into danger by the crowd waiting for a bridge to swing shut. *Kluska v. Chicago*, 97 Ill. App. 665.

It was not negligence *per se* for plaintiff to accompany the driver of traction engine, where he was ignorant of any defects. *Huntington County v. Bonebrake*, 146 Ind. 311.

Nor to drive a horse, blind in one eye. *Gould v. Schermer*, 101 Iowa, 582.

So, as to failure of a blind man to keep in the middle of the bridge, as he had a right to assume that all parts of it were safe. *Heisey v. Rapho*, 181 Pa. St. 561.

So, as to failure to carry a whip, where it was not ordinarily necessary. *Faulk v. Iowa County*, 103 Iowa, 442.

Or because one of the reins on plaintiff's horse was loose. *Worcester County v. Ryckman*, 91 Md. 36.

Otherwise as to one walking off a bridge only 17 feet long and 33 feet wide to avoid a party 200 or 300 feet away. *Auberle v. McKeesport*, 179 Pa. St. 321.

One crosses a bridge with an unusually heavy load at his own risk. *Fulton Iron Works v. Kimball*, 52 Mich. 146.

Bicyclist cannot complain of a lack of guard rail, where she deliberately directed her wheel along the guard log and was thrown over the edge of the bridge. *Beer v. Clarion*, 17 Pa. Super. Ct. 537.

Effect of violation of statute or ordinance:

Violation of ordinance as to speed did not contribute to injury from a defect. Recovery was allowed. *Cullman v. McMinn*, 109 Ala. 614.

Marshall v. McAllister, 18 Tex. Civ. App. 159.

On a conflict of evidence, it was for the jury to say whether such violation contributed to the injury. *Chesapeake &c. R. Co. v. Jennings*, 98 Va. 70.

NECESSITY AND SUFFICIENCY OF GUARD RAILS AT DANGEROUS PLACES.

5. PROXIMATE CAUSE.

City was liable, where failure of its bridge tenders to see that people get off it safely was the proximate cause of injury, though another's negligence contributed. *Chicago v. O'Malley*, 95 Ill. App. 355; s. c. aff'd, 196 Ill. 197.

Court instructed that the plaintiff could recover if the accident would not have happened but for the defective railing; but not, if it would have happened in any event. Held proper. *Walrod v. Webster County*, 110 Iowa, 349; s. c., 47 L. R. A. 480.

Failure to maintain barriers on a bridge was not the direct cause, where the horse got his check rein caught and backing, went over. *Kingsley v. Bloomington*, 109 Mich. 340.

That the immediate cause was a horse's fright does not make the absence of barriers on a bridge the remote cause. *White v. Riley*, 113 Mich. 295.

City not liable for vicious horse backing over unguarded wall. *Cage v. Franklin*, 11 Pa. Super. Ct. 533.

Plaintiff's negligence need not be the immediate or proximate cause under S. C. R. S. 1893, barring recovery if it "contributed." *McFail v. Barnwell County*, 57 S. C. 294.

(d). EMBANKMENT, RAILINGS, &c.

When a public walk or highway is carried along an embankment, or over a bridge, or other elevated place, and in the apprehension of a person of ordinary prudence, there is danger of injury to one properly using the same, the municipality having jurisdiction thereof, should use the means available by law, to render the same reasonably safe for travel.

1. NECESSITY AND SUFFICIENCY OF GUARD RAILS AT DANGEROUS PLACES.

A road sixteen feet wide, in excellent condition, one foot above the level, running along a side hill, held not to require a barrier along the outer side. *Patchen v. Walton*, 17 App. Div. 158.

Town was not liable for the insufficiency of a barrier it had no notice of. *McFarland v. Emporia*, 59 Kan. 568.

A barrier is not insufficient because a child may climb through it. *Lineburg v. St. Paul*, 71 Minn. 245.

Dangerous character of the place for the determination of the jury:

Reasonable necessity for a barrier is a question for the jury. *Coney v. Gilboa*, 55 App. Div. 111.

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Necessity of barrier was for the jury, where there was a drop of nine feet terminating in a steep slope on one side of the road which was only 10 to 12 feet wide. *Wilson v. O'Hara*, 14 Pa. Super. Ct. 258.

Failure to erect railings on a bridge is not negligence *per se*; and if plaintiff, knowing the lack of railings, went upon the bridge in the dark and was injured, the court should submit the question of his negligence to the jury as matter of defense. *Staples v. Canton*, 69 Mo. 592.

Circumstance in which absence of safeguard deemed negligence:

There was no visible boundary to the line of a city street, and a portion of the traveled roadway, although outside the street, was so near the line as to induce the belief that one traveling on it was within the street, and the city had notice of this defect. The city should, by railing or otherwise, have prevented danger to a traveler. The plaintiff was injured by a walk, which was long defective and which was built by the owner. *Jewhurst v. City of Syracuse*, 108 N. Y. 303, aff'g judg't for pl'ff.

Citing *Cogswell v. Inhabitants of Lexington*, 4 Cush. 307; *Hayden v. Attleborough*, 7 Gray, 338; *Alger v. City of Lowell*, 3 Allen, 405. See *Tisdale v. Inhabitants of Norton*, 8 Met. 388; *Rowell v. City of Lowell*, 7 Gray, 100.

The plaintiff, in the night time, was traveling over a long used highway; his horses, instead of following the curve in the highway, continued straight on, and with the wagon fell down into a cut, made by the railroad company eleven years before. The edge of the cutting was eleven feet from the beaten track and there was no ditch or barrier.

If the situation was such as to render travel upon the road, at the place in question, dangerous and such danger was within reasonable apprehension, it was the commissioners' duty to use the means available to them, to guard travelers, and the fact that the exposed condition had continued for so long a time, was sufficient to warrant the inference that they knew or ought to have known of the danger. The court properly refused to charge, that if the plaintiff's horses were running away or were beyond his control and the accident would not have happened had they been going at an ordinary rate of speed or were under control, the defendant would not be liable. *Ivory v. Town of Deerpark*, 116 N. Y. 476, aff'g judg't for pl'ff.

An omission to erect barriers in a dangerous place may constitute negligence on the part of a highway commissioner.

A railway company crossed a highway about twelve (12) feet above the ordinary grade and the highway was carried over the track by an

embankment eleven or twelve feet wide and the traveled part of the same was six to eighteen inches from the edge of the west side. The road over the embankment had three curves between the natural grade of the highway on each side. A person with a load of brick was passing over after the embankment was softened by rain, when the hind wheels, on one side, cut down into the embankment, and drew the front wheels over, and the wagon was overturned and the driver killed. The commissioners had funds to put the highway in proper repair. The defendant was liable on account of the omission of the highway commissioners to erect barriers. The omission and failure of the railway company to restore the highway to its original state of usefulness did not relieve the commissioners of highways from the care imposed upon them, for a commissioner may, under act of 1855, chap. 255, compel a railroad company to perform its duty, and maintain an action against the company for accidents occurring thereby. *Bryant v. Town of Randolph*, 133 N. Y. 70, aff'g judg't for pl'ff.

Disapproving *Bartlett v. Crozier*, 17 Johns. 440; *West v. Village of Brockport*, 16 N. Y. 161.

There were no guards to an embankment to a bridge and a stranger fell off in the night. The judge properly left it to the jury to say whether the absence of guards to the embankment was negligence, and in determining it the jury could consider absence of guards for sixty-eight years without accident. *Maxim v. Town of Champion*, 50 Hun, 88, aff'g judg't for pl'ff.

From opinion.—"In *Hyatt v. Trustees of the Village of Rondout*, 44 Barb. 386, a question was presented very similar to one before us. In that case it appeared that 'on the upper side of the road is a high bank and on the lower side also is a steep precipitous bank, forty-one feet high, at the foot of which Rondout creek flows. The road is directly on the edge of the bank, and there was no guard or fender there to prevent a wagon and horse from going off.'

In the course of the opinion delivered by Hogeboom, J., it is said, viz: 'It would appear to be sufficiently obvious that the duty of keeping a bridge or a highway in repair extended not merely to the floor of the bridge or to the road-bed of a highway, but to proper guards or railing on their sides or borders, where necessary for the safety or protection of the public; but the point has been repeatedly adjudicated.' *Palmer v. The Inhabitants of Andover*, 2 Cush. 600; *Hayden v. Inhabitants of Attleborough*, 7 Gray, 338; *Norris v. Litchfield*, 35 N. H. 271.

The opinion concludes with an assertion that it was a question for the jury to determine, 'Whether the place where the accident occurred required a guard or barrier in order to the safety and protection of travelers, and whether the defendants were guilty of actual negligence in not constructing such guard or barrier.' The verdict was sustained, and the case was taken to the court of appeals and affirmed in 41 N. Y. 619. That case is referred to in *Monk v. Town of New Utrecht*, 104 N. Y. 557. * * *

The principle is laid down in *Sherman and Redfield on Negligence*, secs. 390,

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391. In the latter section cited it is said: 'Thus it is gross negligence to construct a passageway along a precipice without having sufficient guards for the protection of travelers.' And in Wharton on Negligence, sec. 974, it is said: 'The absence of any guard or railing at the side of a bridge forming a part of a highway, is a fact from which the jury may find that the bridge was defective within the meaning of the statute rendering towns liable for injuries resulting from defective highways,' and in section 976 the same author says, viz: 'The true test (as to negligence, in fencing roads), is whether there is such a risk of a traveler, using ordinary care in passing along a street, being thrown or falling into the dangerous way (adjoining the highway), that a railing is requisite to make the place safe and convenient. Hence a municipal corporation, charged with building and repairing roads, is guilty of negligence in constructing a passageway by the side of a hill without sufficient guards to protect travelers.' And Dillon on Municipal Corporations (sec. 1004), states, viz: 'Want of a railing when necessary is an actionable defect.' * * *

In *Palmer v. Inhabitants of Andover*, 2 Cush. 600, it was held that a liability attached for an injury 'alleged to have been caused by a defect in a highway occasioned by the want of a rail or barrier, * * * if such rail or barrier were necessary for the proper security of travelers and would have prevented happening of the injury complained of.' The court remarked, in delivering the opinion in the case, viz: 'To guard against damage by such accidents the law requires suitable railings and barriers, a proper width of the road, and whatever may be reasonably required for the safety of the traveler.'"

The same doctrine was asserted in *Haydon v. Inhabitants of Attleborough*, 7 Gray, 338. A like doctrine was held in *Collins v. Dorchester*, 6 Cush. 396. The absence of a railing which would have prevented an accident was held to be sufficient ground for a liability on the part of the town. See, also, *Norris v. Litchfield*, 35 N. H. 271; *Wiley v. Portsmouth*, id. 304; *Davis v. Hill*, 41 id. 329; *Joliet v. Verley*, 35 Ill. 58; *Houfe v. Town of Fulton*, 29 Wis. 296; s. c., 9 Am. Rep. 568; *Hey v. Philadelphia*, 81 Pa. St. 41."

Plaintiff leaned against the railing of a bridge and the same gave way and he fell into the river. Defendant was bound to supply railing strong enough to resist the pressure of a person leaning against it. A statute requiring a street to be of a certain width does not apply to a bridge. *Langlois v. City of Cohoes*, 58 Hun, 226, reversing nonsuit.

Negligence of a commissioner of highways may consist as well in the omission to erect barriers in dangerous places in a highway as in leaving the bed of the highway defective, and it is for the jury to determine, upon the trial of an action, whether a town was or was not negligent in failing to erect suitable railings or barriers along the side of a highway. *Van Gaasbeck v. The Town of Saugerties*, 82 Hun, 415.

A person has the right to skate upon a navigable river, which is a public highway, and when so doing is not negligent in assuming that he runs no risk, except the ordinary risk incident to such a highway. He is not,

as a matter of law, negligent in assuming that his life will not be imperiled by the gross negligence of parties engaged in cutting ice in omitting to guard their ice cuttings by putting a sufficient fence or guard around the same, as required by the provisions of section 429 of the Penal Code, until the ice has become safe. The absence of such a fence or guard about a cutting is an assurance that the ice is at least six inches in thickness. *Sickles v. The New Jersey Ice Company*, 80 Hun, 213.

From opinion.—"Deceased, when he met his death, was skating on a navigable river. He was rightfully there. *French v. Camp*, 18 Maine, 433; *Woodman v. Pitman*, 79 id. 456; 10 Am. & Eng. Ency. of Law, 861. He was upon a public highway.

It is said in the opinion delivered by Judge Gray in *Turner v. The City of Newburgh*, 109 N. Y. 301-307, in reference to one traveling along an ordinary highway: 'A person using a public highway is not bound to anticipate danger without some notice of a condition of things suggesting a peril of travel. It was for the jury to decide, as a matter of fact, whether, under the proofs, the plaintiff conducted herself as a person ordinarily does under similar circumstances.' In *Jennings v. Van Schaick*, 108 N. Y. 530, 531, Judge Finch stated in regard to one passing along a highway: 'She had a right to assume the safety of the sidewalk, and so was not called upon to give her attention to her steps until in some manner warned of danger.' In *Pettingill v. The City of Yonkers*, 116 N. Y. 558-564, the doctrine laid down in the above-cited cases was followed, and it was held that a person using a public street has no reason to apprehend danger, and is not required to be vigilant to discover, dangerous obstructions, but he may walk or drive in the day-time or night-time, relying upon the assumption that the corporation, whose duty it is to keep the streets in a safe condition for travel, have performed that duty, and that he is exposed to no danger from its neglect.'

I think to a certain extent the same doctrine should apply to one traveling on the ice on a river highway; that is, that one so traveling is not negligent in assuming that he runs no risks except the ordinary risk incident to such a highway. He is not, as matter of law, negligent in assuming that his life will not be imperiled by the gross negligence of parties in omitting to guard their ice cuttings as directed by the statute."

The balking of a horse and the backing of a vehicle off a highway down a steep bank, whereby the person driving was thrown out and injured, although, in one sense, the primary cause of an accident, will not prevent the person injured, if she be free from fault, from recovering damages for personal injuries from a municipality which was bound to maintain the highway in a proper condition.

It is the duty of the municipalities and towns to place some guard at dangerous and exposed places along highways, where the happening of accidents from the failure to place guards may be reasonably anticipated.

The principle that the liability of a town for damages for personal injuries sustained by reason of the unsafe condition of a highway is limited to the liability of its highway commissioners, does not apply to a city or village.

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It was shown upon the trial of an action brought to recover damages for personal injuries sustained by reason of the alleged negligence of the defendant, a city, in failing to provide safeguards on a highway, that the width of the highway, which ran along the side of a hill, at the place where the accident happened, was but seven feet; that to the west of the track there was a space of three feet on the same level, then a slope of thirteen feet with a descent of two feet, then a precipitous fall of four feet, then a descent of sixteen and one-half feet vertical in a space of thirty-one feet horizontal, and that to the east of the track there was a slight rise of fourteen feet, and then a steep ascent.

Held, that it was proper to submit to the jury the question whether the city was negligent in failing to provide at that place some safeguard; that it could not be said, as matter of law, that there was no evidence to justify the jury in finding that the city was guilty of negligence. *Burns v. City of Yonkers*, 83 Hun, 211.

Robertson v. Mayor &c. and New York Central &c. R. Co., 7 Misc. 645.

A guard rail is a necessity along an embankment in a street four feet above a pond and only eighteen inches from the wagon track. *Morsman v. Rockland*, 91 Me. 264.

Otherwise, on an embankment seven feet high on a road of good width through a low uninhabited tract of land. *Tarras v. Winona*, 71 Minn. 22.

Narrow walk ran near a ravine. Negligence in failing to guard by rail was for the jury. *Weiser v. St. Paul*, (Minn.) 90 N. W. Rep. 8.

Barrier was necessary upon the approach of a bridge which was high and narrow. *Topeka v. Hempstead*, 58 Kan. 328.

So, along a retaining wall nine feet high. *McCarroll v. Kansas City*, 64 Mo. App. 283.

So, where there was considerable declivity at the intersection of streets, which, though private, were customarily used by the public. *O'Malley v. Parsons*, 191 Pa. St. 612.

So, as to a steep declivity next to a river where the road was only ten to twelve feet wide. *Davis v. Snyder*, 196 Pa. St. 273.

So, as to a culvert eighteen inches high where the road was narrow and smooth and the usual track one and one-half feet from the end thereof. *Prahl v. Waupaca*, 109 Wis. 299.

Circumstances in which absence of safeguard deemed not negligence:

The plaintiff was riding on a good road thirty feet wide, with a grade on one side of twelve feet; the sidewalk was ten feet wide, and there was a curb stone between it and the road. The horse shied over both the curb stone and the walk and went down the embankment. The road had been

in that state for ten years, and the defendant was not liable for an accident so rare and unexpected. *Hubbell v. City of Yonkers*, 104 N. Y. 434, rev'g 35 Hun, 349, and judg't for pl'ff; distinguishing *Kennedy v. Mayor*, 73 N. Y. 365.

Macaully v. Mayor &c., 67 N. Y. 602.

At a clearing or break in some woods, which separated the ordinary country highway from a pond, which was eight or ten feet away, the plaintiff stopped her horse and cutter to allow a team to pass her. Her horse was frightened by a barrel, falling from the load of the other team, became unmanageable, and turning the cutter at right angles with the road, backed it into the pond and upset the plaintiff into the water. The plaintiff had been familiar with the *locus in quo* for many years and no accident from the same had ever happened. The defendant was not negligent. *Glasier v. Town of Hebron*, 131 N. Y. 447, rev'g 62 Hun, 137, and judg't for pl'ff.

Following *Hubbell v. City of Yonkers*, 104 N. Y. 434.

The mere absence of a barrier upon the side of a highway, at a point where there is a perpendicular descent therefrom to the water of a pond below, is not alone sufficient to charge the highway commissioner of the town in which such road is situated with negligence, when the highway is at that point seventeen feet wide, level and smooth. *Glasier v. The Town of Hebron*, 82 Hun, 311.

Absence of barrier from unfrequented road at a point where it sloped at an angle of 45° to a culvert thirty inches below, held not negligence. Road had been in same condition twenty years. *Waller v. Hebron*, 5 App. Div. 577.

Where a street is 42 feet wide, smooth and slopes but two feet from the center to the sidewalk, a village is not chargeable with failure to provide against the unexpected contingency of a tricyclist losing control of her wheel and going off to the side of the road and over the sidewalk and down a declivity. *Smith v. Henderson*, 54 App. Div. 26.

So, as to failure to safeguard a dam in a park to prevent boats floating over it. *Ewen v. Philadelphia*, 194 Pa. St. 548.

Path was four feet wide, but at one point five or six feet above the road. No barrier required. *Siegler v. Mellinger*, 203 Pa. St. 256.

So, as to failure to place guard rail on the banks of a creek, a traveler would have to go considerably out of the traveled portion of the way to get into danger from. *Hannibal v. Campbell*, 86 Fed. Rep. 297.

When such negligence is the proximate cause of the injury:

The question whether a town is or is not negligent, in failing to erect

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railings along the side of a highway in dangerous places, is for the jury.

The fact that a highway, a defect in which has caused an accident, forming the basis of an action to recover damages from the town, had been in the same condition for a long time, and that no previous accident had occurred, will not relieve the town of the charge of negligence.

Where there is a defect in a highway, one whose horse became frightened, ran away, and became uncontrollable, may recover damages from the town, although the conduct of the horse was a proximate cause of the injury complained of, if the negligence of the officers of the town was another proximate cause of such injury. *Wood v. The Town of Gilboa*, 76 Hun, 175.

Where it is negligent not to erect barriers along the swampy side of a road, it was no defense that the fright of horses was due to the dashing of water on the road from the lake side. *Roblee v. Indian Lake*, 11 App. Div. 435.

The sudden appearance of a bicyclist unlawfully on the sidewalk did not prevent recovery for injury proximately due to lack of a barrier. *Knouff v. Logansport*, 26 Ind. App. 202.

Nor did the fact that the fright of plaintiff's horse contributed to the injury. *Harvey v. Clarinda*, 111 Iowa, 528.

Topeka v. Hempstead, 58 Kan. 328; *Coles v. Revere*, 181 Mass. 175.

Fright of a horse and not the lack of barriers was the cause of the accident, where the highway was safe for ordinary travel. *Bell v. Wayne*, 123 Mich. 386; s. c., 48 L. R. A. 644.

Failure to maintain barriers on a bridge made a town liable notwithstanding the horse passed a few feet beyond it. *Bitting v. Maxatawny Twp.*, 177 Pa. St. 213.

Failure to guard an embankment at the entrance to a bridge was not the proximate cause of an accident to a wagon, where the traces broke. *Willis v. Armstrong County*, 183 Pa. St. 184.

Likewise where a horse shied at a cow on the road. *Heister v. Fawn*, 189 Pa. St. 253.

Otherwise where it became unruly. *Boone v. East Norwegian*, 192 Pa. St. 206.

Or where the harness became detached from the wagon. *Card v. Columbia*, 191 Pa. St. 254.

Failure to erect guard rails was not ground for recovery, where control of horse was lost through the breaking of the harness. *Habecker v. Lancaster*, 9 Pa. Super. Ct. 553.

No recovery where the fright was not caused by defendant's negligence

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and the road was wide enough for safety of ordinary travel. *Bell v. Wayne*, 123 Mich. 386; s. c., 48 L. R. A. 644.

Habecker v. Lancaster, 9 Pa. Super. Ct. 553; *Doak v. Saginaw*, 119 Mich. 680.

Otherwise, when the fright was occasioned through defendant's negligence on a narrow road bordering a steep bank to a river. *Davis v. Snyder*, 196 Pa. St. 273.

The proximate cause of the injury in such a case is for the jury. *Closser v. Washington*, 11 Pa. Super. Ct. 112.

Beardslee v. Columbia, 5 Lack. Leg. N. 290.

Plaintiff was not thrown from his carriage which ran off an unguarded embankment until it had gone 75 feet. The lack of guards was held the proximate cause of injury. *Stone v. Pendleton*, 21 R. I. 332.

Whether the fright of a mule, a hole in the bridge or the absence of a barrier was the proximate cause of its backing off it was a question for the jury. *Blakeley v. Laurens County*, 55 S. C. 422.

Sudden fright of a horse was not the proximate cause of injury, where no injury would have been sustained had barrier been maintained. *San Antonio v. Porter*, (Tex. Civ. App.) 59 S. W. Rep. 922.

Otherwise, where none would have occurred had a man instead of a boy been in charge of the horse. *Hungerman v. Wheeling*, 46 W. Va. 761.

2. CONTRIBUTORY NEGLIGENCE.

If the condition of a public street or place under the control of a municipality is such as to render the use thereof by the public dangerous, and such danger is within reasonable apprehension, it is the duty of the municipality to use the means available to it for the purpose of reasonably guarding against such dangers.

The defendant laid out a street on an embankment crossed by a railroad. A traveler saw an approaching train and turned his horse about, and, while doing so, backed off, in consequence of the absence of a railing, which absence he could have discovered by looking back. The municipality was liable and the plaintiff's contributory negligence was for the jury. *Gillespie v. City of Newburgh*, 54 N. Y. 468, aff'g judg't for pl'ff.

The plaintiff's intestate was walking in the traveled part of the highway in the evening, when, encountering a loaded team upon a bridge, he stepped to one side to let it pass, and fell from the unprotected side of the bridge. The other side of the bridge was protected by a railing, and there was a walk for foot passengers there, but the same was obstructed by snow and was slippery. Held, that it was not *per se* negligence for the deceased to travel where he did, and that the question of

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contributory negligence was for the jury. *Morrell v. Peck*, 88 N. Y. 398, rev'g 24 Hun, 37, and aff'g judg't for pl'ff.

A street was graded thirty feet above the adjoining land. The plaintiff was injured by falling off on a starlight night, while he was drunk. He claimed that there should have been barriers. The omission was not a defect in the highway, but in the plan, and the defendant was not liable and the plaintiff was guilty of negligence. The action was under chap. 700, Laws 1881. *Monk v. Town of Utrecht*, 104 N. Y. 552, aff'g judg't of nonsuit.

A bridge had been erected and kept in repair by the town, within the limits of which the village, thereafter incorporated, was situated. By the charter, the trustees were made highway commissioners with certain powers, but not over highway bridges. The trustees built foot bridges on either side of the bridge in question and joined them thereto so as to substantially form a part of it, except that the floor of the bridge was slightly higher than the additions. The point of junction was about four feet within the curb line of the street. The whole structure appeared safe for traveling; the plaintiff did not know that one part of the bridge was for foot passengers only; he had seen people frequently drive over such parts, which bore imprints of wheel tracks. The plaintiff drove on the added parts to get his truck up to the projecting platform of a store, as it was difficult to unload without so doing. The ordinance forbade driving on the sidewalk as does also sec. 622 of the Penal Code. The motion for non-suit was improperly granted, as it could not be said, *per se*, that the plaintiff's negligence contributed to the accident. *Fisher v. Village of Cambridge*, 133 N. Y. 527, rev'g 57 Hun, 296, judg't for def't.

Connected with the abutment of a bridge was an extension of a bridge in the form of a wall, along the outer side of which was no railing or barrier; the plaintiff's intestate was familiar with it, and was found injured on a dark and rainy night, at the base of the abutment. A nonsuit was proper on ground that proof of absence of contributory negligence on part of defendant had not been proved. *Peasley v. Town of Chatham*, 69 Hun, 389, affirming nonsuit.

It was negligent to drive a team in a dangerous place with a heavy load with defective hames nearly worn through by eight years' use. *Patchen v. Walton*, 17 App. Div. 158.

Plaintiff, while driving between an excavation and the pile of earth removed, was suddenly confronted by a rapidly approaching vehicle and pulled upon the bank of loose earth. This frightened the horse and he jumped and fell into the excavation. Recovery allowed. *Akers v. New York*, 14 Misc. 524.

That plaintiff was subject to dizzy spells did not make her negligent

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in going upon the unprotected sidewalk. *Normal v. Webb*, 91 Ill. App. 183.

Nor was plaintiff negligent in approaching a crossing 200 feet away while a train was passing, where his horse was gentle and the road 14 feet wide. *Lebanon &c. R. Co. v. Purdy*, (Ky.) 37 S. W. Rep. 588.

Nor was plaintiff negligent, where, upon finding himself on a narrow road with an unprotected embankment with a train approaching, he attempted to drive on to a place of safety. *Sprowls v. Morris*, 179 Pa. St. 219.

Otherwise, where the fright could have been prevented by observance of ordinary care in discovering the approach of the train in time. *Dixon v. Butler*, 4 Pa. Super. Ct. 333.

Tasker v. Farmingdale, 91 Me. 521.

Plaintiff went at night with a stumbling horse by a dangerous route instead of a safer one. Not negligent *per se*. *Stokes v. Ralpho*, 187 Pa. St. 333.

Wilson v. O'Hara, 14 Pa. Super. Ct. 258.

Child, in sport, left his father's side to grasp a post in the railing of a bridge, and fell through a hole and was drowned. He was not *per se* negligent. *Gulline v. Lowell*, 144 Mass. 491.

Plaintiff was negligent in running along the railroad ties on an embankment in the dark. *Kaseman v. Sunbury*, 197 Pa. St. 162.

Knowledge that the embankment was unguarded did not make plaintiff negligent in driving along it where his horse was gentle. *San Antonio v. Porter*, (Tex. Civ. App.) 59 S. W. Rep. 922.

See, also, *Stone v. Pendleton*, 21 R. I. 332.

So, where, though plaintiff knew of the existence of an embankment, he had no idea that he was near it. *Dwyer v. Salt Lake City*, 19 Utah, 521.

(e). FIRES,—DEFECTIVE BUILDINGS.

Although a municipality, for fire, or other police purposes, has power to compel the owner to remove danger from a defective, unsafe, or ruinous building, or structure the exercise of such power is not imperative, but judicial, where only injury to the other adjoining property is concerned; if, however, such defective building or structure, threaten injury to persons, using a public street, or place, the same is a nuisance, and it is the duty of the municipality to avail itself of lawful means to abate the same.

Authority to a municipality to raze buildings, that may become dangerous by fire, is merely enabling, and the municipality is not liable for neglect to use it. Although the city has the power to compel the owner

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to correct a defective line wall, yet, as fact of the defect was, in this case, known to the city, it was not liable for failure to order it done. *Cain v. City of Syracuse*, 95 N. Y. 83, aff'g 29 Hun, 105, and judg't for def't; distinguishing *Kiley v. City of Kansas*, 69 Mo. 102.

Parker v. Mayor &c. of Macon, 39 Ga. 725; *People v. Corporation of Albany*, 11 Wend. 539; *Jones v. New Haven*, 34 Conn. 1; *Norristown v. Moyer*, 67 Pa. St. 356.

From opinion.—"That municipal corporations, accepting chartered powers from the state, and so by their own consent assuming duties not previously imposed, become liable in consideration of the grant for the due exercise of the powers, and the proper performance of the duties thus conferred and imposed, *Conrad v. Village of Ithaca*, 16 N. Y. 161; *McCarthy v. City of Syracuse*, 46 id. 194; *Maxmilian v. Mayor, &c.*, 62 id. 160; 20 Am. Rep. 468; that where a public body is clothed by statute with power to do an act which the public interest requires to be done, and the means of performance are placed at its disposal, the execution of the power may become a duty, although the statute conferring it be only permissive in its terms; *People v. Albany*, 11 Wend. 539; *People ex. rel. Otsego County B'k v. Supervisors of Otsego Co.*, 51 N. Y. 401; and that upon the evidence in this case a jury might have found that the wall which fell after the fire and crushed the deceased was in fact, while left standing, dangerous to the adjoining private property and those in its occupation; these three propositions, in their proper application, may be conceded as preliminary to the further inquiry, whether the corporation owed any duty in respect to the dangerous structure under the city charter, which duty was so absolute, certain and imperative as to found a right of action; or whether such duty was judicial in its character and rested in discretion, for a violation of which no action can be maintained. * * *

Section 5 provided that 'the common council shall have power by resolution,' among other things, 'to compel the owners or occupants of any wall or building within the city, which may be in an unsafe or ruinous condition, to render the same safe, or to take down or remove the same, and to prohibit such erections' and also 'to require the summary removal or abatement of all nuisances, or substances likely to become such, from any street, lot or building.' * * * No power is here given to the corporation to enter upon private property and abate a private nuisance. It can only act indirectly by putting a command upon the owner, and punishing his disobedience under section six by a fine not exceeding one hundred dollars or imprisonment not exceeding three months. In this respect, the power, and, therefore, the resultant duty, of the corporation is very different from that relating to the city streets, parks, avenues and buildings, which are within the corporate possession and control, which involves no invasion of private property or private right, and for the negligent care of which the city is alone responsible. The cases relied upon in behalf of the appellant are mainly, if not entirely of the latter character. In *Kiley v. City of Kansas*, 69 Mo. 102; 33 Am. Rep. 491, the court said, 'had this wall been standing in the center of a lot or block belonging to a private person the city may not have been liable for injuries resulting from its fall.' The wall fronted upon the street, menacing the public, and was deemed a public nuisance. In this case, too, the common council had legislated and passed an ordinance declaring all buildings and structures dangerous to the public, nuisances. In *Parker v. Mayor &c. of Macon*, 39 Ga. 725, the

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wall stood on the edge of the sidewalk. In *People v. Corporation of Albany*, 11 Wend. 539, the foul and dirty basin endangered public health. In *Jones v. New Haven*, 34 Conn. 1, the trees to be pruned were in the streets and public parks. In *Norristown v. Moyer*, 67 Pa. St. 356, the rotten liberty pole stood in the street. In all these cases, collected for us by a faithful industry, the general public were interested; the citizens were menaced; the nuisance was public; the corporation could act without danger or question of trespass. While here, the walls threatened only adjoining private property, and endangered the lives not of the public, but of the adjoining owners or occupants."

Failure to furnish facilities for extinguishment of fire was not ground of recovery. *Springfield &c. Ins. Co. v. Keeseville*, 148 N. Y. 46; s. c., 30 L. R. A. 660.

Akron Waterworks Co. v. Brownless, 10 Oh. C. C. 620.

Nor is the city liable for the negligence of its firemen. *Davis v. Lebanon*, (Ky.) 57 S. W. Rep. 471.

Lenzen v. New Braunfels, 13 Tex. Civ. App. 335. See, also, IV, *post*, p. 1967.

City was not liable for the destruction of a house by fire from a wooden building permitted to be erected in violation of an ordinance. *Forsyth v. Atlanta*, 45 Ga. 152.

Collapse of a building does not of itself give recovery. Negligence must be proved. *Peoria v. Adams*, 72 Ill. App. 662.

Damage to the building of one citizen from the falling of another's building, which had been permitted to become dangerous, is not chargeable to the municipality. *Anderson v. East*, 117 Ind. 126.

Lightning rods on a school house were out of repair and a child was injured by lightning striking the school. School district was not liable. *Lane v. Woodbury*, 58 Iowa, 462.

Where city is the landlord it must do the lighting in the building. *Little v. Holyoke*, 177 Mass. 114.

No liability rests on a town for the death of person from the negligent burning of the town jail. *Brown v. Guyandotte*, 34 W. Va. 299.

Corporation not liable for failure to exercise chartered powers to abate a nuisance. *Dillon Munic. Corp.* (4 ed.) sec. 951 and const. cited.

No liability attached to a municipal corporation for failure to enforce an ordinance prohibiting the erection of wooden buildings. *Hines v. Charlotte*, 72 Mich. 278.

A municipality may destroy private property to arrest a conflagration. *Dillon's Munic. Corp.* secs. 955-958.

(f). AWNINGS.

Where an awning projects over a portion of a street, without its authority, the municipality should remove the same as a nuisance; if such authority

AWNINGS.

exist, the municipality should use ordinary and reasonable care, to see that it is properly erected and maintained, and it is liable for injury from any culpable defects of which it has, or in the exercise of reasonable care, should have notice.

The authorities of a city are not bound to be skilled in mechanics or architecture, but are only held to reasonable intelligence and ordinary prudence. A city is not liable for obstructions, not placed by its own officials or authority, until after notice or a sufficient lapse so that notice will be presumed.

An awning was injured by a fire engine and was repaired by a competent mechanic, but gave way at a defective place after a heavy fall of snow. The city was not liable for secret defects. *Hume v. The Mayor*, 47 N. Y. 639, rev'g judg't for pl'ff.

From opinion.—"There are important questions involved in the actions, touching the liability of cities for injuries resulting from structures and projections of this character, but which are not clearly and distinctly presented upon this appeal."

Awnings, although not erected by the consent of the city, if insecurely supported so as to be dangerous are defects in the street, and, if the city has notice of it or it is so easy to be observed, that notice may be inferred, the city is liable. If it exist without authority the city should remove it as a nuisance; if it exist by authority the city is liable for negligence in not properly supervising it. It is especially a nuisance when the city owns the fee of the street. *Hume v. The Mayor*, 74 N. Y. 264; reversing 9 Hun, 674, and ordering judgment for plaintiff on verdict.

From opinion.—"In *Pedrick v. Bailey*, 12 Gray, 161, it was held that an awning erected over the sidewalk of a street without the consent of the municipal authorities was an unlawful obstruction which the mayor had power to remove. In *Drake v. The City of Lowell*, 13 Metc. 292, it was held that the city was liable to a person who received injury from the fall of a wooden awning projected over the sidewalk of a street by the owner of a building, if the awning had been dangerous to travelers for the space of twenty-four hours before the injury.

* * * *Day v. The Inhabitants of Milford*, 5 Allen 98, was a similar case, and it was held that the defect and want of repair in the highway by which the traveler was endangered, were in the state of the awning and want of sufficient strength to sustain its own weight and such accumulations as would ordinarily occur. * * * The same court which decided the two last cases referred to had previously held that the city was not liable for an injury to a traveler resulting from snow and ice projecting from the roof of a building. *Hixon v. Lowell*, 13 Gray, 59, and it subsequently held in *Jones v. City of Boston*, 104 Mass. 75, that the city was not liable for the fall of a sign which the proprietor of an adjacent building had suspended over the sidewalk on an iron rod insecurely fastened, although the city had notice of the insecurity of the fastening. These cases were held not to fall within the duty to keep the streets in repair and safe

condition, and the distinction between them and the case of an awning or roofing of the street is pointed out by the court in the case of 104 Mass. 75, viz.: That the awning is not a mere incident or attachment of the building alone, but is a structure erected with reference, in part at least, to the use of the sidewalk as a street, adapted to it in some measure as a part of its construction and arrangement for use as a sidewalk; and that a danger from its insecure condition may reasonably be treated as arising from a defective or unsafe condition of the sidewalk. This view is not in conflict with the case cited from 34 Conn. 136 (*Hewison v. The City of New Haven*), in which it was held that a weight attached to a flag suspended over a street was not a defect in the street, which the city was bound to remove. Even in that case the court rejected the claim of the counsel for the city that a road could only be rendered defective by something in or upon the road-bed itself, as being too limited a construction, and in *Norristown v. Mayor*, 67 Penn. St. R. 355, a municipality was held responsible for injury caused by the fall of a liberty pole which had become rotten, though it stood in a part of the road where it did not obstruct travel, placing its decision upon the broad ground that municipal authorities were bound to remove dangerous nuisances from streets under their jurisdiction."

From the weight of the snow an awning, in front of property abutting on the street, fell. The city was liable for this or any defect that might have been discovered by inspection.

Where, therefore, a person was injured by the fall of a wooden awning which had been constructed in violation of a city ordinance, and had been suffered to remain for several years over the sidewalk of a street in said city, which awning was not securely supported, and upon which snow had been permitted to accumulate and remain for such a length of time as to warrant an inference of notice to the city, the city was liable.

In the absence of evidence of personal negligence on the part of the commissioner of the department of public works, he was not liable.

Under the charter of the city of Brooklyn (chap. 863, Laws of 1873) the primary duty of caring for its streets and keeping them in a safe condition for public use is imposed upon the city; the department and officers charged with that duty, except so far as otherwise provided by the statute, are to be treated as instrumentalities employed for its performance, and it is responsible for damages to individuals resulting from their negligent action or omission.

The city was not relieved from such liability by the provision of said charter (sec. 27, tit. 19), declaring that it "shall not be liable in damage for any misfeasance or nonfeasance of * * * any officer of the city * * * of any duty imposed upon them, or any or either of them" by said act; that provision applies only where his duty is devolved, not only upon the city, but directly upon some officer or department. *Bieling v. City of Brooklyn* and another, 120 N. Y. 98.

On the subject of awnings, see *Dillon's Munic. Corp.* sec. 1013.

(g). SIDEWALKS.

While sidewalks are specially appropriated to their use, yet pedestrians may cross a street at any part thereof, whether at a cross walk or otherwise, and may assume, unless they have knowledge to the contrary, that the street or sidewalk is free from excavations and obstructions. While it is within the discretion of a municipality, whether a sidewalk shall be built, either by itself or another, yet if it be so built, the municipality must use ordinary care to keep it in a reasonable state of repair, and it is liable for injury arising in its use from a culpable defect of which it has, or in the exercise of such care should have, notice or knowledge. It is immaterial that it is the duty of the abutting owner to keep it in repair. An action is not usually maintainable against an adjoining owner for injury suffered by a person in the use of a sidewalk, from lack of repair, although it be the duty of such person to keep it in repair, nor can a municipality indemnify itself from such owner for damages, it has been obliged to pay, on account of such owner's negligence in so keeping it in repair, but may recover only any expenses incurred by the municipality in making necessary repairs. By statute the liability or rights of a municipality may be otherwise than as here stated.

1. DUTY TO USE DUE CARE IN CONSTRUCTION AND REPAIR.

When it is the duty of the city to keep a street in repair, it is liable for the negligence of the common council in permitting it to remain out of repair. *Diveny v. City of Elmira*, 51 N. Y. 506, aff'g judg't for pl'ff.

Sidewalk was not properly constructed where the lay of the ground did not necessitate the incline made. *White v. Trinidad*, 10 Colo. App. 327.

Provision of a charter giving recovery for defects in streets construed to include sidewalks. *McLean v. Lewiston*, (Id.) 69 Pac. Rep. 478.

Barriers should have been maintained along a walk three or four feet above the ground. *Normal v. Webb*, 91 Ill. App. 183.

Post holes should have been guarded on a dark night. *Goshen v. Alford*, 154 Ind. 58.

Defectiveness of sidewalk was for the jury where it was without cleats and inclined five feet in forty. *Ford v. Des Moines*, 106 Iowa, 94.

Whether a crosswalk over an open drain 15 feet wide at the top, five feet deep with sloping sides, should have been guarded, was for the jury. *Rosedale v. Cosgrove*, 10 Kan. App. 211.

Fall was precipitated by defect in walk adjacent to an excavation. Failure of another to barricade the latter was no defense. *Brydon v. Detroit*, 117 Mich. 296.

Duty to keep street in safe condition extended to a place between the sidewalk and the curbing. *Fockler v. Kansas City*, 94 Mo. App. 464.

Care proportionate to the danger is due in lighting and guarding ob-

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structions while grade of street is being changed. *Frazier v. Butler*, 172 Pa. St. 407.

Failure to properly guard as provided by ordinance was negligence *per se*. *Corsicana v. Tobin*, (Tex. Civ. App.) 57 S. W. Rep. 319.

City was liable for a defect in a walk connecting school buildings. *Powers v. City of Philadelphia*, 18 Pa. Super. Ct. 621.

The Wisconsin Statute provides that no liability shall attach to a city for injuries from defects in sidewalks until all legal remedies shall have been exhausted against the person causing the defect. *Hiner v. Fond du Lac*, 71 Wis. 74.

Plaintiff, a child, was injured by defective sidewalk while rolling her hoop along it; recovery should be allowed. *Reed v. Madison*, 83 Wis. 171.

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By constructing a walk a town undertakes to keep it in repair. *Birngruber v. Eastchester*, 54 App. Div. 80.

Miller v. Bradford, 186 Pa. St. 164.

Where a crowd frequently assembled at a place, the walk thereat should be made sufficient to stand the extra strain. *Leggett v. Watertown*, 55 App. Div. 321.

City is liable where the duty is made a special one by its charter. *Lord v. Mobile*, 113 Ala. 360.

See, also, *Evansville v. Frazer*, 24 Ind. App. 628.

Reasonably safe condition is the measure of a city's duty; it is not an insurer. *McQueen v. Elkhart*, 14 Ind. App. 671.

Carvin v. St. Louis, 151 Mo. 334; *Waggenger v. Point Pleasant*, 42 W. Va. 798; *Mancuso v. Kansas City*, 74 Mo. App. 138.

An instruction that a pedestrian had a right to assume that a walk would be free from defects was erroneous. *Wallis v. Westport*, 82 Mo. App. 522.

Degree of care in keeping sidewalk in a reasonably safe condition depends on the risk involved. *Bieber v. St. Paul*, (Minn.) 91 N. W. Rep. 30.

Duty applies by night as well as by day. *Ord v. Nash*, 50 Neb. 335.

And to children as well as adults. *Omaha v. Richards*, 49 Neb. 244.

The condition should be such that one using the street with ordinary care will not be injured. *Durbin v. Napoleon*, 21 Oh. C. C. 160.

Smith v. East Mauch Chunk, 3 Pa. Super. Ct. 495; *Roanoke v. Shull*, 97 Va. 419.

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But the gist of the action is negligence. *Cincinnati v. Frazer*, 18 Oh. C. C. 50.

Calhoon v. Milan, 64 Mo. App. 398.

Liability attaches if the defect was within the walk as traveled. *Hyde v. Swanton*, 72 Vt. 242.

But not for unusual uses:

Where sidewalk was reasonably safe for ordinary uses, there was no recovery because it gave way under an unusual strain. *Kohlhof v. Chicago*, 192 Ill. 249.

Use of a sidewalk for bicycles is not one a city is bound to provide for. *Morrison v. Syracuse*, 45 App. Div. 421.

So of moving 1400-pound safe on raised wooden sidewalk. *Chicago v. Kohlhof*, 64 Ill. App. 349; s. c. aff'd, 192 Ill. 249.

Duty exists though walk built by others:

Where a municipality has power to prevent an incumbrance on the street, it is liable for a dangerous walk built without its authority but existing so long as to charge it with notice. *Saulsbury v. Village of Ithaca*, 94 N. Y. 27, rev'g 24 Hun, 12, and aff'g judg't for pl'ff.

From opinion.—"It is true that whether a municipal corporation shall build, or permit to be built, a sidewalk on any of its streets is matter of discretion not to be regulated by the courts, yet when a sidewalk is built with or without its permission, it becomes responsible for its condition and bound so long as it exists to keep it in order. This duty is ministerial and not judicial. *Hines v. City of Lockport*, 50 N. Y. 239; *Hyatt v. Village of Rondout*, 44 Barb. 395; 41 N. Y. 619; *Vogel v. Mayor, &c.*, 92 id. 10; 44 Am. Rep. 349. In this case, therefore, it can make no difference how the walk came into existence, if the corporation with notice, permitted it to be used for public travel. By the act of the builder, and acceptance or acquiescence in the building of it on the part of the defendant's officers, they had control over it, and it became the property of the village as completely as if it had been put in position by the village itself. The principle upon which the above cases were decided uphold this proposition, and the case of *Requa v. City of Rochester*, 45 N. Y. 129; 6 Am. Rep. 52, to the same effect, is so like the case before us as to make it decisive in favor of the appellant.

That of *Urquhart v. Ogdensburg*, 91 N. Y. 67; 43 Am. Rep. 655, is relied upon by the respondent. There the sidewalks needed no repair and the complaint related to the plan of its construction. As that was within the judicial discretion of the defendant, negligence could not be predicated of it."

A defect consisting of a loose grating existed in a sidewalk of a village over an opening into a vault beneath, which grating was set by the property owner, with the acquiescence and consent, actual or implied, of the

village authorities many years before the happening of an accident, caused by the same, which resulted in the personal injuries for which the person injured recovered damages against the village.

Held, that the village could not recover over against the property owner because of the original construction of the grating, whether it was good or bad.

Where, however, the opening into the vault was reconstructed and the grating was reset, without the consent or acquiescence of the village authorities, and, by reason of the improper manner in which such work was performed, the reconstructed opening and grating became a nuisance, the property owner and not the village is primarily liable for injuries to third persons resulting therefrom.

Where a property owner avails himself of a license by implication to make an opening in the sidewalk of a village, he does so under an implied contract not only to do the work in a safe and proper manner, but also to keep the structure in a safe condition by repairs, as the same may become necessary, and if he negligently permits the structure to fall into disrepair and to become dangerous to passengers on the sidewalk, and an accident results therefrom, the village, being subjected to the payment of damages thereby, is entitled to recover the same from the property owner.

The general rule which denies indemnity or contribution to joint wrongdoers is elementary, and the cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured, are exceptions to the general rule, and are based upon principles of equity. Such exceptions obtain in two classes of cases, viz., where the party claiming indemnity has not been guilty of any fault except technically or constructively, and where both parties have been in fault, but not in the same fault, towards the person injured, and the fault of the party from whom indemnity is claimed is the primary and efficient cause of the injury. *The Trustee of the Village of Canandaigua v. Foster*, 81 Hun, 147.

A municipal corporation is liable to persons using its streets or sidewalks, where injury results from its neglect to keep them in a proper state of repair, notwithstanding the fact that a duty to repair such sidewalks is imposed upon the property owners in front of whose premises the injury occurs.

Where a duty is imposed by its charter upon a municipality, in which an accident occurs, to keep its streets in good and safe condition, an action is not maintainable against a lot owner to recover the amount of damages sustained by a person who, in consequence of a defect in the

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sidewalk in front of his lot, was thrown down and injured; under such circumstances, the primary duty of constructing sidewalks and keeping them in repair rests upon the municipality, and it alone is liable to persons injured through defects therein. *Law v. Kingsley*, 82 Hun, 76.

From opinion.—"It seems to be well settled that a municipal corporation is liable to persons using its streets or sidewalks, for damages arising from a neglect to keep them in a proper state of repair, notwithstanding the fact that a duty to repair such sidewalks is also imposed upon the property owners in front of whose premises the injury occurs. *Russell v. Village of Canastota*, 98 N. Y. 496; *Pettengill v. City of Yonkers*, 116 id. 558; *Saulsbury v. Village of Ithaca*, 94 id. 27; *Bullock v. Mayor &c. of New York*, 99 id. 654; *Pomfrey v. Village of Saratoga Springs*, 104 id. 459; *Jewhurst v. City of Syracuse*, 108 id. 303. * * *

In *City of Rochester v. Campbell*, 123 N. Y. 405, where the plaintiff's charter, in all its essential particulars, is like that of the city of Rome, it was held that an action was not maintainable against a lot owner to recover the amount of a judgment against the city for damages sustained by one who, in consequence of a defect in the sidewalk in front of such owner's premises, had been thrown down and injured; that, as a duty was imposed upon the municipality, by its charter, to keep its streets in good and safe condition, and so, through its common law liability, abundant indemnity was provided for any damages caused by defective streets, the purpose of the provision was not the protection of the public or individuals, but to furnish the municipality, by a proper distribution of burdens, the means of discharging its duties, and that the lot owner could only be made liable for any expense the corporation incurred in making the necessary repairs. In that case it was also held that the primary duty of constructing sidewalks and keeping them in repair rested upon the municipality, and that it alone was liable to persons injured by reason of defects therein. See, also, *Avery v. City of Syracuse*, 29 Hun, 537; *Village of Fulton v. Tucker*, 3 id. 529; *Moore v. Gadsden*, 93 N. Y. 12; *Wenzlick v. McCotter*, 87 id. 127; *Dill. Mun. Corp. sec. 1012*; *Hill v. City of Fond du Lac*, 56 Wis. 242; *Knupfle v. Knickerbocker Ice Company*, 84 N. Y. 488; *Weller v. McCormick*, 47 N. J. L. 397; *Kirby v. Boylston Market Association*, 14 Gray 249; *Flynn v. Canton Co. of Baltimore*, 40 Md. 312; *Heeney v. Sprague*, 11 R. I. 456; *City of Hartford v. Talcott*, 48 Conn. 525; *Eustace v. Jahns*, 38 Cal. 3; *Jansen v. City of Atchison*, 16 Kans. 358; *State v. Gorham*, 37 Maine 451; *Keokuk v. District of Keokuk*, 53 Iowa, 352; *Taylor v. Lake Shore & M. S. Ry. Co.*, 45 Mich. 74, which are cited by *Ruger, Ch. J.*, in *The City of Rochester v. Campbell*, *supra*, as sustaining the doctrine of the non-liability of the lot owner to travelers or municipalities. In the further discussion of this question the court said: 'We have thus referred at length to many of the cases holding the non-liability of the lot owners, for the reason that there seems to have been quite a common impression, in which judges and lawyers have shared, that abutting owners are in some way liable to an injured party for damages occasioned from their neglect to keep sidewalks in repair when that duty is in any way enjoined upon them. It seems to us that there could never have been any logical cause for such impression, and it seems it has no foundation in the reported cases. Any other conclusion than that reached by us would, we think, be most unfortunate, as it would tend to relax the vigilance of municipal cor-

porations in the performance of their duties in respect to the repair of streets and highways, and impose that duty upon those who might be utterly unable to discharge it. It would tend directly to demoralize the public service and lead to disorder, decay and impassability of the public highways.' The principle of these cases renders it quite manifest that the plaintiff cannot maintain this action, and that the court properly granted the defendant's motion for a nonsuit.

Robinson v. Chamberlain, 34 N. Y. 389, and other kindred cases cited by the appellant, which, in effect, hold that a public officer, or person engaged to perform the duties of a public officer, is liable for negligence or malfeasance to any one sustaining special damage in consequence thereof, have no application here.

The judgment must be affirmed, with costs."

That the walk in question was built by a private party was no defense. *McVee v. Watertown*, 92 Hun, 306.

Hill v. Sedalia, 64 Mo. App. 494; *Alliance v. Campbell*, 3 Oh. Dec. 630.

Though pursuant to the authority of the city. *Kansas City v. Orr*, 62 Kan. 61.

If corporation is adjudged liable for injury from defective streets or sidewalks, it may indemnify itself in action against the person by whose wrong the unsafe condition existed, unless it was a wrong done between it and such person. *Dillon's Munic. Corp.*, sec. 1035, but a person is not liable for injury arising from a defective sidewalk, simply because he owns the land abutting thereon. *Jansen v. Atchison*, 16 Kan. 358.

See "Indemnity," p. 1295.

Not relieved because an obligation to repair rests upon another:

City cannot, by delegating the duty to repair, relieve itself of the duty of seeing that it is properly done. *Atherton v. Bancroft*, 114 Mich. 241.

Though a charter provision imposes the duty upon abutting owners. *Lincoln v. Pirner*, 59 Neb. 634.

And it is primarily liable where it is authorized to notify the owner of a defect and to repair upon his failure to do so. *Dallas v. Jones*, (Tex. Civ. App.) 54 S. W. Rep. 606.

Nor by fact that another cause contributed to the injury:

Liability remains though a cause for which it is not responsible contributed. *Hawley v. Gloversville*, 4 App. Div. 343.

Conklin v. Elmira, 11 App. Div. 402; *Lockport v. Richards*, 81 Ill. App. 533; *Ford v. Des Moines*, 106 Iowa, 94; *Chacey v. Fargo*, 5 N. D. 173; *Lawrence v. Davis*, 8 Kan. App. 225.

Negligence of a companion was not imputed to plaintiff. *Barnes v. Marcus*, 96 Iowa, 675.

3. WHAT CONSTITUTES REASONABLY SAFE CONDITION.*

Loose, misplaced, broken and decayed walks:

Stringer was so rotten that it would not hold nails. It was not properly constructed. *Aslen v. Charlotte*, 35 App. Div. 625.

Sciota v. Norton, 63 Ill. App. 530.

City liable for defect in platform and steps to a building adjacent to and used in connection with a sidewalk. *Leggett v. Watertown*, 55 App. Div. 321.

That locality of defect was lighted does not relieve city, though it is a consideration bearing on contributory negligence. *Giffen v. Lewiston*, (Id.) 55 Pac. Rep. 545.

Flagstone rocked when stepped upon it. Recovery was allowed. *Joliet v. Youngs*, 61 Ill. App. 589.

Plaintiff tripped upon a loose plank in a sidewalk and fell about two feet to the ground through a hole, which had existed for a long time. Recovery allowed. *Anna v. Boren*, 77 Ill. App. 408.

By allowing others to place boards across a street which warp and shift about, city becomes liable. *Springfield v. Tomlinson*, 79 Ill. App. 300.

Caton v. Sedalia, 62 Mo. App. 227; *Schovely v. Jenkintown*, 180 Pa. St. 196.

Where both plaintiff and defendant were chargeable with notice of the warped condition of a plank, negligence and contributory negligence were for the jury. *Lawrence v. Littell*, Kan. App. 58 Pac. Rep. 495.

A plank 15 to 18 inches long and 4 to 6 inches wide was broken and sagged 2 to 3 inches, and sank 3 to 4 when stepped on. Reasonable safety was for the jury. *Urtel v. Flint*, 122 Mich. 65.

Sagging of one of four parallel planks of a sidewalk, not a defect *per se*. *La Fave v. Superior*, 104 Wis. 454.

Safety of walk with missing boards was for jury. *Wilkins v. Flint*, 128 Mich. 262.

Walk was defective, where the stringers had so decayed as to let the boards down upon the uneven earth. *Williams v. Hannibal*, 94 Mo. App. 549.

City was negligent in allowing a boiler to be maintained under the sidewalk in violation of an ordinance provision as to construction. *Beall v. Seattle*, 28 Wash. 593.

Grades:

The building of a side hill sidewalk in successive grades instead of on an incline, permitted by statute. *Hoyt v. Danbury*, 69 Conn. 341.

Where the difference in grades was several feet, a loose plank was not

*NOTE.—On the subject of defective sidewalks, see Dillon's Munic. Corp. sec. 1012.

a safe transit. *Hogan v. Chicago*, 168 Ill. 551; rev'g s. c., 59 Ill. App. 446.

City, having the power to enforce obedience, was negligent in failing to make owner's sidewalk come to the grade permitted to be established by an adjoining owner. *Blume v. New Orleans*, 104 La. 345.

A variation of from one to five and one-half inches in the grades of the sidewalks of intersecting streets held not negligent. *Morgan v. Lewiston*, 91 Me. 566.

Where a grade is safe in its natural condition it is not made unsafe by the presence of snow and ice. *Wesley v. Detroit*, 117 Mich. 658.

Whether a grade was unsafe where a slope of seven and one-quarter inches in a descent of nineteen was for the jury. *Henry v. Williamsport*, 197 Pa. St. 465.

See, also, *Tompsett v. Glade*, 198 Pa. St. 376.

Excavations and dangerous places unguarded:

Private party excavated across the sidewalk to lay a sewer. City was liable for failure to see that it was properly guarded. *O'Hara v. Buffalo*, 39 App. Div. 443.

See, also, *Brown v. Louisburg*, 126 N. C. 701.

Though the walk itself be not defective. *Hall v. Manson*, 99 Iowa, 698; s. c., 34 L. R. A. 207.

A lamp placed at each end of an excavation 50 feet long was an insufficient guard. *Cummings v. Hartford*, 70 Conn. 115.

Where the excavation had existed for a sufficient time to charge defendant with notice, the duty was imposed. *Seward v. Wilmington*, 2 Marv. (Del.) 189.

City held liable for death of child drowned in pool of water collected on street by defective culvert. *Elwood v. Addison*, 26 Ind. App. 28.

City was not liable where its barriers had been removed. *Welsh v. Lansing*, 111 Mich. 589.

Otherwise, where it removed a bridge over a ditch to widen and deepen it but instead of replacing the bridge laid a couple of planks over it which were liable to turn when walked upon. *Stainback v. Meridian*, 79 Miss. 447.

Street not reasonably safe where city failed to place guard rail about an excavation adjoining the street. *Wiggin v. St. Louis*, 135 Mo. 558.

Hall v. Manson, 99 Iowa, 698, 34 L. R. A. 207.

City held not liable to one passing from a street across a lot on a level with it and falling into a street below the level of the lot. *Denison v. Warren*, (Tex. Civ. App.) 36 S. W. Rep. 296.

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Town was not negligent where the excavation had only existed for an hour and a half before the accident. *Franklin v. House*, 104 Tenn. 1.

By permitting a hatchway to be constructed in a sidewalk a city becomes bound to see that it is properly guarded when in use. *Whitty v. Oshkosh*, 106 Wis. 87.

Holes:

Depression two feet long, seven and one-half inches wide and only two and one-half deep was uncovered. No liability. *Beltz v. Yonkers*, 148 N. Y. 67.

See, also, *Jackson v. Lansing*, 121 Mich. 279; *Getzoff v. New York*, 51 App. Div. 450; *Koepke v. Milwaukee*, 112 Wis. 475; *Diamond v. Brooklyn*, 91 Hun, 640.

While plaintiff was walking on a sidewalk she tripped on a flagstone which had been removed by the defendant's servant while making an excavation for the purpose of placing a gas connection, and which they had placed over another which was broken, and she was thereby thrown down and injured. In an action to recover damages for such injuries, questions of negligence and contributory negligence were for the jury.

While there is a presumption that a person will exercise care in regard to life and limb, an inference that he was not guilty of contributory negligence cannot be drawn from such presumption. *Whalen v. The Citizens' Gaslight Co.*, 10 Misc. 281.

A space 20 inches by four was left unrepaired from a month to a year and a half. Negligence was for the jury. *Denver v. Hyatt*, 28 Colo. 129.

Two inches between cement pavement and a plank walk charges city with negligence. *Glantz v. South Bend*, 106 Ind. 305.

Platform which projected into the street and within a foot of the sidewalk but did not connect with it leaving a space two feet deep, held a defect. *Kansas City v. Smith*, 8 Kan. App. 82.

But see *Canavan v. Oil City*, 183 Pa. St. 611.

So, where city failed to light a dangerous hole in the sidewalk. *Griswold v. Ludington*, 116 Mich. 401.

So, as to a depression of one and one-quarter inches in cement sidewalk. *Bieber v. St. Paul*, (Minn.) 91 N. W. Rep. 20.

Where there was a sharp conflict as to the size and period of existence of defect the question was for the jury. *Rhyner v. Menasha*, 107 Wis. 201.

Inequalities and projections:

Slight inequalities in a path were not defects because water might collect and freeze in them. *Hogan v. Waterliet*, 42 App. Div. 325.

Slight inequalities caused by the projection of cellar doors along the edge of the sidewalk from three-quarters of an inch to an inch and a half was not unreasonable. *Tubesis v. Buffalo*, 51 App. Div. 14.

Crosswalk 14 inches above sidewalk constituted a menace to safety. *Indianapolis v. Mitchell*, 27 Ind. App. 589.

Whether it was negligent to maintain two adjoining walks of different heights was for the jury. *Osage City v. Brown*, 27 Kas. 74.

So, whether a crosswalk was sufficient. *Whitney v. Milwaukee*, 57 Wis. 639.

City was negligent in failing to fix an inequality in a walk liable to cause injury in the dark. *Labarre v. New Orleans*, 106 La. 458.

Sneed v. Salisbury, (Mo. App.) 68 S. W. Rep. 369.

Question was for the jury where hinges on bulkhead door projected two inches. *Lemb v. Worcester*, 177 Mass. 82.

As to the projection of a water pipe four inches next to the curb. See *Archer v. Mt. Vernon*, 57 App. Div. 32.

As to the projection of a plank of a crosswalk two inches above the sidewalk with which it connects. See *Baxter v. Cedar Rapids*, 103 Iowa, 599.

So, as to inequalities of six inches or more in a business street of a third-class city for a year or more. *Hartford v. Graves*, 8 Kan. App. 677.

So, as to a stake, driven to indicate a grade, projecting about four inches above the curb. *Jones v. Deering*, 94 Me. 165.

A projection of bricks in a walk three-quarters of an inch does not constitute a defect. *Haggerty v. Lewiston*, 95 Me. 374.

Two inches difference in level in roadway over sidewalk held not a defect. *Yotter v. Detroit*, 107 Mich. 4.

Nor need a city continue a sidewalk in the outskirts, though there is a slight difference in level where it ends. *Shietart v. Detroit*, 108 Mich. 309.

Projecting ends of a sidewalk must be leveled off. *Plainview v. Mendelson*, (Neb.) 90 N. W. Rep. 956.

Drop of seven inches was negligence. *Toledo v. Higgins*, 12 Oh. C. C. 541.

Fire plug of ordinary construction is an authorized obstacle. *Horner v. Philadelphia*, 194 Pa. St. 542.

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Failure to place a bevel board to an apron laid on a cement sidewalk projecting two inches held not unreasonable. *Kleiner v. Madison*, 104 Wis. 339.

Nor was defendant liable because an apron from a sidewalk to a crosswalk inclined to the extent of one inch in ten, and was slightly tilted to one side. *Depere v. Hibbard*, 104 Wis. 666.

Obstructions:

Show case constituting an obstruction was blown over by the wind. That a collision with a truck had broken its fastenings the day before was no defense. *Wells v. Brooklyn*, 9 App. Div. 61.

See, also, *Wells v. Brooklyn*, 45 App. Div. 623; *Whittall v. New York*, 64 N. Y. Supp. 250.

Pile of mortar was allowed to remain unguarded for several weeks. Liability. *Johnson v. Poughkeepsie*, 29 App. Div. 16.

But a city may permit the withdrawal of a portion of the street from use for the purpose of depositing building materials thereon. *Richmond v. Leaker*, 99 Va. 1.

So, where obstruction backed up water so as to conceal the misconnection of crosswalks. *Lloyd v. Walton*, 57 App. Div. 288.

City not liable for permitting a platform used for loading hay to project over the street from the second story of a building. *Parmenter v. Marion*, 113 Iowa, 297.

Negligence of city in leaving a coal chute leaning against the outside of its engine house was for the jury, where a small child stepped on its lower cleat and pulled it over upon himself. *Fink v. Des Moines*, (Iowa) 89 N. W. Rep. 28.

Lawful use of a hydrant is no excuse for accumulation of ice. *Waltermeyer v. Kansas City*, 71 Mo. App. 354.

City liable for failure to exercise diligence to remove a fallen tree across the walk. *Blackwell v. Kansas City*, 76 Mo. App. 46.

Otherwise, as to the fall of a limb where its appearance gave no sign of defectiveness. *Jones v. Greensboro*, 124 N. C. 310.

No liability attached to a city for injuries received from the swinging open on to the sidewalk of the doors of a fire house. *Kies v. Erie*, 135 Pa. St. 144.

Allowing fruit rinds, decayed vegetables, &c., to remain deposited on the sidewalk charged city with damages for a fall caused thereby. *Archer v. Johnson City*, (Tenn.) 64 S. W. Rep. 474.

Table was allowed to project out into the sidewalk in violation of an ordinance. Liability. *Palestine v. Hassell*, 15 Tex. Civ. App. 519.

So, as to permitting a stone two feet long and one foot high to occupy

two and one-half feet of width of a ten-foot sidewalk. *Davis v. Austin*, 22 Tex. Civ. App. 460.

But a city may permit the withdrawal of a portion of the street from use for the purpose of depositing building materials thereon. *Richmond v. Leaker*, 99 Va. 1.

Water boxes:

A water shut off box in the middle of the sidewalk projected upward an inch and a quarter on one side. Reasonably safe condition was for the jury. *Redford v. Woburn*, 176 Mass. 520.

See, also, *Staples v. Dickson*, 88 Me. 362.

Carriage block:

Whether a carriage block was an obstruction, was for the jury. *Tiesler v. Norwich*, 73 Conn. 199.

One of the usual size and in the usual location held not to violate a statute. *Cincinnati v. Fleischer*, 63 Oh. St. 229.

Mud:

Accumulation of mud on pavement one and one-half to two inches thick held no ground for recovery. *O'Reilly v. Syracuse*, 49 App. Div. 538.

Bicycles:

City owes no greater duty to bicyclists on sidewalks than to pedestrians. *Morrison v. Syracuse*, 53 App. Div. 490.

Wheeler v. Boone, 108 Iowa, 235; s. c., 44 L. R. A. 821.

Under a statute requiring city to keep street in repair and free from nuisance a bicycle on a sidewalk held not an obstruction. *Custer v. New Philadelphia*, 20 Oh. C. C. 177.

Areas:

Entrance to an area seven feet deep adjoining street should have been guarded. *Baldwin v. Springfield*, 141 Mo. 205.

That there were a large number of cellarways in the sidewalk at other places in the same condition held no defense. *McLeod v. Spokane*, 26 Wash. 346.

Coal and sewer hole covers:

Coal hole had not exhibited signs of defectiveness before and there was no evidence as to how it became so. There was not sufficient evidence of negligence to permit recovery. *Rushton v. Allegheny*, 192 Pa. St. 574.

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Relevant evidence of defective condition:

That others had stumbled over the same plank was admitted. *Fordham v. Gouverneur Village*, 160 N. Y. 541; rev'g s. c., 44 N. Y. Supp. 111½.

See, also, *Gable v. Kansas City*, 148 Mo. 470; *Circleville v. Sohn*, 20 Oh. C. C. 368.

That no like accident had happened for six years, did not prevent recovery. *Lloyd v. Walton*, 57 App. Div. 288.

Plaintiff was not confined to the precise spot in describing the place of injury where the walk was in substantially the same defective condition for a considerable distance. *Kankakee v. Steinbach*, 89 Ill. App. 513.

Subsequent repair admitted as evidence of defective condition. *Jeffersonville v. McHenry*, 22 Ind. App. 10.

Contra *Sylvester v. Casey*, 110 Iowa, 256.

Admission of evidence of the condition of a walk just after the accident let in evidence as to its condition during a month after. *Bailey v. Centerville*, 108 Iowa, 20.

Condition weeks before the accident admitted. *Butts v. Eaton Rapids*, 116 Mich. 539.

General bad condition shown. *Rodda v. Detroit*, 117 Mich. 412.

Rotten condition a week or two after the accident shown. *Hall v. Austin*, 73 Minn. 134.

So, where a plank was taken up and replaced within two weeks of the accident. *Plummer v. Milan*, 79 Mo. App. 439.

Proximate cause:

The inherent vice of a horse frightened at the scraping of wheels against a car track and not the violation of an ordinance, in leaving tracks raised above the street level, was the proximate cause of injury. *Macon v. Dyke*, 103 Ga. 847.

Walk was defective and one person stepped on one end of a plank causing the other to tip up and trip another. City liable. *Dixon v. Scott*, 181 Ill. 116; aff'g s. c., 81 Ill. App. 368.

Aggravation of prior infirmity held proximate result of injury. *Noble v. Hanna*, 74 Ill. App. 564.

The injury must be the natural and probable result as distinguished from the direct and natural consequence. *Collins v. Janesville*, 107 Wis. 436.

4. DUTY OF MAINTENANCE REQUIRES REASONABLE DILIGENCE IN INSPECTION.

City was not liable where it had no notice that a plank was missing. *Boulder v. Weger*, (Colo. App.) 66 Pac. Rep. 1070.

Where reasonable diligence in inspection would have revealed a defect, notice of its existence will be imputed. *Columbia v. Payne*, 13 App. D. C. 500.

Evansville v. Frazer, 24 Ind. App. 628; *Mattoon v. Worland*, 97 Ill. App. 13.

Otherwise, where appearances did not indicate the probability of defects. *Lincoln v. Pirner*, 59 Neb. 634.

Duncan v. Philadelphia, 173 Pa. St. 550; *Cooper v. Milwaukee*, 97 Wis. 458.

The number of streets to be taken care of held not to affect the question. *Roanoke v. Shull*, 97 Va. 419.

City must have notice when the obstruction is put on the sidewalk by a stranger. *Lewisville v. Batson*, (Ind. App.) 63 N. E. Rep. 861.

Defect had existed for three weeks. Inspection had been made within ten days. Question of notice was for the jury. *Wilkins v. Flint*, 128 Mich. 262.

See, also, *Jordan v. Seattle*, 26 Wash. 61.

5. AND REASONABLE DILIGENCE IN REPAIRING AFTER NOTICE OF THE DEFECT, ACTUAL OR CONSTRUCTIVE.

The city must have reasonable time to repair after notice. *Abbott v. Mobile*, 119 Ala. 595.

Richardson v. Marceline, 73 Mo. App. 360; *Joliet v. Johnson*, 177 Ill. 178; *Columbia v. Payne*, 13 App. D. C. 500; *Pleasanton v. Rhine*, 8 Kan. App. 452; *Burleson v. Reading*, 110 Mich. 512; *Buckley v. Kansas City*, 156 Mo. 16; *Springfield v. Purdey*, 61 Ill. App. 114; *Reid v. Chicago*, 83 Ill. App. 554; *Ryan v. Chicago*, 79 Ill. App. 28; *Circleville v. Sohn*, 20 Oh. C. C. 368.

Flagstone remained in a dangerous condition for three months. City was negligent. *Columbia v. Payne*, 13 App. D. C. 500.

City had not a reasonable opportunity to discover and repair, where the defect arose unexpectedly from a sudden storm. *Seward v. Wilmington*, 2 Marv. (Del.) 189.

Plaintiff must show notice or inexcusable failure to acquire it. *Hyde v. Swanton*, 72 Vt. 242.

Cooper v. Milwaukee, 97 Wis. 458.

City had sufficient opportunity, where the defect had been in existence from two to four months. *Huntington v. Burke*, 21 Ind. App. 655.

See, also, *Lawrence v. Littell*, 9 Kan. App. 130.

Menard v. Bay City, 114 Mich. 450.

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So, where a frequently used hatchway in a walk remained unguarded for three years. *Whitty v. Oshkosh*, 106 Wis. 87.

What constitutes actual notice:

Notice to a foreman having general power to repair, held notice to the city. *Sprague v. Rochester*, 159 N. Y. 20; rev'g s. c., 88 Hun, 613.

Notice to a policeman to inspect the streets was notice to the city. *Columbus v. Ogletree*, 102 Ga. 293.

Where notice was to a captain of a police precinct through a policeman. See *Higgins v. Brooklyn*, 54 App. Div. 69.

Notice to alderman of the general defective condition was notice to the city, where he introduced a resolution in respect to its repair. *Decatur v. Boston*, 69 Ill. App. 410; s. c. aff'd., 169 Ill. 340.

Mattoon v. Russell, 91 Ill. App. 252.

So, as to notice to police, charged with the duty of reporting defects. *Lundon v. Chicago*, 83 Ill. App. 208.

Mareck v. Chicago, 89 Ill. App. 358.

Notice as to sidewalks to a city treasurer or police magistrate held not notice to the city. *City of Savannah v. Trusty*, 98 Ill. App. 277.

Notice to members of the city council held notice to the city. *Owen v. Ft. Dodge*, 98 Iowa, 281.

See, also, *Keyes v. Cedar Falls*, 107 Iowa, 509.

Notice must be given to some officer or agent having authority to act for the city in the matter. *Topeka v. Noble*, 9 Kan. App. 171.

Dallas v. Meyers, (Tex. Civ. App.) 55 S. W. Rep. 742.

Members of the committee on streets and allies of the city council are such officers. *Pittsburg v. Broderson*, 10 Kan. App. 430.

So are highway commissioners. *Dutton v. Landsdowne*, 10 Pa. Super. Ct. 204.

So are officers having supervision of streets. *Lynchburg v. Wallace*, 95 Va. 640.

Notice as to the existence of a defect without locating it held insufficient. *Rogers v. Orion*, 116 Mich. 324.

Notice is not necessary if defect is in construction. *Alliance v. Campbell*, 3 Oh. Dec. 630.

Dallas v. Jones, (Tex. Civ. App.) 53 S. W. Rep. 377.

City has notice where its officers themselves create the defect. *Rowland v. Philadelphia*, 202 Pa. St. 50.

The chief burgess of a borough noticed a defect upon passing the spot.

Held sufficient evidence of notice for the jury. *Smith v. East Mauch Chunk*, 3 Pa. Super. Ct. 495.

Repeated notice of the defective condition of a cellar doorway in the sidewalk charged defendant with liability. *Snadler v. Murphy*, 19 Pa. Super. Ct. 35.

City was chargeable with notice of construction of a boiler under a sidewalk, where its officers had been applied to for certain permits in connection with the work. *Beall v. Seattle*, 28 Wash. 593.

Notice held not a prerequisite to liability where city had failed to keep street free from obstructions. *Arthur v. Charleston*, 51 W. Va. 132.

City had notice and opportunity to repair, where its street commissioner knew of the condition from personal examination, a sufficient time before injury for the purpose. *Mauch v. Hartford*, 112 Wis. 40.

Effect of statutes requiring actual notice:

Requirement of actual notice as a condition of recovery precludes implication of notice constructively. *Hurley v. Bowdoinham*, 88 Me. 293. *Littlefield v. Webster*, 90 Me. 213; *Rhyner v. Menasha*, 107 Wis. 201.

Direction by a city officer to a laborer to spread gravel, held not to charge city with actual notice that it had been improperly done. *Emery v. Waterville*, 90 Me. 485.

Otherwise, where the officer did the act himself. *Jones v. Deering*, 94 Me. 165.

Notice of heavy general snow drifted, held not actual notice of a particular drift. *Gurney v. Rockport*, 93 Me. 360.

Requirement of a written notice unless the want of repair has existed for ten days held not to apply to defects in original construction. *Houston v. Owen* (Tex. Civ. App.) 67 S. W. Rep. 788.

What constitutes constructive notice:

Lapse of time.—A joist supporting a walk on a bridge which had begun to rot, had been reported to the city a year before the accident. Question was for the jury. *Leggett v. Watertown*, 55 App. Div. 321.

Water pipe projected four inches above the ground for nine months. Sufficient to give city notice. *Archer v. Mt. Vernon*, 57 App. Div. 32.

So, as to the existence of a hole about a foot wide and eight or nine inches deep for a month. *Lord v. Mobile*, 113 Ala. 360.

And, where the defect was obvious and had existed for two months. *Denver v. Hyatt*, 28 Colo. 129.

City was given by ordinance six hours in which to acquire notice of the accumulation of snow and ice. *McAllister v. Bridgeport*, 72 Conn. 733.

A year's existence of an obstruction was sufficient to make it negli-

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gence for city to fail to discover and remove it. *Downs v. Smyrna*, 2 Penn. (Del.) 132.

Lapse of sufficient time to give the city reasonable opportunity to discover the defect, charges it with knowledge thereof. *Hogan v. Chicago*, 168 Ill. 551; rev'g s. c., 59 Ill. App. 446.

Decatur v. Besten, 169 Ill. 340; *Streator v. Christman*, 182 id. 215; *Kankakee v. Whitehouse*, 71 Ill. App. 635; *Lockport v. Richards*, 81 id. 533; *Belvedere v. Crichton*, id. 595; *Chicago v. Gillett*, 91 id. 287; *Bloomington v. Mueller*, 71 id. 268; *Frankfort v. Coleman*, 19 Ind. App. 368; *Dutcher v. Philadelphia*, 202 Pa. St. 1; *Hart v. New Haven*, (Mich.) 89 N. W. Rep. 677; *Boxberger v. Kansas City*, 68 Mo. App. 412; *Cincinnati v. Frazier*, 18 Oh. C. C. 50; *Lincoln v. Pirner*, 59 Neb. 634; *Lynchburg v. Wallace*, 95 Va. 640; *McQuillam v. Seattle*, 13 Wash. 600; *Piper v. Spokane*, 22 Wash. 147; *Cowie v. Seattle*, id. 659.

So, where a bill board in front of a theatre was unfastened for four or five months. *Cason v. Ottumwa*, 102 Iowa, 99.

Small rods placed by stranger so as to project over the walk and remaining so for six hours, held insufficient to charge city with notice. *Lewisville v. Batson*, (Ind. App.) 63 N. E. Rep. 861.

Condition of defectiveness for two years was sufficient to impute notice. *Scheel v. Detroit*, (Mich.) 89 N. W. Rep. 554.

See, also, *Beaver v. Eagle Grove*, 116 Iowa, 485.

Ten days or two weeks was sufficient as to an obvious defect in a populous part of the city. *Baxter v. Cedar Rapids*, 103 Iowa, 599; *L'Herault v. Minneapolis*, 69 Minn. 261.

Eight days. *Eldorado v. Drapeere*, 5 Kan. App. 631.

Several months. *Salina v. Kerr*, 7 Kan. App. 223; *Rodda v. Detroit*, 117 Mich. 412.

Three weeks; question was for the jury. *Keen v. Havre de Grace*, 93 Md. 34.

See, also, *Wickliffe v. Moring*, (Ky.) 68 S. W. Rep. 641.

So, where the defect could be seen for two rods. *Urtel v. Flint*, 122 Mich. 65.

So, where a hole four inches wide, 18 long and six deep, remained for six weeks. *Young v. Webb City*, 150 Mo. 333.

So, where rotten and patched condition had existed for a year. *McClosky v. Dubois*, 4 Pa. Super. Ct. 181.

So, where a table projected out onto the sidewalk for 30 days in violation of an ordinance, in plain view of a policeman passing several times daily. *Palestine v. Hassell*, 15 Tex. Civ. App. 519.

So, where defect existed one to four months. *Devenish v. Spokane*, 21 Wash. 77.

General condition.—Knowledge of the general defective condition held sufficient. *Shelbyville v. Brant*, 61 Ill. App. 153.

Huntingburg v. First, 22 Ind. App. 66; *Grattan v. Williamston*, 116 Mich. 462; *Butts v. Eaton Rapids*, 116 Misc. 639; *Boyle v. Saginaw*, 124 Mich. 348; *Kuntsch v. New Haven*, 83 Mo. App. 174.

But not to impute notice of a particular defect. *McHugh v. Minocqua*, 102 Wis. 291.

Notice that other sticks were loose, held not notice that the one in question was. *Bucher v. Bend*, 20 Ind. App. 177.

Condition of a walk 200 feet away was not too remote where the intervening strip was just as bad. *Bailey v. Centerville*, 108 Iowa, 20.

Evidence of condition "along the place" was admitted. *Lyons v. Red Wing*, 76 Minn. 20.

Notice was for the jury, where city had made repairs but had failed to replace stringers, which were so decayed that they would not hold nails. *Brown v. Owosso*, (Mich.) 89 N. W. Rep. 568.

Notoriety.—Where the cover of a ventilating hole in the sidewalk was off most of the time, question was for the jury. *McKissick v. St. Louis*, 154 Mo. 588.

Notoriety in the neighborhood held sufficient notice. *Elster v. Seattle*, 18 Wash. 304.

Declarations of third persons as to such conditions held admissible to show it. *Piper v. Spokane*, 22 Wash. 147.

Defect need not be "notorious and continued" to charge city. *Anderson v. Albion*, (Neb.) 89 N. W. Rep. 794.

Conspicuousness.—A person has the right, in walking along a street, to assume that the city authorities have performed their duty, and that its sidewalks are safe.

Upon the trial of an action brought to recover damages for injuries sustained by a fall upon a sidewalk of a city, it was shown that a triangular piece had been broken off the adjacent outside corners of two flagstones, leaving a hole twenty-six inches on the longest side, and five inches in the widest place, in the middle of the walk, which had been there for about four years.

Held, that the evidence was sufficient to charge the city with constructive notice of the existence of the defect in its sidewalk; that it was sufficiently dangerous to attract attention. *Beltz v. City of Yonkers*, 74 Hun, 83; s. c., rev'd, 148 N. Y. 67.

Facts showed knowledge that boys tampered with the lids to catch basins and that one of the lugs holding one in position had been broken long enough for it to have become rusted. Question of notice was for the jury. *Columbia v. Wayne*, 13 App. Div. 500.

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Notice imputed, where the condition was such as to draw the attention of several passers-by, two months before. *Hoover v. Mapleton*, 110 Iowa, 571.

Wilberding v. Dubuque, (Iowa) 82 N. W. 857.

Otherwise, where the defect was not conspicuous. *Buckley v. Kansas City*, 156 Mo. 16.

Or ordinarily perceptible. *Cole v. Scranton*, 4 Lack. L. News, 287.

As, where five witnesses testify that they used the walk daily without observing the defect. *Baustian v. Young*, 152 Mo. 317.

See, also, *Fitzpatrick v. Darby*, 184 Pa. St. 645.

Cracks in plain view in an iron sidewalk charged city with duty of inspection. *Buckley v. Kansas City*, (Mo. App.) 68 S. W. Rep. 1069.

Defect is conspicuous enough if it is apparent upon being consciously looked upon. *Rosevear v. Osceola Mills*, 169 Pa. St. 555.

Defective material.—Use of old material held sufficient notice of defectiveness. *Frohs v. Dubuque*, 109 Iowa, 219.

Subsequent repair.—Subsequent repair does not necessarily tend to prove prior neglect. *Dallas v. Meyers*, (Tex. Civ. App.) 55 S. W. Rep. 742.

Other accidents.—Evidence that others had fallen at about the same time and place admitted. *Piper v. Spokane*, 22 Wash. 147.

What constitutes reasonable diligence in repairing:

Councilman replaced a board in a walk without nailing it and went to dinner before notifying the commissioner. City was not chargeable. *McKormick v. West Bay City*, 110 Mich. 265.

It was for the jury to say whether city was negligent in allowing a difference of three inches between the grades of adjoining walks on a main street, to remain for six months. *Watertown v. Greaves*, 112 Fed. Rep. 183.

6. CONTRIBUTORY NEGLIGENCE.

Right to rely upon presumption that street is reasonably safe, in absence of notice to the contrary:

Brusso v. City of Buffalo, 90 N. Y. 679, aff'g judg't for pl'ff.

From opinion.—"A person desiring to cross the street either in the night time or in the day time is not confined to a crossing. He has a right to assume

that all parts of the street intended for travel are reasonably safe; and if in the night time he desires to cross from one side to the other, knowing of no dangerous excavation in the street, or other obstruction, he may cross at any point that suits his convenience, without being liable to the imputation of negligence.* *Raymond v. City of Lowell*, 6 Cush. 524, 530."

One has a right to presume that a sidewalk is safe and is bound to use no special care and need not be on guard for obstructions. It is neither wrong nor negligent for a child to play on the sidewalk. *McGuire v. Spence*, 91 N. Y. 303, aff'g judg't for pl'ff.

Jennings v. Van Schaick, 108 N. Y. 530, aff'g judg't for pl'ff and 13 Daly 438; *Weed v. Balston*, 76 N. Y. 329, aff'g judg't for pl'ff.

From opinion.—"Our attention is called to certain cases in other states as authority for the doctrine that only those using the streets for their appropriate and normal purpose are within the rule of protection. *Blodgett v. City of Boston*, 8 Allen 237; *Stinson v. Gardiner*, 42 Me. 248; *McCarthy v. City of Portland*, 67 id. 167; 24 Am. Rep. 23. In these cases the actions were against municipal corporations under statutes which bound them to keep the streets safe and convenient for travelers, and a just construction of the written law furnished the limitation of the corporate duty."

Pedestrian is not bound to be on the lookout for a coal chute. *Downey v. Low*, 22 App. Div. 460.

Or a hole just off the traveled way concealed by weeds, where he is compelled to go out of the traveled part to avoid an obstruction. *Laverdure v. New York*, 28 App. Div. 65.

In the absence of any appearance of danger he need not be on his guard. *Birmingham v. Starr*, 112 Ala. 98.

Lord v. Mobile, 113 Ala. 360; *East Dubuque v. Burhyte*, 173 Ill. 553; aff'g s. c., 74 Ill. App. 99; *Robinson v. Cedar Rapids*, 100 Iowa, 662; *Topeka Water Co. v. Whitings*, 58 Kan. 639; s. c., 39 L. R. A. 90; *Shidet v. Jules Dreyfuss Co.*, 50 La. Ann. 280; *Ohliger v. Toledo*, 20 Oh. C. C. 142; *Guthrie v. Swan*, 5 Okla. 779; *Schively v. Jenkintown*, 180 Pa. St. 196.

Otherwise where plaintiff is familiar with the condition. *Cowie v. Seattle*, 22 Wash. 659.

And knows it is not safe. *Collins v. Janesville*, 111 Wis. 348.

As he may assume that a walk is free from obstructions. *Taylorville v. Stafford*, 196 Ill. 288.

Savannah v. Trusty, 98 Ill. App. 277.

He may make such assumption at night, though the defect was obvious in the day time. *Seward v. Wilmington*, 2 Marv. (Del.) 189.

See, also, *Baxter v. Cedar Rapids*, 103 Iowa, 599; *Heckman v. Evenson*, 7 N. D. 173.

He may assume that excavations have been guarded and lighted. *Keyes v. Cedar Falls*, 107 Iowa, 509.

* NOTE.—See cases gathered under "Contributory Negligence, Knowledge of Defect," p. 1876.

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That a street is safe throughout. *Salem v. Webster*, 192 Ill. 369; aff'g s. c., 95 Ill. App. 120.

See, however, *Neal v. City of Marian*, 129 N. C. 345.

Plaintiff was not negligent in crossing a street using a plank which was apparently safe. *Bell v. Clarion*, 115 Iowa, 357.

Reasonable care required in the use of the street does not prevent one from relying on such assumption. *Topeka Water Co. v. Whiting*, 58 Kan. 639; s. c., 39 L. R. A. 90.

Assumption applies to the whole width of the walk. *Shidet v. Dreyfuss*, 50 La. Ann. 280.

Pedestrian was not negligent, where he was used to the walk and had no reason to apprehend a defect. *Williams v. Hannibal*, (Mo. App.) 68 S. W. Rep. 380.

He may assume that a walk previously known to be defective has been repaired. *Thompson v. Winston*, 118 N. C. 662.

Whether sufficient time has elapsed to justify such assumption is a question for the jury. *Durbin v. Napoleon*, 21 Oh. C. C. 160; *Watseka v. Smith*, 75 Ill. App. 391.

Leaving at night a sidewalk, known to be safe, for one in fact unsafe, but unknown to be so, was not negligence *per se*. *Smith v. New Castle*, 178 Pa. St. 298.

Effect of knowledge of defect:

Not necessarily negligent to use walk with such knowledge.—A person may use a street, knowing it to be unsafe. The plaintiff's and defendant's negligence were for the jury. *Bullock v. Mayor &c.*, 99 N. Y. 654, rev'g nonsuit.

Columbia v. Crumbaugh, 13 App. D. C. 553; *Streator v. Hamilton*, 61 Ill. App. 509; *Altamont v. Carter*, 97 id. 196; *Savannah v. Trusty*, 98 id. 277; *Pox v. Chelsea*, 171 Mass. 297; *Waltemeyer v. Kansas City*, 71 Mo. App. 354; *Stevens v. Walpole*, 76 Mo. App. 213; *Ohliger v. Toledo*, 20 Oh. C. C. 142; *Salzer v. Milwaukee*, 97 Wis. 471; *Hillsboro v. Jackson*, 18 Tex. Civ. App. 325.

Though a safer way might have been taken. *Waverly v. Henry*, 67 Ill. App. 407.

Mt. Sterling v. Crummy, 73 Ill. App. 572; *Culverson v. Maryville*, 67 Mo. App. 343; *Rusher v. Aurora*, 71 id. 418.

The question being for the jury. *Hoover v. Mapleton*, 110 Iowa, 571.

So, as to knowledge that there was a hole somewhere in the vicinity. *Chicago v. Fitzgerald*, 75 Ill. App. 174.

While such knowledge does not necessarily constitute negligence. *Litchfield v. Anglim*, 83 Ill. App. 55.

It is an element of consideration. *East St. Louis v. Donahue*, 77 Ill. App. 574.

Frankfort v. Coleman, 19 Ind. App. 368.

But it is not conclusive where the defect is not actually known to be dangerous. *Huntington v. Folk*, 154 Ind. 91.

That plaintiff himself so considered it is not sufficient. *Crites v. New Richmond*, 98 Wis. 55.

So, knowledge that a cellarway is without barriers did not make use negligence. *Kingsley v. Mulhall*, 95 Iowa, 754.

So, though plaintiff had passed the place by daylight a few hours before. *Eldorado v. Drapeere*, 5 Kan. App. 631.

And, though the condition was known to be very bad. *Ottawa v. Black*, 10 Kan. App. 439.

So, where plaintiff, at night, left the road for a sidewalk known to be defective. *Taylor v. Mankato*, 81 Minn. 276.

So, as to the use of a sidewalk at night, where three out of the five feet of its width was in good repair. *Graney v. St. Louis*, 141 Mo. 180.

So, as to use of sidewalk at night with knowledge of an abutting excavation. *Cannon v. Lewis*, 18 Mont. 402.

Or that one was about to be made. *Moon v. Middletown*, 14 Oh. C. C. 498.

Negligence and contributory negligence were for the jury, where the planks of a walk were known to be loose. *Fordsville v. Spencer*, (Ky.) 65 S. W. Rep. 132.

Temporary forgetfulness did not prevent recovery, where plaintiff was using reasonable care in any event. *Urtel v. Flint*, 122 Mich. 65.

Whether plaintiff was chargeable with failure to remember the existence of a defect was for the jury. *Durban v. Napoleon*, 21 Oh. C. C. 160.

See, also, *Bothell v. Seattle*, 17 Wash. 263.

But care must be used proportionate to the known danger.—Knowledge that a walk is defective, however, imposes additional care in proportion to the known danger. *Collom v. Justice*, 161 Ill. 372; aff'g s. c., 59 Ill. App. 304.

Birmingham v. Starr, 112 Ala. 98; *Swart v. District of Columbia*, 17 App. D. C. 407; *Noble v. Hanna*, 74 Ill. App. 564; *Bedford v. Neal*, 143 Ind. 425, 431; *Salem v. Walker*, 16 Ind. App. 687; *Williamsport v. Lisk*, 21 id. 414; *Hurdingburgh v. First*, 22 id. 66; *Indianapolis v. Marold*, 25 id. 428; *Bedford v. Woody*, 23 Ind. 231; *Bailey v. Centerville*, 115 Iowa, 271; *Lyons v. Red Wing*, 76 Minn. 20; *Ohliger v. Toledo*, 20 Oh. C. C. 142; *Collins v. Janesville*, 107 Wis. 436.

Greater care required when danger known than when unknown. *Hoover v. Mapleton*, 110 Iowa, 571.

Richmond v. Leaker, 99 Va. 1.

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Not negligent to use defendant's walk unless the danger is so obvious as to deter a reasonable person in venturing on it. *Huntingburgh v. First*, 22 Ind. App. 66.

The danger must be considered and the use voluntary. *Barnes v. Marcus*, 96 Iowa, 675.

Such care used.—Board placed between stones and dirt ostensibly for passage appeared safe. Plaintiff was justified in using it. *Schubert v. Cowles*, 31 App. Div. 418.

Pedestrian at night not guilty of contributory negligence *per se* because upon discovering a pile of dirt across the sidewalk he failed to stop and find out what it was. *O'Hara v. Buffalo*, 39 App. Div. 443.

Negligence of pedestrian in use of walk was for the jury, where she did not know the exact location of loose boards. *District of Columbia v. Crumbaugh*, 13 App. D. C. 553.

Pedestrian, after failing in an attempt to get around a slippery place, passed over. He was allowed to recover. *Rockford v. Rannie*, 77 Ill. App. 665.

So, where plaintiff attempted to step over a hole two feet wide and but four inches deep. *Toledo v. Center*, 16 Oh. C. C. 308.

A familiar step was raised from 2 to 14 inches without plaintiff's knowledge. He was injured in the dark. Was allowed to recover. *Indianapolis v. Mitchell*, 27 Ind. App. 589.

Use, with knowledge of defect, did not prevent recovery, where it was reasonably apparent that injury might be avoided by the exercise of ordinary care. *Nichols v. Laurens*, 96 Iowa, 388.

Streator v. Christman, 182 Ill. 215; aff'g s. c., 82 Ill. App. 24; *Giffen v. Lewiston*, (Id.) 55 Pac. Rep. 545; *Graham v. Oxford*, 105 Iowa, 705; *Whichita v. Cogshall*, 3 Kan. App. 540; *Boulton v. Columbia*, 71 Mo. App. 519.

Pedestrian on a dark night took a side walk narrowing from 6 to 3½ feet, instead of going by a safer road. His negligence was for the jury. *Musselman v. Hatfield*, 202 Pa. St. 489.

Such care not used.—Boy attempted to cross a ditch on a beam instead of going a short distance around it. *Powers v. Creem*, 22 App. Div. 480.

Pedestrian to avoid rain, ran across an iron door, instead of going around it. *Sandmann v. Baylies*, 21 Misc. 523.

Plaintiff knew that an abutting excavation was unguarded. He could easily have crossed the street where it was safe. *McGraw v. Friend & Co. Lumber Co.*, 120 Cal. 574.

Plaintiff with a stiff leg walked down a 12-inch plank. *Rome v. Baker*, 107 Ga. 347.

Plaintiff walked along a sidewalk known to be old, loose and icy, with his hands in his pockets, where he had a safe route. *Boswell v. Wakeley*, 149 Ind. 64.

Knowledge that boards are loose is notice of their liability to tip when stepped on at the end. *Huntingburgh v. First*, 15 Ind. App. 552.

Making it negligent to walk thereon, though in play. *Hudon v. Little Falls*, 68 Minn. 463.

So, where plaintiff felt his way in the dark with the knowledge of the close proximity of a deep ditch instead of going a safe route. *Rogers v. Bloomington*, 22 Ind. App. 601.

Pedestrian, passing along a street he knew to be defective, at night, without looking where he was going, was not allowed to recover. *Evansville v. Christy*, (Ind. App.) 63 N. E. Rep. 867.

Plaintiff fell a second time in the same place. *Barce v. Shenandoah*, 106 Iowa, 426.

Plaintiff knew of an excavation on one side of the walk but failed to guide himself by the rail on the other. *Church v. Howard City*, 111 Mich. 298.

Plaintiff used a defective path of a bridge on one side at night in spite of warnings, instead of the roadway or the path on the other side. *Ray v. Poplar Bluff*, 70 Mo. App. 252.

Where plaintiff was thoroughly familiar with the defect, temporary forgetfulness was no defense. *Neal v. Marion*, 126 N. C. 412.

Neal v. Marion, 129 N. C. 345.

Full knowledge of the defective condition of a walk made it negligent to use it. *Cleveland v. Stofer*, 52 Oh. St. 684.

Hudon v. Little Falls, 68 Minn. 463.

Negligent to use walk with known defect, when, by reason of darkness or failing sight, it could not be located. *Pittman v. El Reno*, 4 Okla. 638.

Plaintiff attempted to pass over stones which she had regarded as dangerous enough to avoid theretofore. *Nicholas v. Peck*, 20 R. I. 533.

Plaintiff was negligent in stepping off a plank walk on to a stone walk which had been worn slippery and was obviously dangerous. *Devine v. Fond du Lac*, 113 Wis. 61.

Obvious defects:

Where the evidence tended to show that a manhole in the sidewalk was left open in the evening, and the attention of the plaintiff, who was injured thereby, was directed by the people in the street, a judgment for the plaintiff was sustained. The sufficiency of a notice to the defendant

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under the statute was determined. *Saumby v. Rochester*, 72 Hun, 489, aff'g judg't for pl'ff.

A person walking on a sidewalk in the evening stepped into a hole, partially concealed by grass. Immediately before stepping into the hole she had met four people walking upon the sidewalk, two abreast, and had turned aside to pass them, and in so doing, without noticing the hole, stepped into it and fell; she had passed over the walk once or twice before and knew that there were defects in it, but thought that she had passed by the bad places before she met with the accident. Contributory negligence was for jury. *Parcells v. Auburn*, 77 Hun, 137.

A channel extending under the end of a stone in a crosswalk held not obvious. *Cummings v. New Rochelle*, 38 App. Div. 583.

Plaintiff was injured while crossing a temporary bridge over an excavation under the sidewalk where defendant was erecting a building. The bridge was three or four feet high; plaintiff had crossed and was descending the steps when she fell because of the absence of one of the steps; she was looking at the time, but failed to discover that the step was missing in time to recover her balance. One of her witnesses testified that the step had been missing for a week, and hence he avoided going over the bridge. Defendant was there every day and had a foreman and six laborers at the building. Questions of negligence were for the jury. *Durand v. Acken*, 7 Misc. 440.

Loose planks or projecting spikes in a walk were not so obvious as to make it negligence *per se* not to see them. *Rusch v. Dubuque*, 116 Iowa, 402.

Reasonable belief of the existence of a defect imposes the duty of watchfulness where there is light enough to make it discernible. *Birmingham v. Starr*, 112 Ala. 98.

Notice was not imputed, as matter of law, where the defect was not discernible at a glance. *Cox v. Des Moines*, 111 Iowa, 646.

But only by careful scrutiny. *Bruch v. Philadelphia*, 181 Pa. St. 588.

Otherwise, where the slightest attention would have brought the defect to plaintiff's notice. *Osborne v. Pulaski Light &c. Co.*, 95 Va. 16.

Plaintiff saw the stone before stubbing her toe against it. She was not allowed to recover. *Grandorf v. Detroit Citizen's Street R. Co.*, 113 Mich. 496.

See, also, *Lamb v. Worcester*, 177 Mass. 82.

Plaintiff tripped against a block 4 to 6 inches above the walk. No recovery. *Shallcross v. Philadelphia*, 187 Pa. St. 143.

Pedestrian was not chargeable where the condition of the walk might easily be overlooked. *Nicholson v. Philadelphia*, 194 Pa. St. 460.

Morris v. Philadelphia, 195 Pa. St. 372.

Notice of obvious defectiveness of one part of a walk does not preclude reliance upon apparent soundness of another. *Evans v. Brookville*, 5 Pa. Super. Ct. 298.

Failure to discover an obvious defect was not negligence *per se*. *Barnes v. Marcus*, 96 Iowa, 675.

The question was for the jury, where plaintiff, well acquainted with a hole in a sidewalk 300 feet from a lamp, stepped into it at night when it was covered with leaves and dirt. *Kopelka v. Bay City*, 125 Mich. 625.

Negligent conduct—use of sidewalk:

A child of four was permitted to play in the street alone. Not negligent *per se*. *McVee v. Watertown*, 92 Hun, 306.

Nor was a pedestrian in using a temporary bridge over a sidewalk because it was unlighted. *Fischer v. Franke*, 21 App. Div. 635.

Nor in walking in an unlighted part of the street. *Higgins v. Brooklyn &c. R. Co.*, 54 App. Div. 69.

Owen v. Ft. Dodge, 98 Iowa, 281.

Negligence was for the jury, where plaintiff was walking slowly along on a dark night when it was slippery. *Birngruber v. Eastchester*, 54 App. Div. 80.

One-armed man carrying a parcel under it failed to grasp a railing in descending steps. Was not negligent *per se*. *Hoyt v. Danbury*, 69 Conn. 341.

Woman was negligent in trying to step over instead of going around a hole. *Moshenvel v. District of Columbia*, 17 App. D. C. 401.

See, also, *Rome v. Baker*, 107 Ga. 347.

Momentary diversion of attention did not impute negligence. *Nokomis v. Salter*, 61 Ill. App. 150.

So, as to inattention to bill board though the wind was blowing strongly. *Cason v. Ottumwa*, 102 Iowa, 99.

So, where a girl of 10 stood by a pile of loose stones while a team passed. *Mahar v. Steuer*, 170 Mass. 454.

So, as to a boy injured by obvious defect while running to escape snowballs. *Penrose v. Fehr*, 113 Mich. 517.

So, as to one using a couple of planks 10 inches wide to avoid mud and ice on the sidewalk, ignorant of an excavation beneath. *Wiggin v. St. Louis*, 135 Mo. 558.

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So, as to one running or walking fast without looking down at the sidewalk. *McCormick v. Monroe*, 64 Mo. App. 197.

So, where a boy of ten used a section of a boardwalk as a raft on water accumulated in the street. *Omaha v. Richards*, 49 Neb. 244.

So, where plaintiff, coming unexpectedly to a place of danger in the dark and thinking it but a step, stepped off the walk into the street. *Guthrie v. Swan*, 5 Okla. 779.

So, where the unguarded hatchway was not in plaintiff's line of vision as she approached almost upon it. *Whitty v. Oshkosh*, 106 Wis. 87.

Otherwise, where bricks of a walk were slightly raised by the growth of roots, and plaintiff, accustomed to sweep the walk, stumbled without looking where he was going. *Covington v. Manwaring*, (Ky.) 68 S. W. Rep. 625.

Pedestrian is not negligent in using a traveled walkway on one side of the street because a sidewalk had been provided on the other side. *Neal v. Marion*, 129 N. C. 345.

Pedestrian was not negligent in talking to another while both were walking together. *Butcher v. Philadelphia*, 202 Pa. St. 1.

Negligence of pedestrian in stepping into a hole partially filled with debris, in a crowded sidewalk, was for the jury. *Glading v. Philadelphia*, 202 Pa. St. 324.

"Ordinary care and prudence" is not such as the mass of mankind usually exercised in their daily affairs but such as they would usually exercise under circumstances similar to those in the present case. *Rhyner v. Menasha*, 107 Wis. 201.

Cowie v. Seattle, 22 Wash. 659.

Crossing street elsewhere than at regular crossing:

The defendant was not liable to a pedestrian crossing a street at night, for injury caused by stepping into an opening four inches wide and three inches deep, between the ends of two curb stones, not on the sidewalk or at the termination of a crosswalk, which opening had been made to carry away water from the street. *Harrigan v. Brooklyn*, 67 Hun, 85, aff'd, 143 N. Y. 661; aff'g nonsuit, and distinguishing *Clemence v. Auburn*, 66 N. Y. 334; *Goodfellow v. Mayor*, 100 N. Y. 15.

Plaintiff was injured while crossing a street elsewhere than at the regular crossing. He was not negligent *per se*. *Bell v. Clarion*, 113 Iowa. 126.

Durbin v. Napoleon, 21 Oh. C. C. 160; *Dallas v. Webb*, 22 Tex. Civ. App. 48; *Denver v. Sherret*, 88 Fed. Rep. 226; *Magaha v. Hagerstown*, 95 Md. 832.

The question is one for the jury. *Plummer v. Milan*, 79 Mo. App. 439.

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The right to presume safety extends to all parts of the street. *Heckson v. Evanson*, 7 N. D. 173.

Pedestrian held negligent in crossing a street elsewhere than at a crossing, where the conditions and the danger were known. *Winchester v. Carroll*, 99 Va. 727.

Defective persons:

Blindman held entitled to assume safety of streets. Not negligent in being out alone, or in not constantly feeling his way. *Carter v. Nunda*, 55 App. Div. 501.

Foy v. Winston, 126 N. C. 381.

So, as to a person with green glasses. *Malhan v. Everett*, 50 La. Ann. 1162.

The fact that plaintiff weakened her ankle by a defect in defendant's sidewalk held not ground for a recovery, where subsequently, knowing of its weakness, she took chances of its giving way in getting on a chair to decorate. *Raymond v. Haverhill*, 168 Mass. 382.

Violation of ordinance:

That plaintiff was violating an ordinance at the time did not prevent recovery, where it was not the proximate cause of the injury. *Atchison v. Acheson*, 9 Kan. App. 33.

The effect of statute granting remedy on defense of contributory negligence:

Contributory negligence held a defense to statutory action for injury from defective street. *Giffen v. Lewiston*, (Id.) 55 Pac. Rep. 545.

(h). SNOW AND ICE.

It is the duty of a municipality to use ordinary care to keep its sidewalks reasonably free from snow and ice. Active vigilance is required, and it is liable for defects of which it had, or in the exercise of the requisite care should have had, notice or knowledge. The time for which the defect has existed may be sufficient to afford a presumption of knowledge thereof, and of an opportunity to correct the same.

A municipality is only required to remove accumulations of snow and ice existing in such form as to render passage dangerous in the apprehension of a person of ordinary prudence. It is not the mere slippery surface of the walk for which a municipality is responsible, but some dangerous condition thereof arising from negligence in allowing snow and ice to accumulate.

Usually negligence has been considered culpable when there has been an accumulation of snow and ice in ridges, or other dangerous form, rendering the surface uneven so as to disturb the equilibrium of a traveler, or when its glazed surface has made passage over it perilous.

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In New York it has been held, that the burden is on the plaintiff to prove that the negligence of the defendant was the proximate cause of the injury; thus, if there was too great a slope of the walk, as well as a dangerous condition from snow and ice, it must affirmatively appear that the injury arose in part at least from the latter cause for which alone the municipality would be liable. So if new snow or ice, for which the defendant would not be liable from over accumulations for which defendant would be liable, plaintiff must show that without the operation of the old snow and ice the accident would not have happened.

In some States, Maine and Massachusetts, it is considered that if, besides the defect in the way, there is also another proximate cause of the injury, the municipality is not liable. A distinction is to be drawn between an injury from snow and ice, produced by natural causes, and one arising from an artificial cause; as where ice came from the water of an overflowing sewer, which had remained defective through culpable neglect. Although it be the primary duty of the lot owner to remove snow, or otherwise care for the sidewalk, the person injured thereon usually has no action against him.

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Mere fact that walk is slippery:

Ice on a sidewalk does not show it to be dangerous, nor preclude one from walking on it in the night time. A traveler is bound to exercise such ordinary care and caution as would a person of ordinary prudence. *Evans v. City of Utica*, 69 N. Y. 166, aff'g judg't for pl'ff.

It is not sufficient to show that there was ice on the walk making it slippery. A city is not bound to keep its sidewalks absolutely free from ice; an accumulation of ice and neglect to remove it must be shown. The ice was of recent formation. It had been thawing and ice lay "all in one sheet, just alike." *Kinney v. Troy*, 108 N. Y. 567; reversing 38 Hun, 285, and judg't for pl'ff.

There was a piece of old ice rounded up on the sidewalk. Conflict of evidence, as to whether the day the plaintiff slipped, and fell at that point, there had been a fall of snow, sleet and rain, which had frozen and made everything slippery. Held, that the court should have charged that if the sidewalk would have been slippery from recent rain, without regard to old formation, the defendant would not be liable. *Tobey v. Hudson*, 49 Hun, 318, rev'g judg't for pl'ff.

From opinion.—"It is not to be questioned that a city may be liable for injuries occasioned by the accumulation of ice upon its sidewalks. So it is said in *McKinney v. Troy*, (108 N. Y. 567), on the authority of *Todd v. Troy* (61 id. 506). Such, too, was the doctrine of *Pomfrey v. Saratoga* (104 id. 459), and of *Elgie v. Troy* (109 id. 635, affirming 37 Hun, 641). But in the *Kinney* case the court seems to use the word 'accumulation' as meaning a ridge or unevenness. For they say that, as the ice was all in one sheet, the plaintiff should have been nonsuited.

In *Kaveny v. Troy* (108 N. Y. 571), decided at the same term, the court were not willing to say whether the *Todd* case should be followed to its full extent. And they remarked that snow could be removed without serious difficulty, but that ice from the drip of the roof was a different matter; that in severe winters it was difficult to remove it. And having shown that the plaintiff might have fallen on ice formed by the drip of the roof, they held that it was not reasonable that the city should be required to remove it, and that the city was not liable. They also held that the freezing of the night and next day before the accident could not have failed to form a new coating of ice. That this must have made a new coating over the ice which had been formed by the drip; that the city was not bound to remove that new coating; that the accident might have come from this natural cause, and plaintiff should have been nonsuited on that ground also. In *Taylor v. Yonkers* (105 N. Y. 202), sand and gravel had lain on the sidewalk, which fact tended to show negligence. On the night before the accident rain fell and froze, and the whole city was slippery. The plaintiff fell on the sloping ice which had formed on the sand and gravel. The court held the city not liable, because it was just as possible that plaintiff would have slipped if the place had been level.

* * * * *

Now in the *Taylor* Case and in the *Kaveny* Case, we understand the Court of Appeals to hold substantially this: That if there has been an old obstruction, be it of sand or ice or snow, and if then there be a fall of sleet or rain which freezes and makes everything slippery that it covers, including the old obstruction, and then if a person slips on the old obstruction, now covered with the newly-formed coating of ice, it cannot be said that the city was bound to remove this new coating. And also in such a case it is not right to assume that the person's fall was caused by the old obstruction, even though it was a possibly concurring cause. That the plaintiff must fail if he does not show that the accident was due to that cause, for which defendant was responsible. *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661."

In an action brought to recover from a municipality damages resulting from a personal injury suffered through the plaintiff's having fallen upon an icy sidewalk on which there was a ridge of earth covered with slippery ice, at a time when, by reason of the low temperature, the municipality was not responsible for the slippery condition of the sidewalk or for the ice upon the ridge, the plaintiff is properly nonsuited on failing to establish the fact that the accident would not have occurred but for the presence of the ridge. *Safford v. Village of Green Island*, 74 Hun. 306.

Thin smooth coating of ice had collected from natural conditions and was more or less distributed throughout the walks of the city. There were no ridges or unevenness. City was not liable for a failure to remove it. *Anthony v. Glens Falls*, 4 App. Div. 218.

Buck v. Glens Falls, 4 App. Div. 323; *Driscoll v. Ansonia*, 73 Conn. 743; *Depere v. Hibbard*, 104 Wis. 666.

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So as to the mere melting and freezing of snow. *McQueen v. Elkhart*, 14 Ind. App. 671.

So, of the filling of a catch basin and its approach, by the melting of a heavy fall of snow. *Spillane v. Fitchburg*, 177 Mass. 87.

Accumulations dangerous in themselves:

An abutting property owner, or street railway company, may remove snow from the adjoining sidewalk, but may not accumulate it in the street, so as to become a nuisance. If a traveler is injured by it, he is liable.

Passenger slipped on accumulated snow while entering car, by defendant's negligence. *Dixon v. Brooklyn City & Newtown R. Co.*, 100 N. Y. 170, aff'g judg't for pl'ff.

Sidewalk was a long time icy and rounded so that the plaintiff, as he passed over, kept hand on adjoining fence, until he met a person coming opposite when he was obliged to let go, as he thought to pass him, and in passing he fell and was injured. Plaintiff did not take risk. *Fox v. Village of Fort Edward*, 48 Hun, 363, aff'g judg't for pl'ff.

Six inches of snow accumulated on a sidewalk and became soft and marked by foot prints, and two or three days prior to the accident snow and sleet fell, covering the entire surface of the sidewalk, rendering the same slippery, from which time the temperature ranged from nineteen degrees to eight degrees above zero; although the defendant was negligent as to the accumulation of snow, it was not as to the last storm, and as the plaintiff, who was injured by slipping or stumbling on the walk, failed to show that the injury resulted from the cause for which defendant was liable, he was properly nonsuited. *Durr v. Village of Green Island*, 71 Hun, 260, aff'g nonsuit.

City liable for an accumulation of snow and ice four or five inches in depth and higher in the center than at the sides existing for two weeks. *Walsh v. Buffalo*, 17 App. Div. 112.

So, where the dangerous accumulation had been allowed to remain for several weeks. *Beck v. Buffalo*, 50 App. Div. 621.

So, where the accumulations are allowed to remain till travel beats them into dangerous shapes and conditions. *Huston v. Council Bluffs*, 101 Iowa, 33; s. c., 36 L. R. A. 211.

Wyman v. Philadelphia, 175 Pa. St. 117; *Scott v. Scranton*, 5 Lack. L. News, 73; *Lynchburg v. Wallace*, 95 Va. 640.

Accumulation of ice though smooth, made city liable. *Magaha v. Hagerstown*, 95 Md. 62.

City held not liable for injury from frozen footprints in an accumulation of snow worn smooth by travel. *Hyer v. Janesville*, 101 Wis. 371.

It is for the jury to say whether ridge of accumulated snow or ice four

inches high by twelve wide was such an obstruction that the street was not reasonably safe. *Byington v. Merrill*, 112 Wis. 211.

Or in combination with other causes:

Plaintiff slipped on ice on a crosswalk and caught his foot in a depression 34 inches long and four to twelve inches wide, worn by the passage of vehicles, which has remained in such condition for a year or more. The defect in the crossing was the proximate cause of injury and charged the city with liability though not responsible for the slippery crosswalk. *Hamilton v. Buffalo*, 55 App. Div. 423.

Where new ice would not have formed but for an accumulation of ice previously formed and allowed to remain city was liable. *Graham v. Poughkeepsie*, 68 App. Div. 262.

Where a city was negligent in leaving snow and ice on a sidewalk until it became rough and dangerous it was not relieved because a subsequent fall of sleet increased the danger. *Hodges v. Waterloo*, 109 Iowa, 444.

See, also, *Salzer v. Milwaukee*, 97 Wis. 471; *Piper v. Spokane*, 22 Wash. 147.

Negligence not to remove snow and ice, where the construction of the walk makes an accumulation dangerous. *Russell v. Toledo*, 19 Oh. C. C. 418.

Hodges v. Waterloo, 109 Iowa, 444.

Otherwise, where improper construction is not charged, but only failure to remove the ice. *Driscoll v. Ansonia*, 73 Conn. 743.

A depression in the sidewalk known to the authorities was concealed by snow. Recovery allowed. *Kellow v. Scranton*, 195 Pa. St. 134.

Jury were unable to tell whether a defect or fall of snow caused the fall. No liability. *Dapper v. Milwaukee*, 107 Wis. 88.

Sloping sidewalks:

The plaintiff fell upon new ice, formed the night before over an old accumulation of ice and snow upon a sidewalk, so negligently constructed as to have too great a slope towards the street. In the absence of evidence showing that the slope of the street was the concurring cause of the fall, without which it would not have happened, the plaintiff was not entitled to recover. *Ayers v. Hammondsport*, 130 N. Y. 665, rev'g judg't for pl'ff.

Following *Taylor v. City of Yonkers*, 105 N. Y. 202.

Slope of three inches in three feet did not make a sidewalk defective. *Beekman v. New York*, 18 Misc. 509.

Where a walk was necessarily on an incline and the city used reasonable care to prevent slipping, there was no liability. *Chicago v. Richardson*, 75 Ill. App. 198.

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Failure to place cleats or sand upon apron of a crosswalk was not negligent *per se*. *Morrison v. Madison*, 96 Wis. 452.

Eavesdrippings and defective hydrants:

The defendant had allowed ice to accumulate from the wastings of a pump and the leader of an abutting house. Question of negligence was for the jury. *Allison v. Village of Middletown*, 101 N. Y. 667, rev'g judg't of nonsuit.

A municipality is not responsible for the construction or sufficiency of eaves of a building on the land of an individual adjoining the sidewalk, nor is it bound to prevent the formation of ice from the drippings therefrom. *Kaverny v. City of Troy*, 108 N. Y. 571, rev'g judg't for pl'ff; distinguishing *Todd v. City of Troy*, 61 id. 506; *Pomfrey v. Village of Saratoga*, 104 id. 459.

A few days before the accident there had been a storm of rain and snow. There was an awning over, and so no snow had accumulated upon that part of the sidewalk where plaintiff fell, but there was ice upon it, and there was evidence tending to show that during the storm defendant's servants, in cleaning a crosswalk near the point east the snow upon a grating through which the water along the sidewalk was accustomed to flow into a drain, and this prevented such flow, turning the water upon the sidewalk, which freezing, formed the ice upon which plaintiff fell. Held, the question of defendant's negligence was properly submitted to the jury. *Bishop v. The Village of Goshen*, 120 N. Y. 337, aff'g judg't for pl'ff.

Water from the roof of adjoining premises was conducted across the sidewalk, through a gutter channeled in the surface stone of the sidewalk; this stone and the gutter stone had become disjointed and broken, so that the flow of water was interrupted and it ran on to the sidewalk, froze, and caused the plaintiff to fall. Held, that as the dangerous condition of the walk was not due to natural, but to artificial causes, the defendant, if chargeable with notice of the defect, was liable. *Gillrie v. City of Lockport*, 122 N. Y. 403, rev'g judg't for pl'ff; distinguishing *Muller v. City of Newburgh*, 32 Hun, 24; 105 N. Y. 668; *Taylor v. City of Yonkers*, 105 id. 202.

It appeared that plaintiff in passing over a sidewalk on a clear, cold day, stepped upon a ridge of ice, formed by the discharge of water from a conductor on a building adjoining the street. This ridge was seven inches high, and two or three feet wide. It was covered by an inch or two of light snow, but was plainly visible and formed a dangerous obstruction. No evidence whatever was given as to the exercise of any care

by plaintiff. Held, the evidence was insufficient to sustain a verdict for plaintiff. *Weston v. City of Troy*, 139 N. Y. 281, rev'g judg't for pl'ff.

From opinion.—"The presumption which a wayfarer may indulge, that the streets of a city are safe, and which excuses him from maintaining a vigilant outlook for dangers and defects, has no application where the danger is known and obvious. If the plaintiff did not discover the ridge, and passed along relying upon the walk being safe, or supposing if she saw the ridge, that it was made of compacted snow, and not by ice, these and other circumstances might have been shown to meet the burden the law places upon a plaintiff suing for negligence of being himself free from fault. But no evidence whatever was given by the plaintiff to meet this condition.

It is said by counsel that this was a mere inadvertence, and he asks us in substance to hold that the mere happening of the accident, by stepping upon the ridge, when it was covered with a light snow, made the question of contributory negligence one for the jury. We cannot assent to this view.

The judgment should, therefore, be reversed and a new trial granted."

Water from conductor had been accustomed to fall close to the house and thence to run over the sidewalk and freeze from time to time for several years. The night was dark, and a thin coating was thus formed over the ice; plaintiff had seen ice there before but was not thinking of it. Question for jury. *Darling v. Mayor*, 18 Hun, 340, rev'g nonsuit.

It is declared by the statute, that after being used five years continuously, all streets and avenues shall be deemed public streets, &c., and no further official action is necessary to establish the character of such streets. A hydrant upon the defendant's street leaked during the winter and the water worked its way across the street and caused ice to form upon the sidewalk, whereby plaintiff slipped and fell. Although the defendant did not have even constructive notice of the ice, yet it had negligently left the hydrant to leak, so as to inevitably cause ice to form when the weather should become cold. *Corbett v. City of Troy*, 53 Hun, 228, aff'g judg't for pl'ff.

The evidence on the part of the plaintiff, contradicted by defendant, tended to show that the water, which dripped from a water column used to supply engines, while being shut off, ran upon or was carried by the wind on to the sidewalk of a street; that the drain which usually carried off the water was allowed to become blocked by ice and snow and the water allowed to continue to flow upon the sidewalk, which became icy and dangerous, and that the plaintiff walking on such sidewalk slipped upon the ice and received injuries. For jury.

The action, if negligence was proved, was maintainable against the railroad corporation, and the city in which the accident happened was not alone liable for the damages occasioned by reason thereof. *Thuringer v. N. Y. C. & H. R. R. Co.*, 72 Hun, 33.

Where the evidence tended to show that a person unlawfully main-

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tained an awning from a roof of which water flowed into the gutter on its outer edge, and therefrom was discharged through spouts more than twelve feet above the sidewalk, and was blown therefrom upon the sidewalk and froze, rendering the same unsafe, and that such awning was an obstruction upon the street, and the plaintiff's fall was occasioned thereby, the action should have been submitted to the jury.

On March 4th, it snowed and turned to sleet, and at midnight 4 2-10 inches of snow had fallen. On the 5th, the day of the accident, in the afternoon it was freezing in the shade, and thawing in the sun. The awning posts were covered with ice and there was a sheet of ice from the fresh water that had recently fallen and quite a volume of water was coming down, which made the sidewalk slippery. Such evidence tended to show that the defendant was maintaining a nuisance. *McConnell v. Bostelmann*, 72 Hun, 238, rev'g nonsuit, distinguishing *Moore v. Gadsden*, 87 N. Y. 84; *City of Rochester v. Campbell*, 123 id. 405; *Dickinson v. Mayor*, 92 id. 58, as they were actions founded upon negligence. And citing, on the question of the fee being in defendant, *McGoldrick v. N. Y. Cent. &c. R. Co.*, 20 N. Y. Supp. 914; *Simmons v. Everson*, 124 N. Y. 319.

Drippings from a roof leader had frozen in ridges. The city's negligence was for the jury, where it had remained in substantially that condition the whole winter. *Stone v. Poughkeepsie*, 15 App. Div. 582.

So, where the ridges were allowed to remain in such condition for ten days or more. *Thompson v. Saratoga Springs*, 22 App. Div. 186.

Morris v. Saratoga Springs, 55 App. Div. 263.

Though the eaves were those of private dwellings. *Miller v. Bradford*, 186 Pa. St. 164.

Otherwise, as to the formation of smooth ice three feet wide and only two and one-half to two inches thick. *Garrett v. Jackson*, 109 Mich. 408; s. c., 32 L. R. A. 861.

Similarly as to ice formed by a private hydrant of which the city had no notice; it was not a business street and defect had not been in existence more than three days. *Corey v. Ann Arbor*, 124 Mich. 134.

2 ENTITLED TO REASONABLE OPPORTUNITY TO REMOVE THE DEFECT.

Although an ordinance imposes on the tenant only the duty to keep the walk free from snow, yet the municipality is not relieved from its duty, but it may wait a reasonable time for the owner to act. A fall of rain or the melting of snow on premises adjoining the sidewalk was followed by severe cold, hence there was ice on the sidewalk whereby

it became slippery and dangerous. The municipality could wait for a thaw to remedy the evil and was not responsible for the omission of the householder to sprinkle the surface with ashes or sand, but should require them to do so. Where there are two accruing causes producing an injury the municipality cannot be made liable unless it appear, that the injury would not have been sustained, but for the defect for which the municipality was liable. The slope of the walk may be the cause of liability. *Taylor v. Yonkers*, 105 N. Y. 202, rev'g judg't for pl'ff.

From opinion.—"The question involved has been quite earnestly debated in other States where it arose under statutes requiring towns to keep the streets safe and convenient. In Maine and Massachusetts it is held that if, besides the defect in the way, there is also another proximate cause of the injury contributing directly to the result, for which neither of the parties is in fault, the town is not liable. *Moore v. Abbott*, 32 Me. 46; *Moulton v. Sanford*, 51 id. 127; *Marble v. Worcester*, 4 Gray 395; *Billings v. Worcester*, 102 Mass. 329. These rulings are based largely upon two grounds, that the town is liable for the defect alone, and that the proportion of injury due to that cause is impossible to be ascertained. A contrary rule is held in Vermont and New Hampshire. *Hunt v. Pownal*, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197. We have already stated the rule to be in this State that the defect, even when a concurring cause, must be such that without its operation the accident would not have happened. Where the defect is the sole explanation of the injury there is no difficulty; but where there is also another, for which no one is responsible, we have held that 'the plaintiff must fail if his evidence does not show that the damage was produced by the former cause.' *Searles v. Manhattan R. Co.*, 101 N. Y. 661. And we added that he must fail also if it is just as probable that the injury came from one cause as the other, because he is bound to make out his case by a preponderance of evidence, and the jury must not be left to a mere conjecture or to act upon a bare possibility. In this case that rule was violated. The plaintiff slipped upon the ice. That of itself was a sufficient, certain, and operating cause of the fall. No other explanation is needed to account for what happened. It is possible that the slope of the walk had something to do with it. It is equally possible that it did not. There is not a particle of proof that it did. To affirm it is a pure guess and an absolute speculation. Are we to send to a jury for them to imagine what might have been?"

A municipality is not required to remove snow from the sidewalks immediately after it forms, and where a person, in the day time, deliberately walks upon uncovered ice, understanding its condition, when he could have passed along the side of it with safety, he contributes to his injury and cannot recover. *Clegg v. Buffalo*, 72 Hun, 541, rev'g judg't for pl'ff.

Defendant was not liable for plaintiff's falling and slipping at about eight or nine o'clock, A. M. on account of ice frozen on planks from rain fallen on preceding night. *Evers v. H. R. Bridge Co.*, 18 Hun, 144, aff'g nonsuit.

Water ran down a lane by plaintiff's house from springs and melted snows in plaintiff's yards and upon and across the walk. Plaintiff, at

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about 1 P. M., slipped on ice formed on the sidewalk the night before. The day before there was snow and ice on the walk, but was so trodden down as not to be slippery. Defendant was not negligent in failing to remove within time named. *Blakeley v. Troy*, 18 Hun, 167, rev'g judg't for pl'ff.

From opinion.—"Without attempting to lay down a rule which shall apply to all cases, it is safe to say that the mere neglect to remove ice before 1 o'clock, P. M., which formed the night before, is not enough to make the city liable."

Under charter it is not primary duty of defendant's trustees to make and repair sidewalks, but if owner does not repair pursuant to ordinance, the village is bound to do so. If individual be liable for injuries he is liable over to municipality against which recovery has been made. *Haskell v. Pen Yan*, 5 Lansing, 43, aff'g judg't for pl'ff.

Rain and sleet immediately followed a snow fall which in turn were followed by two successive snow falls which froze to the sidewalks as it was beaten by trampling. The extreme weather lasted four days. City was not liable for failure to remove it during that time. *Staley v. New York*, 37 App. Div. 598.

Otherwise, where an embankment of snow 15 to 18 inches high sloping to the street car track, beside which there was a rut four to six inches deep, was left so over a month, during which time numerous accidents had happened. *Haight v. Elmira*, 42 App. Div. 391.

A wait of 48 hours to give the abutting owners chance to clean off the sidewalks, was not an unreasonable delay. *Hawkins v. New York*, 54 App. Div. 258.

In the absence of proof that the weather had been such as to permit the removal of ice since it was alleged to have formed, city was not liable for its presence on the walk. *Berger v. New York*, 65 App. Div. 394.

A city which permits snow and ice to remain upon its sidewalks after a reasonable time to remove the same has elapsed, is liable to one who is injured by reason thereof. *Smith v. Chicago*, 38 Fed. Rep. 388.

Reasonable time from the discovery of the dangerous accumulation must be allowed. *Lynchburg v. Wallace*, 95 Va. 640.

As to ice and snow, see Dillon's Munic. Corp., sec. 1006.

3. AFTER NOTICE.

Where a municipality is bound to keep its streets in repair, there must be active diligence, and where a defect has become notorious, and its officers have full opportunity to know of it, the municipality is chargeable with notice. It is the duty of a municipality to keep its sidewalks reasonably free from snow and ice.

The water from the conductor of a building adjoining the street had for a long time fallen on the sidewalk, where it froze three or four days before the accident, and was concealed by a slight covering of snow. Plaintiff had no rubbers and was walking fast but at an ordinary gait. For jury. *Todd v. Troy*, 61 N. Y. 506, aff'g 61 Barb. 580 and judg't for pl'ff.

From opinion.—"After a street has been out of repair, so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice and charges it with negligence. *Hart v. City of Brooklyn*, 36 Barb. 226; *Clark v. City of Lockport*, 49 id. 580; *Conrad v. Village of Ithaca*, 16 N. Y. 158; *Requa v. City of Rochester*, 45 id. 129; *Hyatt v. Trustee, &c., of Rondout*, 44 Barb. 385."

Actual notice to the proper municipal authorities of a defect is not necessary in order to charge it with negligence; they owe to the public the duty of active vigilance; and where a street or sidewalk has been out of repair for any considerable length of time, so that by reasonable diligence they could have notice of the defect, such notice may be imputed to them. *Pomfrey v. Saratoga Springs*, 104 N. Y. 459, aff'g 34 Hun, 607, and judg't for pl'ff.

In the last case snow and ice, which had fallen from time to time from a barn adjoining the sidewalk on one of defendant's streets, had accumulated on the sidewalk to the height of about three feet above the surface, and about two and a half feet above the snow on the rest of the sidewalk. This accumulation had been there about two weeks when plaintiff, in passing over it, fell and was injured. By defendant's charter (chap. 220, Laws of 1866) the care and custody of its streets are imposed upon its trustees, and it is made their duty to establish such ordinances and regulations as they may think proper, among other things, to provide for and regulate the repairing and cleaning of streets and sidewalks, and power is given to raise money to discharge these duties. In an action to recover damages, defendant was liable.

The duty resting upon a municipal corporation to remove accumulations of ice and snow upon its streets, becomes imperative only when dangerous formations or obstacles have been created and notice of their existence has been received by the corporation, or sufficient time has elapsed to afford a presumption of knowledge of their existence and an opportunity to effect their removal.

It appeared that for some weeks the snow had not been entirely removed from the walk; for four days previous to the accident the weather had been warm, causing the accumulation of snow and ice on the sidewalk to thaw and become soft. On the night previous it froze hard, and a ridge or strip of ice was formed on the walk. Plaintiff, in passing over this strip, slipped and fell. If there was any unusual or dangerous obstruction, so far as danger was to be apprehended, it arose

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from the frozen and slippery condition of the walk, and this was caused solely by the freezing of the night before, and there was no such lapse of time between its creation and the accident, as to afford a presumption of knowledge in the municipality of its existence or opportunity to remove it after notice. *Harrington v. Buffalo*, 121 N. Y. 147, rev'g judg't for pl'ff.

The plaintiff slipped on a sidewalk, covered with a glaze of ice, and within one foot of a building. The evidence tended to show that ice had been on the walk for about three days prior thereto; that three days before there was rain, snow and sleet, and on the morning of the preceding day the temperature was below zero. The defendant's superintendent had passed over the sidewalk about one week before, and also ten or twelve days before, the superintendent testified that he had passed through the street several times before the accident, but he did not remember the dates, when there was ice upon the sidewalk, the same as was on every other street in the city, which was covered with ashes on the traveled part.

A nonsuit was properly granted, as there was no evidence, that the superintendent had knowledge of the dangerous condition of the walk after the rain, sleet, freezing, &c. *McNally v. Cohoes*, 127 N. Y. 350; affirming 53 Hun, 202, and nonsuit.

Sixteen days before the accident complained of, there had been a heavy fall of snow, and another four days previous. The plaintiff's evidence was, that a ridge of snow, six or seven inches high, extended along the centre of the sidewalk, and that it was formed, in part, of the snow which fell on the said two occasions, and was uneven and slippery and had been there about one week before the plaintiff fell. The evidence was sufficient to sustain a verdict for the plaintiff. *Keane v. Waterford*, 130 N. Y. 188, aff'g judg't for pl'ff.

Plaintiff, at 8 P. M. Sunday, slipped and fell on an icy sidewalk; a few inches of snow fell on the preceding Thursday, after which it rained and had then frozen hard, and at the time of the accident a light snow covered the ice. No proof of notice to city. *Muller v. Newburgh*, 32 Hun, 24, affirming nonsuit.

Heavy snow November 28th and 29th; it melted and ice formed. City had no notice. On December 4th plaintiff slipped. Nonsuit sustained. *Smith v. Brooklyn*, 36 Hun, 224, affirming nonsuit.

Plaintiff slipped on some ice upon a sidewalk in Troy, on the evening of January 28, 1881. Evidence was given showing that at the time he slipped and fell there was hard ice on the sidewalk, and that the plaintiff was seriously injured. No direct evidence was given that the ice had been on the sidewalk for any time prior to the accident, but the plaintiff

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sought to prove that the ice had been for some time on the sidewalk by showing that the temperature of the weather was below freezing point from the seventeenth of January to the day of the accident, and that snow fell on January 22, and not again until after the 28th.

Held, that the evidence was insufficient to show constructive notice to the city, and that the court erred in submitting that question to the jury. *Foley v. Troy*, 45 Hun, 396, rev'g judg't for pl'ff.

Plaintiff fell on smooth ice covered by falling snow on sidewalk. The street sloped and the water from a vacant lot was discharged on the sidewalk at the place in question. No notice to defendant of ice, nor evidence that there had been time for constructive notice; no liability. City not obliged to drain adjoining lot under sidewalk. *Tracy v. Poughkeepsie*, 46 Hun, 569, affirming nonsuit.

Notice to policeman whose duty is to report such dangers is notice to the city. *Hawley v. Gloversville*, 4 App. Div. 343.

O'Hara v. Brooklyn, 57 App. Div. 176.

The question of constructive notice was for the jury, where the dangerous condition of the walk had been in existence for a week. *Hodges v. Waterloo*, 109 Iowa, 444.

Notice to a foreman under road commissioners, was not notice to the city. *Rich v. Rockland*, 87 Me. 188.

Notice that a waterway was obstructed did not charge city with notice that the water froze on the sidewalk. *Stanke v. St. Paul*, 71 Minn. 51.

Knowledge of defect is not sufficient without cause for apprehending that an accumulation of snow might cause injury. *City of Circleville v. Sohn*, 20 Oh. C. C. 368.

Similar accidents at about the same time and place are admissible on the question of negligent maintenance. *Russell v. Toledo*, 19 Oh. C. C. 418.

Reasonable opportunity to discover and remedy defects imputes notice and implies negligence. *Wyman v. Philadelphia*, 175 Pa. St. 117.

Spaulding v. Beverly, 167 Mass. 149.

4. EFFECT OF STATUTES.

Preventing liability from snow and ice:

Under its charter mayor and aldermen constitute common council of the city of Ogdensburg, and are made commissioners of highways, and are liable individually for negligently allowing snow and ice to accumulate on a sidewalk so as to render it unsafe, whereby plaintiff slipped, etc. Although the city, by statute, is relieved from liability for the injury,

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the defendants are not relieved thereby from their negligence. *Piercy v. Averill and others*, 37 Hun, 360, overruling demurrer to complaint.

From opinion.—"The general rule in this State is, that public officers, charged with a ministerial duty, are answerable in damages to any one specially injured by their carelessness and negligent performance of, or an omission to perform the duties of their office. *Robinson v. Chamberlain*, 34 N. Y. 389; *Hover v. Barkhoof*, 44 id. 113; *Clark v. Miller*, 54 id. 528; *Bennett v. Whitney*, 94 id. 302. Of course this rule does not apply to an action which is, in any sense, judicial.

Now it is undoubtedly true that the deciding whether or not a sidewalk shall be made, and of what materials and of what grade it shall be made is a *quasi* judicial act. But, on the other hand, the keeping of a sidewalk or street in repair has often been held to be a ministerial act. We may refer, by way of illustrating these principles, to the two decisions of *Urquhart v. Ogdensburg*, 91 N. Y. 67, and *Same v. Same*, 97 id. 238. If the duty is imposed on a public officer of keeping a sidewalk or street in repair, he cannot excuse himself on the ground that, in his judgment, it was best not to repair it. *Wilson v. Mayor*, 1 Denio 595. He may excuse himself of course, by showing that he did the best that he could.

The defendants, in the present case, urge that the duty is not put upon them of doing the manual work of repairing sidewalks or of keeping the snow off the streets; that they cannot attend to this in person; that, therefore, their only duty was to appoint persons to do the manual work; that for the negligence of these employes they are not liable. *Walsh v. Trustees, &c.*, 96 N. Y. 428. This argument might be very appropriate, if the facts of the case had been proved on a trial, and if plaintiff had failed to show that the defendants had themselves been negligent, and it had appeared that the only negligence was that of their employes. Very possibly these defendants are not the 'legal superiors' of any person employed by them, and are not liable as superiors for the misconduct of such employes. But that is not to the point. The demurrer admits that the defendants have been negligent in not keeping the sidewalk in repair and free from snow and ice. The allegation is such as would be made in an action against a commissioner of highways or similar officer. It is not the duty of a commissioner of highways to do the manual work of repairs. Yet it may be shown, by proper proof, that he was negligent in failing to keep the highway in order, and that he was therefore liable to one who was injured. It is not the duty of a corporation, that is, of the legal person to do the manual work of repairing streets. Yet a complaint alleging the duty and the neglect of a corporation would be proper. If it is the duty of a corporation to repair streets, it is no answer to an allegation of neglect to do this that the duty was not to do the manual work, but only to cause the repairing to be done. *Urquhart v. Ogdensburg*, *supra*, second case."

Immunity is granted under Mass. St. 1896, ch. 540, unless the walk is otherwise defective. *Newton v. Worcester*, 169 Mass. 516.

But it does not extend to discharges from a water conductor of an abutting owner. *McGowan v. Boston*, 170 Mass. 384.

The former being the sole or proximate cause of the accident. *Newton v. Worcester*, 174 Mass. 181.

CONTRIBUTORY NEGLIGENCE.

And, where the walk is defective it must contribute to the injury. *Bailey v. Cambridge*, 174 Mass. 188.

City is entirely exempt under Wis. R. S. 1898, sec. 1339, as amended by L. 1899, ch. 305, unless the accumulation of ice had existed three weeks before injury. *Byington v. Merrill*, 112 Wis. 211.

Requiring actual notice of the defect:

Statutory exemption from liability for injury from snow and ice in absence of actual written notice construed to apply to defect due to that cause alone. *McCloskey v. Moies*, 19 R. I. 297.

See, also, *Allen v. Cook*, 21 R. I. 525.

Existence of snow on sidewalk to knowledge of policeman for three days in spite of an ordinance requiring removal of snow within four hours sustained finding of negligence. *O'Hara v. Brooklyn*, 57 App. Div. 176.

5. CONTRIBUTORY NEGLIGENCE.

Plaintiff stepped off from a crosswalk to avoid water onto snow in the roadway which had frozen in ridges, and fell. Recovery was denied. *Lichtenstein v. New York*, 159 N. Y. 500, rev'g s. c., 29 App. Div. 542.

Plaintiff knew ice was on the street the preceding Saturday, and he slipped and fell on the next Tuesday. Plaintiff said the walk was then crowded and he did not notice the ice before falling. For jury. *Thomas v. Mayor*, 28 Hun, 110, rev'g nonsuit.

Plaintiff walked across a patch of rough slippery ice. But she had rubbers on and was attentive to her steps. Contributory negligence was for the jury. *Stone v. Poughkeepsie*, 15 App. Div. 582.

See, also, *O'Hara v. Brooklyn*, 57 App. Div. 176; *Dipper v. Milford*, 167 Mass. 555.

Knowledge of the danger due to slipperiness did not make use negligence *per se*. *Beck v. Buffalo*, 50 App. Div. 621.

Though an incline made it more dangerous. *Highlands v. Raine*, 23 Colo. 295; *Manross v. Oil City*, 178 Pa. St. 276.

Whether the incline was sufficient to make it dangerous, was for the jury. *Sylvester v. Casey*, 110 Iowa, 256.

Such knowledge did make use negligence. *Chicago v. Richardson*, 75 Ill. App. 198.

District of Columbia v. Brewer, 7 App. D. C. 113.

Especially where there was an incline.

Cooper v. Waterloo, 98 Wis. 424; *Depere v. Hibbard*, 104 Wis. 666.

PROXIMATE CAUSE.

And where there was a failure to use any care whatever in passing. *Marshall v. Belle Plaine*, 106 Iowa, 508.

Black v. Manistee, 107 Mich. 60; *Howey v. Fisher*, 122 id. 43; *Conneaut v. Naef*, 54 Oh. St. 529; *Boyle v. Mahanoy City*, 187 Pa. St. 1.

And where the accumulation had existed for ten days, was obvious at a distance and was at place known to be otherwise dangerous. *Hursen v. Chicago*, 85 Ill. App. 298.

See *Mareck v. Chicago*, 89 Ill. App. 358 on the effect of intoxication under the circumstances.

Plaintiff persisted in driving over a flooded highway on ice only two or three inches thick. Negligence. *Smith v. Walker*, 117 Mich. 14.

Van Pelt v. Clarksburg, 42 W. Va. 218.

General knowledge of defective condition and temporary forgetfulness did not defeat recovery. *Vergin v. Saginaw*, 125 Mich. 499.

See, also, *Cowie v. Seattle*, 22 Wash. 659.

Plaintiff was not allowed to recover for slipping down an ice-coated grade, obviously dangerous to him before he attempted to use it. *Friday v. Moorhead*, 84 Minn. 273.

Contributory negligence was for the jury where pedestrian walked on a ridge of ice in the center of the sidewalk in plain view. *Womach v. St. Joseph*, 168 Mo. 236.

Pedestrian was not negligent simply because he was not on the lookout for danger from slipperiness. *Dean v. Newcastle*, 201 Pa. St. 51.

Plaintiff was not negligent *per se* in walking on a ridge of ice, though she could have seen the danger had she looked. *Brown v. White*, 202 Pa. St. 297.

Reliance cannot be placed on removal of defect when conditions make it impossible. *Lynchburg v. Wallace*, 95 Va. 640.

6. PROXIMATE CAUSE.

Rough ice had been allowed to accumulate but rain coated it with smooth ice. The latter and not the former was the proximate cause of the injury and prevented recovery. *O'Keefe v. New York*, 29 App. Div. 524.

A hole in a street formed by the wash of surface water was caused by the peculiar situation and construction of an adjacent sewer basin. The presence of snow and ice, which combined to cause a wagon wheel to slip into the hole was not an intervening cause. *Lehmann v. Brooklyn*, 30 App. Div. 305.

Langhammer v. Manchester, 99 Iowa, 295.

NEGLIGENCE IN CONSTRUCTION.

The existence of a washout in the highway was not proximate cause of the damage where the plaintiff's horse attempted to spring on the ice which had formed on it, two or three inches thick, and fell. *Smith v. Walker*, 117 Mich. 14.

(i). SEWERS.

A municipality is under no duty to private persons to furnish facilities for sewerage or drainage, unless the necessity for it arise from its own act, nor if it undertakes to do so, is it liable for damages for injury caused by a defect of plan or failure of capacity, whereby the carrying off and discharge of water and sewage is imperfectly or incompletely done. But the exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which, from its nature, is liable to be repeated and continuous, but is remediable by a change of plan, or the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance of the original cause after notice, and omission to adopt such remedial measures as experience has shown to be necessary and proper. A municipal corporation has no greater right than an individual to collect the surface water from its lands or streets into an artificial channel, and discharge it upon the lands of another, nor has it any immunity from legal responsibility for creating or maintaining a nuisance. Sewers must be constructed in accordance with the plan thereof, and there must be due care to keep the same in a state of repair, and for its negligence in respect thereto the corporation will be liable for injury to property or person.

1. NEGLIGENCE IN CONSTRUCTION.

The City of Rochester, having power "to cause common sewers, drains, etc., to be made in any part of the city," directed a culvert to be built to conduct the water of a natural stream which had previously been the outlet through which the surface water of a portion of the city had been carried off. A freshet having occurred, the culvert through insufficiency of capacity and the *unskillfulness of its construction*, failed to discharge the waters, so that they were set back upon the factory of plaintiffs and injured property thereon. The city was liable. *Rochester White Lead Company v. Rochester*, 3 N. Y. 463.

If the city accepts a charter requiring the construction of sewers, it is liable for injuries arising from its neglect of duty, and is bound to exercise needful care, for in such construction and repair it acts ministerially. (*The Mayor &c. v. Furze*, 3 Hill, 612; *Hutson v. The Mayor &c.*, 9 N. Y. 163; *The Rochester White Lead Co. v. The City of Rochester*, 3 id. 463; *Conrad v. The Trustees of Ithaca*, 16 id. 158; *Mills v. The City of*

NEGLECT IN CONSTRUCTION.

Brooklyn, 32 id. 489.) *Barton v. Syracuse*, 36 N. Y. 54, aff'g judg't for pl'ff.

The officers of a municipality, lawfully permitting a land owner to connect with the sewer, must use reasonable care against injury, but the municipality is not liable for the negligence of those employed by the lot owner to do the work. *Masterton v. Vernon*, 58 N. Y. 391, rev'g judg't for pl'ff.

Distinguishing *Wendell v. Mayor*, 4 Keyes, 261.

The city authorized a private person to enlarge a sewer connection. Such person diminished the sewer capacity, whereby it filled up and, upon the occurrence of a storm, flooded the plaintiff's land. The plaintiff was allowed to recover the damage to his house, which was in the course of construction, under a contract whereby it was to be delivered completed, and also the rental value of the same while he was deprived of the use thereof. Defendant was chargeable with notice. *Nims v. Mayor &c. of Troy*, 59 N. Y. 500, aff'g 3 N. Y. S. C. (T. & C.) 5, and judg't for pl'ff.

Snow gathered in a sewer and caused an overflow after a rain. No proof of prior obstruction or fault in construction was shown. Defendant was not liable. A municipality is liable for an overflow of a sewer on proof of faulty construction or improper repair; in this case no negligence was shown in looking after obstructions or in removing it. *Smith v. Mayor*, 66 N. Y. 295, aff'g 4 Hun, 637, and judg't for pl'ff. Same principle. *McCarthy v. Syracuse*, 46 N. Y. 194.

A gutter ended in front of plaintiff's lot, and carried water on it, contrary to the natural current. The defendant was liable.

The rule that a municipal corporation is not liable for an omission to supply drainage or sewerage does not apply where the necessity for the drainage is caused by the act of the corporation itself. *Byrnes v. The City of Cohoes*, 67 N. Y. 204, aff'g 5 Hun, 602, and judg't for pl'ff.

A municipal corporation has no greater right than an individual to collect the surface water from its lands and streets into an artificial channel, and to discharge them upon the lands of another. The right of a riparian proprietor to drain the surface-water on his lands into a stream flowing through them, does not authorize throwing into a small stream surface water, by means of ditches and drains, when, by so doing the stream will be filled beyond its natural capacity and will overflow and flood the lands of a lower proprietor. Defendant, by its sewers and grading of a street, concentrated surface-water and sewage of a large territory and discharged it into a ravine, and through a box drain, and there being no sufficient outlet, it was discharged upon plaintiff's premises. Judg-

ment for the plaintiff for damages was affirmed. *Noonan v. Albany*, 79 N. Y. 470.

Citing *Weet v. Village of Brockport*, 16 N. Y. 172, note; *Byrnes v. City of Cohoes*, 67 id. 204; *Haskell v. City of New Bedford*, 108 Mass. 208; *Attorney-General v. Leed's Corporation*, L. R. (5 Ch. App. Cas.) 583.

By the plan of a sewer, it would have a proper discharge, but an improper wooden trough was used to carry the contents a part of the distance. Gas arose from this faulty construction and did damage. The defendant was liable although the tides contributed to the injury. *Hardy v. Brooklyn*, 90 N. Y. 435, aff'g judg't for pl'ff.

Following *Fitzpatrick v. Slocum*, 89 N. Y. 358, where *Gray v. City of Brooklyn* 10 Abb. Pr. (U. S.) 186, was considered.

The rule that a municipality under the authority of a statute cannot be subjected to damages in the exercise of such authority, is confined to consequences that are the necessary and usual result of the proper exercise of the authority. It does not shield the corporation when the injury results solely from the defective manner in which the authority was originally exercised and from continuance of the wrong after notice of the injury.

Commissioners of sewage and assessment of the city of Brooklyn, under statute, (chap. 521, L. 1857; chap. 136, L. 1861) established a drainage district not theretofore drained over lands of plaintiff, and a plan of drainage which contemplated the construction of a main sewer into which lateral sewers, as they were built, should empty. The main sewer was built in 1868, and subsequently lateral sewers. Actual use of main sewer shortly demonstrated that it was insufficient to discharge the sewage, and at times the sewage was forced through man-holes and inundated plaintiff's premises, and such inundations increased in frequency as more lateral sewers were connected, to the knowledge of the municipal officers. The city was liable for damages; having by the exercise of its power created a private nuisance on plaintiff's premises, it incurred a duty of adopting such measures as should abate it, as it had power to do. *Seifert v. Brooklyn*, 101 N. Y. 136, aff'g order rev'g judg't for the def't, and ordering judg't absolute for pl'ff. *Distinguishing Mills v. City of B.*, 32 N. Y. 489; *Smity v. Mayor*, 66 id. 295; *Wilson v. Mayor*, 1 Den. 595; *Lynch v. Mayor*, 76 N. Y. 60.

From opinion.—"The question in *Mills v. Brooklyn* (32 N. Y. 489, 495), as stated by Judge Denio, was that 'the grievance of which the plaintiffs complain is that sufficient sewerage to carry off the surface water from their lot and house has not been provided. A sewer of certain capacity was built, but it was insufficient to carry off all the water which came down in a rain storm, and the plaintiff's premises were to a certain extent unprotected. Their condition was certainly no worse than it would have been if no sewer at all had been constructed.'

NEGLECT IN CONSTRUCTION.

It was there held that the corporation was not liable. * * * In *Wilson v. Mayor, &c.* (1 Denio, 595, 598), the damages were occasioned by surface water naturally falling upon plaintiff's premises but prevented from flowing off by the changes made in grading its streets by the city. It was held to owe no duty to its citizens to furnish drainage for the water naturally collected on his premises, and that no liability resulted from the change in the street grade made under statutory authority. It was further said that the power of the corporation 'to make sewers and drains is clear, but it is not their duty to make every sewer or drain which may be desired by individuals or which a jury might even find to be necessary and proper.' *Lynch v. Mayor, &c.* (76 N. Y. 60), was also a case where the natural flow of surface water and drainage was obstructed by the exercise of municipal power in grading, pitching and raising the public streets, and the city was declared free from liability for the damages incidentally occasioned to property in consequence of the obstructed drainage, and its omission to build drains for the convenience of the citizen. Its liability, however, in a case like the present was conceded in the opinion delivered by Judge Earl.

* * * Municipal corporations have quite invariably been held liable for damages occasioned by acts, resulting in the creation of public or private nuisances, or for an unlawful entry upon the premises of another whereby injury to his property had been occasioned. *Baltimore & Potomac R. R. Co. v. Fifth Baptist Church*, 108 U. S. 317. This principle has been uniformly applied to the act of such corporations in constructing streets, sewers, drains and gutters, whereby the surface water of a large territory, which did not naturally flow in that direction, was gathered into a body and thus precipitated upon the premises of an individual, occasioning damage thereto. *Byrnes v. City of Cohoes*, 67 N. Y. 204; *Bastable v. Syracuse*, 8 Hun, 587; also in 72 N. Y. 64; *Noonan v. City of Albany*, 79 id. 470, 475; *Beach v. City of Elmira*, 22 Hun, 158; *Field v. West Orange*, 36 N. J. Eq. 118, 120; s. c. on appeal, 29 Alb. L. J. 397.

We are also of the opinion that the exercise of a judicial or discretionary power, by a municipal corporation, which results in a direct and physical injury to the property of an individual, and which from its nature is liable to be repeated and continuous, but is remediable by change of plan, or the adoption of prudential measures, renders the corporation liable for such damages as occur in consequence of its continuance for the original cause after notice, and an omission to adopt such remedial measures as experience has shown to be necessary and proper (*Wood's Law of Nuisances*, sec. 752), while in the present case the corporation was under no original obligation to the plaintiff or other citizens to build a sewer at the time and in the manner it did, yet, having exercised the power to do so and thereby created a private nuisance on his premises, it incurred a duty, having created the necessity for its exercise, and having the power to perform it, of adopting and executing such measures as should abate the nuisance and obviate the damage. *Phinizy v. City of Augusta*, 47 Ga. 260, 263; *Byrnes v. City of Cohoes*, *supra*."

Judge Dillon (*Mun. Corp.*, sec. 1046) asserts that it is the just tendency of recent decisions to decide that a city may be liable for negligence in employing sewers that clearly demonstrated by experience, result under ordinary conditions in overflowing private property of adjoining or connecting owners with sewage.

Plaintiff is the owner of a lot abutting on one of defendant's streets. On an adjoining lot is a sewer running from the street through which

surface water collected in the gutters of the street is conveyed away. Over the entrance to the sewer in the gutter defendant has placed an iron grate through which the water enters the sewer. In times of unusual storms or floods, leaves and other materials gather upon the grate and obstruct the passage of the water, which overflows the sidewalk on to the plaintiff's premises. The action was to restrain defendant from obstructing the water by means of the grate; it appeared that, in case it should be removed, it would leave an open hole in the sewer which would endanger the safety of the traveling public.

The action was not maintainable; even, although some better device than the grate might have been adopted, the municipality could not be made liable for error of judgment in this respect.

It seems that if there was a neglect of duty upon the part of the defendant in not keeping the grate or entrance to the sewer open and free for the passage of water, an action would lie to recover damages for injuries sustained. *Paine v. The Trustees and Inhabitants of the Village of Delhi*, 116 N. Y. 224, aff'g judg't for def't.

Distinguishing *Seifert v. City of Brooklyn*, 101 N. Y. 136.

Recovery was denied where death of a member of the family whose property was flooded with sewage was due to the negligent construction of a sewer by the city authorities. *Hughes v. Auburn*, 161 N. Y. 96; rev'g s. c., 21 App. Div. 311.

Where an excavation for a sewer about sixteen feet in depth and five feet wide at the top, had been so protected by upright planks and cross-pieces that the sewer had been safely constructed for the length of one-half mile, and then, through the bursting of a water pipe the water filled the trench and caused the banks of the excavation to fall in, whereby the plaintiff's intestate, employed therein by the defendants, was killed, it was held that a cause of action for negligence had not been established, and a verdict for plaintiff was not sustained. *Hoskins v. Stewart*, 57 Hun. 380, rev'g judg't for pl'ff.

A municipality is liable for a direct and physical injury to the property of an individual, including injury to his wife whereby he lost her services, from the adoption of a plan for a sewer and the construction thereof, where such defective plan is remediable by a change of plan. In this case, it was claimed that the contractor had deviated from the plan and specifications, but the city settled with the contractor and thereby approved of the construction.

There are cited in the opinion *Seifert v. City of Brooklyn*, 101 N. Y. 136; *Garrett v. Trustees of Village of Canandaigua*, 16 N. Y. Supp. 717; aff'd, 32 N. R. Rep. 142; *Stoddard v. Village of Saratoga Springs*, 127

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N. Y. 261; *Nims v. City of Troy*, 59 id. 500. *Munk v. Watertown*, 67 Hun, 261, modifying and aff'g judg't for pl'ff.

Where it did not appear that the plan of construction of an authorized sewer was not reasonably safe or that under any other system then known the damage could have been averted or that incompetent contractors were employed, the city was not chargeable with negligence. *Uppington v. New York*, 41 App. Div. 370.

City was not liable for the backing of sewage at times of unusually high water at points where the closets were located in the basement of the building. *Graves v. Olean*, 64 App. Div. 598.

Overflow of a creek caused by a defective sewer did not warrant the award of punitive damages. *Costich v. Rochester*, 68 App. Div. 623.

Where a flood is a contingency which might reasonably occur, it is an element to be considered by a city in determining the capacity of its sewer. *Arndt v. Cullman*, 132 Ala. 540.

Obstruction left in a sewer during alterations caused its overflow during a severe but not extraordinary storm. City was liable. *Judd v. Hartford*, 72 Conn. 350.

Municipality is liable for negligent construction of a sewer without notice of defect. It had been out of repair for two years. *Fort Wayne v. Coombs*, 107 Ind. 75.

Damage to plaintiff's lot from the improper construction of a sewer renders city liable. *Seymour v. Cummins*, 119 Ind. 148.

City was liable for adding its drain to an insufficient culvert constructed under an embankment which it permitted a railroad to erect. *Kelly v. Pittsburg &c. R. Co.*, (Ind. App.) 63 N. E. Rep. 233.

City liable for collection and discharge of sewage on private land. *King v. Kansas City*, 58 Kan. 334.

Capacity of a sewer must be such as to carry off such water as may be reasonably expected to collect. *Louisville v. Norris*, (Ky.) 64 S. W. Rep. 958.

Negligent construction of a sewer made city liable. *Hamlin v. Biddiford*, 95 Me. 308.

Municipality is liable for defective construction of a sewer, and for failure to keep it repaired. *Frostburg v. Dufty*, 70 Md. 47.

If a city exercises its discretionary power conferred by charter, to grade a street, it must answer in damages to the owner of a house flooded by reason of the defective construction by it of a sewer. *Frostburg v. Hitchins*, 70 Md. 56.

The gist of city's liability is negligence. *Baltimore v. Schnitker*, 84 Md. 34.

NEGLIGENCE IN MAINTENANCE.

No liability attached where a sewer was constructed too small to carry off the water intended to be carried off, and plaintiff's cellar, where he entered his drain into the sewer, was overflowed. *Buckley v. New Bedford*, 155 Mass. 64.

By undertaking to construct a sewer a city undertakes the obligation of seeing that it is adequate for the purposes for which it is designed. *Seaman v. Marshall*, 116 Mich. 327.

That the proceedings directing the construction of a sewer were irregular did not relieve city of liability, where it had power to order the work done, and accepted the results. *Foncannon v. Kirksville*, 88 Mo. App. 279.

Damage to plaintiff's land from flooding caused by defective private culvert which the city negligently permitted to be improperly constructed, is chargeable to the city. *Hans v. Bethlehem*, 134 Pa. St. 12; *Bates v. Westborough*, 151 Mass. 174.

A municipality is liable for damages done the property of another from the negligent construction and drainage of a public school outhouse. *Briegel v. Philadelphia*, 135 Pa. St. 451.

Damage to plaintiff's cellar from overflow of a sewer is chargeable to municipality, whether caused by original defect or as a result of its being stopped up, although its capacity was sufficient. *Markle v. Berwick*, 142 Pa. St. 84.

Damage to land from inability of sewer to carry off water of a violent rain storm is not chargeable to the city. *Fairlawn v. Scranton*, 148 Pa. St. 231, following *Fair v. Philadelphia*, 88 id. 309, and *Collins v. Philadelphia*, 93 id. 272; *Bear v. Allentown*, 148 id. 80.

Recovery may be had for damages to a dock from deposits from a sewer, where it was shown that the same could have been avoided by extending the sewer on ground owned by the city. *Butchers' Ice &c. Co. v. Philadelphia*, 156 Pa. St. 54.

That the bottom of an upper manhole was lower than a lower one held not to show that there was not a proper fall between them. *Betterly v. Scranton*, 5 Lack. L. News, 179.

City held liable for closing up an old drain, the natural result of which was to cause an overflow during a heavy rainfall. *Schroeder v. Baraboo*, 93 Wis. 95.

2. NEGLIGENCE IN MAINTENANCE.

The defendant is liable for injuries to third parties for the neglect of persons, not contractors, employed by the officers of the corporation in the repair of sewers.

NEGLIGENCE IN MAINTENANCE.

About eight o'clock in the evening, it being a dark night, while plaintiff was driving his horse before a cart at a walk along Broome street, in the city of New York, his horse fell into a hole dug on the day previous to the accident, and received injuries by the fall which resulted in his death. The hole was dug on the day previous to the accident by direction of an officer of the corporation of New York, having charge of the cleaning of public sewers, in order to cleanse the sewer in Broome street, and remained open that night, and no light was near to give notice of its presence. *Lloyd v. Mayor &c.*, 5 N. Y. 369, aff'g judg't for pl'ff.

A boy was drowned in a hole beside a sewer on private and state property, and fifty feet from the street. Defendant was not liable. *Murphy v. Brooklyn*, 118 N. Y. 575, aff'g nonsuit.

Distinguishing *Beck v. Carter*, 68 N. Y. 283, and following *Murphy v. City of Brooklyn*, 98 N. Y. 642.

The defendant's officer, in cleaning a gutter, had left the sewer obstructed, whereby the street and walk were covered with water, and the plaintiff, unable in the night to determine the position of this gutter, was injured. Defendant's street commissioner, on the day of the accident, found the gutter at the point in question full of ice and snow, and water running over the walk; he cleaned out the gutter, but did not remove the obstructions which prevented the water from running into the sewer, and left the streets in that condition. The place was not guarded, and no lights were placed there. It also appeared that two persons with plaintiff crossed the gutter before him in safety. He was carrying a child and proceeded with caution, but chanced to overstep the sidewalk, and so fell into the gutter. *Bly v. Whitehall*, 120 N. Y. 506, aff'g judg't for pl'ff.

Authority to extend a sewer system is not authority to discharge it into a creek near a private residence. *Moody v. Saratoga Springs*, 163 N. Y. 581; aff'g s. c., 47 App. Div. 207.

The defendant constructed in Frankfort street, from the corner of Franklin and Chatham streets, a sewer extending towards the East river, and thereafter the owner of No. 17 Chatham street was permitted by the defendant to construct a private drain from said house through Chatham street to said public sewer. The owner of Nos. 13 and 15 Chatham street was allowed by the defendant to open the street and make connection with such private drain, but he was told that there was no public sewer in Chatham street, and that as No. 17 Chatham street had been taken by the Brooklyn bridge, he must obtain permission to use the drain from the bridge officials. This permission having been procured, a permit was given, the applicant being told that if he went in there he did so at his

own risk. The plaintiff fitted up the premises, and subsequently, in February, 1881, and on several occasions, sewer refuse ran on plaintiff's premises through the connection made with the drain. If the difficulty arose from the fact that the drain in Chatham street was obstructed, the defendant was not liable, but if the obstruction was in Franklin street, the defendant became liable for the overflow. It was argued that the possession of the drain by the bridge trustees was the possession of the cities of New York and Brooklyn, and that the negligence of the bridge officials would be the negligence of the city; but it was held that such possession was as private owners and not in the use or control of the city of New York under public authority, and also that such trustees were under no greater obligation to keep the drain in repair than was the lessee, the plaintiff himself. *Kosmak v. Mayor*, 53 Hun, 329, aff'g judg't for def't.

Although the plan of a sewer may not, yet negligence in keeping same in repair, does impute negligence to the municipality. *Cassidy v. Poughkeepsie*, 71 Hun, 144.

The question of negligence in making the addition was for the jury, where a drain designed for the conveyance of surface water only, had sewer connections made to it, which, on account of the overflow of the catch basin into which it ran, backed sewage onto plaintiff's premises. *Burnett v. New York*, 36 App. Div. 458.

An action will lie for damages due to a city's failure to keep a sewer in repair, and plaintiff's assumption that the city would repair the same and his consequent failure to do so, would not defeat his action. *Spangler v. San Francisco*, 84 Cal. 12.

Obstruction not ground of liability for backing sewage on private premises, where the result would have been substantially the same had it been unobstructed. *Hession v. Wilmington*, 1 Marv. (Del.) 122.

City held liable for wholly insufficient sewer. *Peoria v. Eisler*, 62 Ill. App. 26.

Non-repair caused an overflow. Recovery was allowed. *Brunswick v. Tucker*, 103 Ga. 233.

Where a sewer is permitted to become defective so as to become a nuisance and injure surrounding property, the owner thereof may recover against the city. *Massengale v. Atlanta*, 113 Ga. 966.

Recovery may be had in an action against a municipality for injury suffered by reason of stench from a sewer. *Bloomington v. Murnin*, 36 Ill. App. 647.

Discharge from a city sewer of such a kind and at such a place as to endanger the health of the plaintiff, gives him a right of action for injuries suffered. *Jacksonville v. Doan*, 145 Ill. 23.

CONTRIBUTORY NEGLIGENCE.

Damages caused by an unauthorized use of a sewer is actionable. *Champaign v. Forrester*, 29 Ill. App. 117.

No recovery was allowed for expenses incurred by reason of defendant's (city's) abandonment of one of its water mains. *Linck v. Litchfield*, 31 Ill. App. 118.

Recovery may be had against a city for allowing water to collect near plaintiff's property without providing any outlet for the same. *New Albany v. Ray*, 3 Ind. App. 321.

By undertaking to construct a sewer a city assumes the obligation of keeping it in repair. *Chicago v. Seben*, 165 Ill. 371; aff'g s. c., 62 Ill. App. 248.

Kankakee v. Illinois Eastern Hospital Trustees, 66 Ill. App. 112; *Lindsay v. Sherman*, (Tex. Civ. App.) 36 S. W. Rep. 1019; *Dallas v. Webb*, 22 Tex. Civ. App. 48.

City was liable for filth deposited on private property by reason of its sewer becoming choked up. *Louisville v. O'Malley*, (Ky.) 53 S. W. Rep. 287.

Repeated overflows should have given a city notice that its sewer was inadequate. *Louisville v. Gimpel*, (Ky.) 59 S. W. Rep. 1096.

A railroad company which includes that portion of a street which contained a culvert within its limits, must assume the duty of maintaining both, and damage to property from defective culvert is chargeable to it and not to the city. *Lander v. Bath*, 85 Me. 141.

The repairing of a sewer which belongs to a city, is a ministerial act. *Hamlin v. Biddeford*, 95 Me. 308.

City walled up the old sewer before plaintiff had connected with the new. It was liable for forcing plaintiff's sewage back on his premises. *O'Brien v. Worcester*, 172 Mass. 348.

City held not liable for explosion of gas in a sewer. *Fuchs v. St. Louis*, 167 Mo. 620.

No liability attached to a city for the necessary uncovering, for the purpose of laying a sewer, of plaintiff company's gas pipes. *Portsmouth Gas Light Co. v. Shanahan*, 65 N. H. 233.

3. CONTRIBUTORY NEGLIGENCE.

If by plaintiff's knowledge or consent a sewer be built or continued on to her land, she cannot recover for damage from sewage coming on her land, so long as she allows the sewer to remain there. She could remove sewer it seems. *Searing v. Village of Saratoga Springs*, 39 Hun, 307, aff'g judg't for def't, citing *McCaffrey v. City of Albany*, 11 Hun, 613; *Matter of Rhinland*, 68 N. Y. 105.

DISORDER ON STREET.

No recovery was had where the damage was due to plaintiff's failure to make proper connection with the sewer. *Wilson v. Waterbury*, 73 Conn. 416.

See, also, *Guthrie v. Nix*, 5 Okla. 555.

Otherwise, where he failed to connect with a new sewer because he was not notified that it was completed. *O'Brien v. Worcester*, 172 Mass. 348.

Where the damage caused by plaintiff's connection in violation of the city's ordinance could not be separated from that which would have been caused in any event, he was not allowed to recover. *Breuck v. Holyoke*, 167 Mass. 258.

(j). DISORDER ON STREET.

The plaintiff was, on the third day of the opening of the Brooklyn bridge, thrown down on the bridge by the crowd and trampled by the crowd. There were forty-four (44) policemen. The two previous days there were large crowds and nothing to indicate inadequacy of police. No liability. The action was against trustees of bridge. *Hannon v. Agnew*, 96 N. Y. 439, aff'g nonsuit.

The city of Cohoes had authorized the use of a particular street for coasting, and plaintiff having been run into and injured by a large bob sled loaded with twelve or fourteen persons, sued the defendant therefor. The question was for the jury as to whether coasting was a legitimate use of the street, and if such was the case, defendant was not liable because the privilege was abused.

The city, having obtained a verdict upon the whole case, was not liable because, under cover of such a license, a reckless person might have come upon the street with a large sleigh and run down a pedestrian using the same. *Arthur v. Cohoes*, 55 Hun, 36, aff'g judgt for def't, 134 N. Y. 589.

No action can be maintained against a municipal corporation for damage by firing of gunpowder, where an ordinance prohibited the same except by permission of the mayor, and this had been obtained. *Wheeler v. Plymouth*, 116 Ind. 158.

A crowd destroying property by a Christmas celebration with boom and rockets, imposed the statutory liability upon the city for property destroyed by a "riotous or tumultuous assemblage." *Madisonville v. Bishop*, (Ky.) 67 S. W. Rep. 269.

Plaintiff's horse was frightened by the licensed firing of a cannon on

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Boston common, and no recovery was allowed against the city for injuries sustained. *Lincoln v. Boston*, 148 Mass. 578.

See "Fireworks."

City is not liable for injury to traveler from one coasting on the street. *Dillon's Munic. Corp.*, § 981, note.

It is within the judicial discretion of a court to close a street when the noise of the same prevents the judge and jury from hearing witnesses and counsel. *Belvin v. Richmond*, 13 Va. L. J. 39.

That a city's officers consented to display of fireworks in street was insufficient to charge it with liability for injury therefrom. *Bartlett v. Clarksburg*, 45 W. Va. 393; s. c., 43 L. R. A. 295.

(k). INJURY FROM MOBS, &c.

The liability of a municipality for the destruction of private property by mobs entirely depends upon statute. *Dillon's Munic. Corp.*, sec. 959; *Louisiana v. New Orleans*, 109 U. S. 285.

1. NO LIABILITY IN ABSENCE OF STATUTE.

Under the statute, if a mob be maddened by the voluntary and unlawful act of claimant, here selling liquor without a license, and destruction of property is the result, the city or county cannot be liable therefor. If the act of destruction was occasioned or in any manner aided, sanctioned or permitted by carelessness or negligence of claimant, there can be no recovery. *Paladino v. Supervisors of Westchester County*, 47 Hun, 337, rev'g judg't for pl'ff.

Statutory liability for acts of mobs does not exclude general liability for torts. *May v. Anaconda*, 26 Mont. 140.

No liability in absence of statute. *Wallace v. Norman*, 9 Okla. 339.

See, also, *Chicago League Ball Club v. Chicago*, 77 Ill. App. 124.

2. CONSTITUTIONALITY OF STATUTES IMPOSING LIABILITY.

A statute imposing a liability for the acts of mobs or riots regardless of any question of negligence held constitutional. *Chicago v. Manhattan Cement Co.*, 178 Ill. 372.

Pennsylvania Co. v. Chicago, 81 Fed. Rep. 317.

Carrying away property is a destruction within such statute. *Spring Valley Coal Co. v. Spring Valley*, 65 Ill. App. 571.

Impending danger of liability under such a statute held sufficient justification for taking private property for public use. *Chicago League Ball Club v. Chicago*, 77 Ill. App. 124.

EFFECT OF PROVISION, REQUIRING NOTICE.

A statute giving recovery for the death of one lynched by a mob and authorizing the county to defray the judgment, held constitutional. *Champaign County v. Church*, 62 Oh. St. 318.

3. TO WHAT CORPORATE BODIES THEY APPLY.

A parish is not a municipal corporation under La. R. S. sec. 2453 as to liability for the acts of mobs. *Fischer v. Bordelon*, 52 La. Ann. 429.

4. TO WHAT PERSONS THEY APPLY.

Liability extends to pound keepers out of whose custody stock has been taken. *New Orleans v. Kerr*, 50 La. Ann. 413.

It extends to prisoners. *Brown v. Orangeburg County*, 55 S. C. 45; s. c., 44 L. R. A. 734.

5. WHAT CONSTITUTES A MOB.

A riotous and disorderly crowd of men, women and boys who, with force and violence and in defiance of law demolish buildings on private premises, and remove material therefrom, held to be a "mob." *Marshall v. Buffalo*, 50 App. Div. 149.

6. PROOF OF UNLAWFUL INTENTION.

Recovery under a statute, giving damages to those suffering from mob violence, is not affected by the fact that the assembly was for a lawful purpose. *Commissioners v. Church*, 62 Oh. St. 318.

The agreement may be deduced from the surrounding circumstances. *Mitchell v. Champaign County*, 9 Oh. S. & C. P. Doc. 821.

Explosion of a common cracker in violation of an ordinance by one of a crowd celebrating the fourth of July did not impose statutory liability for acts of a rioter or a member of a mob. *Aron v. Wausau*, 98 Wis. 502; s. c., 40 L. R. A. 733.

7. EFFECT OF PROVISION, REQUIRING NOTICE.

Failure to notify the sheriff did not defeat recovery where there was no opportunity to do so. *Salisbury v. Washington County*, 30 App. Div. 187; rev'g s. c., 22 Misc. 41.

Where recovery may be had under statute for injuries resulting from the gathering of riotous mobs, but notice of such gathering to the authorities is a condition precedent to the right of action, it was not sufficient to allege merely that the authorities had notice of such riotous mob, and

OBJECTS CALCULATED TO FRIGHTEN HORSES.

could have suppressed it but did not. *Henderson v. Pargny*, 15 Ky. L. R. 745. See cases on notice, Dillon's Munic. Corp., sec. 950.

8. CONTRIBUTORY NEGLIGENCE.

Three "roughs" went to plaintiff's hotel and said that they had come to kill her. When told that she was at home they asked for her, and were furnished with lager beer by two family servants who drank with them. The visitors then began to dance and sing and assault the women, who ran in their fright out of the house, whereupon the men destroyed the furniture, &c., and an action was brought to recover for the loss thereof under chap. 428, Laws 1855—"an act to provide for compensating parties whose property may be destroyed in consequence of mobs or riots." The act provides that no recovery shall be had if the injury "was occasioned or in any manner aided, sanctioned or permitted by the carelessness or negligence of such person," and as the riot began only after liquor had been furnished to the rioters by plaintiff's servants, no recovery was allowed. An action for the same case was brought in the court within three months after the injury, and was dismissed for want of jurisdiction, and about nine months after the injury this action was begun. This action was based upon the provision of the statute that "no action shall be maintained unless the same shall be brought within three months after loss or injury" and was barred. *Hill v. Supervisors of Rensselaer County*, 53 Hun, 194, rev'g judg't for pl'ff.

Employment of degraded laborers or the maintenance of an unauthorized store by the corporation which was the subject of the riot held not a defence. *Spring Valley Coal Co. v. Spring Valley*, 72 Ill. App. 629; s. c., rev'd, 173 Ill. 497.

Reasonable protection of one's own property against a mob does not require one to defend it at the point of a gun. *Spring Valley Coal Co. v. Spring Valley*, 96 Ill. App. 230.

(1). OBJECTS CALCULATED TO FRIGHTEN HORSES.

1. OBJECTS CALCULATED TO FRIGHTEN HORSES OF ORDINARY GENTLENESS ARE DEFECTS IN A HIGHWAY.

An advertising banner, twenty-four by twelve feet, was suspended across the street and frightened plaintiff's horses. Trustees of village were negligent in allowing it to remain there. *Champlin v. Penn Yan*, 34 Hun, 33, aff'g judg't for pl'ff.

From opinion.—"The argument presented by the defendant is this: that it is not the duty of a municipal corporation to remove objects suspended over the street, fastened to supports wholly outside of the street, if they are elevated so

high as not to actually obstruct the use of the road bed or sidewalk. In this state, the proposition, as stated, has never been approved by any reported decision, nor have I been able to find any rule or authority which supports the argument. I think the doctrine contended for was repudiated in *Hume v. The Mayor*, 74 N. Y. 264. In that case the erection complained of as an obstruction to the street was an awning made of a permanent roofing of boards over the entire sidewalk, resting against the building and supported on the outer line by wooden posts standing in the ground, near the curb stone, and was used wholly for private purposes. This was held to be an unauthorized obstruction, or an encroachment upon the street, and the city was liable to a person injured by its fall, for the reason that it was the duty of the city to remove it after notice of its erection. In the opinion of the court, no point was made of the circumstance that a part of the structure was supported by a post standing in the street. The court referred to several Massachusetts cases, with approval, where hanging objects were supported by fastenings in the face of the buildings which were standing on the line of the street, which were held to be unlawful obstructions. The cases to which I refer are *Pedrick v. Bailey*, 12 Gray, 161; *Day v. The Inhabitants of Milford*, 5 Allen, 98. The court commenting on these cases said they are precisely in point upon the question whether such structure, if in a dangerous position or condition, is a defect in the street, which a municipal corporation, in pursuance of its general duty, is bound to remove or repair. It has been repeatedly held that it is the duty of a municipal corporation to remove objects deposited upon the streets, the natural effect of which is to occasion accidents, frightening horses of ordinary gentleness, although the objects were placed wholly outside of the traveled part of the road bed.

In *Eggleston v. The Columbia Turnpike Co.*, 18 Hun, 146, the court remarked, the more common causes of injury and liability are structural defects or means to repair the road bed; but a road may also be rendered unsafe, with consequent liabilities therefor, by unsightly objects placed or permitted to remain upon it, which are calculated to frighten animals employed thereon. See, also, *Sherm. & Redf. on Neg.*, sec. 388; *Morse v. Richmond*, 41 Vt. 435; *Winship v. Enfield*, 42 N. H. 199; *Dimock v. Suffield*, 30 Conn. 129; *Bennett v. Lovell*, 18 Alb. L. J. 303; *Harris v. Mobbs*, id. 382. * * *

In many of the cases cited the argument is rejected that a road bed can only be rendered defective by something in or upon the road itself, as being narrow and unreasonable. See *Norristown v. Moyer*, 67 Penn. 365; *Grove v. City of Fort Wayne*, 45 Ind. 429.

In order to avoid a boulder in the center of a highway, the roadbed was constructed upon the west side of the same. The horses of the plaintiff shied at the boulder, upset the wagon and injured the plaintiff. The boulder was visible for some distance and was not peculiar in shape or appearance. The road round it was in proper condition and of sufficient width to allow a team to safely pass, and the defendant was not liable. In order to make the town liable in such a case, the character of the object should be such as to make the liability of its frightening horses obvious. *Dimock v. Town of Suffield*, 30 Conn. 129; *Ayer v. City of Norwich*, 39 id. 376; *Card v. City of Ellsworth*, 65 Me. 547; *Nichols v. Athens*, 66 id. 402.

OBJECTS CALCULATED TO FRIGHTEN HORSES.

In laying out a highway, town officers act to a certain extent in a *quasi* judicial manner.

In determining to avoid, rather than to remove, the boulder, they exercised their judgment; and if, in such exercise, they failed, the town could not be made liable to a person injured. (*Urquhart v. Ogdensburg*, 91 N. Y. 67; s. c., 97 id. 238; see, also, *Gould v. Topeka*, 32 Kas. 485.) *Barrett v. Walworth*, 64 Hun, 526, aff'g nonsuit.

Municipality held liable for injury caused by a steam roller that approached within 20 feet of a cross street without notice of warning. *Mullen v. Glens Falls*, 11 App. Div. 275.

A couple of lumber wagons along the side of a street were not. *Studeor v. Gouverneur*, 15 App. Div. 229.

It was for the jury to say whether a steam roller 20 feet long and ten feet high, covered with a blanket, by the side of a street about three rods wide, was such an obstruction. *Halstead v. Warsaw*, 43 App. Div. 39.

It is not, as a matter of law, negligent, where city had not had opportunity to remove it. *Columbia v. Moulton*, 181 U. S. 576; rev'g s. c., 15 App. Div. 363.

Mullen v. Glens Falls, 11 App. Div. 275; *Lane v. Lewiston*, 91 Me. 292.

A tent partly on the traveled path of a highway frightened horse, and recovery was had. *Ayer v. Norwich*, 39 Conn. 376.

A horse died in the street at two P. M. and was left there until the next day at three P. M., when a horse was frightened and city was liable for resulting injury. *Chicago v. Hoy*, 75 Ill. 530.

See *Cushing v. Bedford*, 125 Mass. 526; *Kellogg v. Northampton*, 4 Gray, (Mass.) 165; *Snow v. Adams*, 1 Cush. 443; *Gorham v. Cooperstown*, 59 N. Y. 660; *Mackler v. Shaftsborough*, 46 Vt. 580; *Norristown v. Moyer*, 67 Pa. St. 355; *Cogswell v. Lexington*, 4 Cush. (Mass.) 307; *Champlin v. Village of Penn Yan*, 102 N. Y. 680; 34 Hun, 33, (See opinion, *ante*, p. 1912); *Eggleston v. Columbian Turnpike Co.*, 82 N. Y. 281, rev'g 18 Hun, 146; *Roads & Streets*, Elliott, 482, 483, 449; *Cooley on Torts*, 617; *Thompson on Neg.* 349; *Barrett v. Town of Walworth*, 64 Hun, 529; *Winship v. Enfield*, 42 N. H. 197; *Chamberlain v. Enfield*, 43 id. 359.

(See *post*, pp. 2365-6.

City was negligent in leaving a steam roller on the street after the work was finished merely as a place of storage. *Elgin v. Thompson*, 98 Ill. App. 358.

Towns and cities, in the absence of contributory negligence, are liable for injuries resulting from the fright of horses of ordinary gentleness at objects naturally calculated to frighten horses, and which the corporation has negligently placed or permitted to be placed and remain upon the street. A person was allowed to manufacture candy on a street,

CONTRIBUTORY NEGLIGENCE

and a tripod supporting a vessel with fire under it frightened horses. A recovery was sustained. *Rushville v. Adams*, 107 Ind. 475; *Morse v. Richmond*, 41 Vt. 435.

See, also, *Foshay v. Glen Haven*, 25 Wis. 288, (a hollow burnt log); *Card v. Ellsworth*, 65 Me. 547; *Ayer v. Norwich*, 39 Conn. 376; *Equinoire v. Union County*, 112 Iowa, 558.

The escape of water from an open hydrant with considerable force and noise. *Topeka Water Co. v. Whiting*, 58 Kan. 639; s. c., 39 L. R. A. 90.

A horse was frightened by stones filled into a hole in the highway, and no recovery was allowed. *Lawrence v. Mt. Vernon*, 35 Me. 100.

A horse was frightened at a pile of shingles. No recovery. *Merrill v. Hampden*, 26 Me. 234.

A tree standing on a cart in a highway, and no recovery was had. *Davis v. Bangor*, 42 Me. 522.

A horse was frightened by the vehicle coming in collision with defect in the highway, and recovery was had. *Clark v. Lebanon*, 63 Me. 393.

A large rock was dug from the earth and left in the traveled way, whereby a horse was frightened, and recovery for injury was sustained. *Card v. Ellsworth*, 65 Me. 547.

If calculated to cause fright, though not absolutely certain to, it is an obstruction. *Golden v. Chicago & C. R. Co.*, 84 Mo. App. 59.

A town was liable for a steam thresher within the limits of a highway, whereby horses were frightened, and injury resulted. *Burrell Township v. Uncapper*, 117 Pa. St. 353.

A horse was frightened by tubing and machinery left by the side of the highway in the course of the transportation of the same, and recovery was had. *Bennett v. Lovell*, 12 R. I. 166.

A steam threshing engine is not *per se* calculated to frighten horses. *Ouverson v. Grafton*, 5 N. D. 281.

City was negligent in unnecessarily leaving stones for repair where they were calculated to frighten horses. *Patterson v. Austin*, 15 Tex. Civ. App. 201.

So, in leaving a scraper by the way with its bright side upturned. *Weatherford v. Lowery*, (Tex. Civ. App.) 47 S. W. Rep. 34.

Injury held to have been caused by the defect though actually received by an obstacle further on. *Donohue v. Warren*, 95 Wis. 367.

2. CONTRIBUTORY NEGLIGENCE.

Plaintiff saw a steam roller in plenty of time to have avoided it. *Lane v. Lewiston*, 91 Me. 292.

Maanum v. Madison, 104 Wis. 272; *Studeor v. Gouverneur*, 15 App. Div. 229.

BUILDING OPERATIONS.

Fright at a scraper did not make plaintiff negligent in attempting to force his horse past it. *Weatherford v. Lowery*, (Tex. Civ. App.) 47 S. W. Rep. 34.

Where horse was accustomed to bicycles, driver was not guilty of contributory negligence in not holding him by the head, though on an elevated roadway. *White v. Ballard*, 19 Wash. 284.

See, also, *Ouverson v. Grafton*, 5 N. D. 881.

(m). LICENSING NUISANCES.

1. ENCROACHMENTS AND OBSTRUCTIONS ON STREET OR SIDEWALK.

Where a municipal corporation, without pretense of authority and in direct violation of a statute, assumes to grant to a private individual the right to obstruct one of its streets while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance, so long as the obstruction is continued by reason of or under the license, and it is liable for damages resulting therefrom to a third person. A grocer habitually kept his wagon, when unused, in the street in front of his store, under a permit to him from the defendant, for which he paid a license fee, and the thills were held by strings in a perpendicular position. A passing wagon, colliding with the grocer's wagon, caused the thills to fall upon a person passing in the street, causing his death.

The license was unauthorized, (sec. 86, subd. 4, chap. 410, L. 1882) the storage of the wagon in the street was a public nuisance, and the defendant was liable as if it itself maintained the nuisance. *Cohen v. The Mayor &c.*, 113 N. Y. 532, rev'g 43 Hun, 345, and judg't for def't.

License to occupation of a portion of a street with conveyances was void. *Lancaster v. Reisner*, 14 Lanc. L. Rev. 193.

So, as to licensing the obstruction of the highway. *Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488.

Permission to excavate did not relieve city from liability where the excavation became a menace through failure to guard it. *Sproul v. Seattle*, 17 Wash. 256.

2. BUILDING OPERATIONS.

The city does not license a nuisance by permitting building materials to be placed in front of a lot for the purpose of the construction of a building thereon. *Beetz v. Brooklyn*, 10 App. Div. 382.

City's permit to occupy a third of the street with building material was violated and the street was half obstructed with such material. Neither

OBSTRUCTIONS, EXCAVATIONS AND OTHER DEFECTS IN STREETS.

were lights or guards placed about it. City was equally chargeable with the builders. *Rommeney v. New York*, 49 App. Div. 64.

License to occupy a portion of a street for building operations did not permit the driving of teams across the sidewalk so as to break it up. *Springfield v. Boyle*, 164 Mass. 591.

The implied license to obstruct a street given an abutting owner by the direction of a city to build a sidewalk within five days does not extend beyond that period. *Davis v. Omaha*, 47 Neb. 836.

3. EXERCISE OF FRANCHISES.

Authorization by a city for a telephone company to erect its poles in such a way that they projected into the driveway and obstructed the passage of ordinary vehicles near the curb was a sufficient sanction for the creation of an unsafe condition of the street to sustain a verdict against the city. *Fisher v. Mt. Vernon*, 41 App. Div. 293.

By granting franchises to street railway companies a city does not become liable for the latter's violation of ordinance speed. *Hammel v. Denver*, 30 Chic. Leg. News, 262.

Nor for negligent location of a pole. *Tatman v. Benton Harbor*, 115 Mich. 695.

Nor for negligence in building a tunnel. *Terry v. Richmond*, 94 Va. 537.

City must provide for the change in the flow of surface water caused by building of railway. *Peoria v. Adams*, 72 Ill. App. 662.

Zanesville v. Fannan, 53 Oh. St. 605.

4. OCCUPATIONS AFFECTING PUBLIC HEALTH.

Authority to create a nuisance affecting the public health was invalid. *Belton v. Baylor Female College*, (Tex. Civ. App.) 33 S. W. Rep. 680.

5. BICYCLES.

Where the village is one in which the use of the sidewalks by bicycles does not become a nuisance they may be allowed thereon by ordinance. *Lechner v. Newark*, 19 Misc. 452.

Town authorized by statute to license nuisances injurious to health and exempted from liability therefor. *State v. Barnes*, 20 R. I. 525.

(n). OBSTRUCTIONS, EXCAVATIONS AND OTHER DEFECTS IN STREETS AND HIGHWAYS.

It is the duty of a municipality to use ordinary care (the care that a person of ordinary prudence and judgment would observe under the circumstances)

DUTY TO USE CARE IN CONSTRUCTION AND MAINTENANCE.

to so maintain and preserve streets and highways from excavations, obstructions or defects, that persons properly using them will not suffer injury therefrom. The municipality must use active watchfulness, and is liable for injury arising from defects in the street of which it had, or in the exercise of the requisite care should have had, notice. This would be the rule in the case of defects arising from the ordinary and lawful use of the street and its structures by the public, and the decay, deterioration and disrepair arising therefrom, as well as to improper uses and obstructions of the street by parties acting without the license or authority of the municipality. But if the cause of injury is the direct wrongful act of the municipality or its agents, or the wrongful act of another by its sanction, it is not entitled to notice of the existence thereof. And so if instead of making requisite improvements and repairs, through its own agencies and instrumentalities, it intrusts the work to an independent contractor, it cannot by this delegation of authority escape liability for injury that results, in whole or part, from the nature of the work. "Where the obstruction or defect caused or created in the street is purely collateral to the work to be done, and is *entirely* the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but when the obstruction or defect which occasioned the injury results directly from the acts which the contractor agreed and was authorized to do, the person who employs the contractor and authorized him to do those acts, is equally liable to the injured party," and in such case, the municipality would not be entitled to notice of the defect. This creates liability on the part of the municipality for injuries to persons using the street from unguarded or unlighted excavations or obstructions, or insufficient temporary bridges, walks, or similar conditions. The strength of structures on a street, like bridges, etc., should be such as will safely carry the burdens that are usually transported, and need not be suited to objects of extraordinary weight, like elephants or traction engines; and so in some states it is considered that a municipality is not bound to so make its roads that travelers shall be safe when their horses are frightened, unmanageable or running away; but it is otherwise held in several states. A municipality is liable for negligently placing, or suffering to be placed or remain in or beside the street, anything calculated to frighten ordinarily gentle horses, or for negligently allowing to remain beside the street a tree or building or other erection that may be reasonably expected to fall or do injury to travelers. It has been held also that it is liable for negligently interrupting or disturbing gas or water pipes, lawfully occupying a street; but such appliances should be deemed to have been placed in the street subject to the proper use and repair and improvement thereof.

1. DUTY TO USE DUE CARE IN CONSTRUCTION AND MAINTENANCE.

An old well partly under the sidewalk tumbled in. The city sent its servants to fix it, and they worked so negligently that the adjacent earth caved in and carried a boy standing near. The city is liable to the administrator. Under the statute, one killed by negligence need not leave "widow and next of kin" to authorize a recovery. *McMahon v. Mayor*, 33 N. Y. 642, aff'g judg't for pl'ff.

If the owner of a sidewalk does not keep it in repair, the municipality must provide for its safe condition. A mere service of notice to repair, upon the owner, did not, as matter of law, release defendant from further liability; it was still its duty to keep the sidewalks in such condition that they might be safely traveled, and, after notice of existing danger, to cause immediate reparation, or, if delay was necessary, by some guard or barrier close the unsafe place against the public, and for an omission to perform this duty with reasonable care and vigilance it was liable. *Russell v. Canastota*, 98 N. Y. 496, aff'g judg't for pl'ff.

Under chapter 29, Laws 1870, a village is liable for the proper care of its streets, and it is no excuse that the defect existed before the incorporation of the village. *Nelson v. Canisteo*, 100 N. Y. 89, aff'g judg't for pl'ff.

A municipality owes the public the duty to maintain highways under their care in a good, safe and secure condition, and is liable for failure to do so. The fact that a contractor was negligent does not absolve the municipality. The municipality is entitled to notice of an unsafe condition not caused by its agency. In this case the contractor had finished work at the *locus in quo*, and the city did not use care thereafter. *Turner v. Newburgh*, 109 N. Y. 301, aff'g judg't for the pl'ff.*

From opinion.—"The city is not an insurer of the safety of those who travel on its highways, and those who do so are bound to use their faculties and are held to the exercise of ordinary care and prudence. The duty of the city to keep its streets in a safe condition for public use is absolute, and it is bound to exercise reasonable diligence and care to accomplish that end. And, in cases like the present, where it has employed a contractor to do work involving excavation of its streets, it is not absolved from its duty and responsibility. *Dillon on Municipal Corporations*, secs. 791-793, 1066; *Storrs v. City of Utica*, 17 N. Y. 104; *Brusso v. City of Buffalo*, 90 id. 679; *Kunz v. City of Troy*, 104 id. 344, 349.

* * * The city cannot claim legal exemption from liability by reason of its having contracted out the construction of this sewer, and because it had not yet accepted the work of the contractor. The streets remained as much as ever in the care and under the supervision of its officials, and as the defendant's officers had permitted the street at that point to be open for public travel, the city was not discharged from liability for accidents occurring through some defective condition of the streets, by reason of its not having technically or formally accepted the work under the sewer contract; provided, as in all other like cases, the defect had existed a sufficient length of time to charge the city officials with negligence is a question of fact for the jury to consider and decide, in view of all the circumstances disclosed by the proof; for in different cases what would be a sufficient length of time might vary in the judgment of men."

Notwithstanding it be the primary duty of a railroad company to restore and maintain a portion of the public highway, in this case a bridge, occupied by it, yet the municipality is not relieved from its duty to keep

* NOTE.—See *Pettengill v. Yonkers*, 116 N. Y. 558, digested, *post*, 1991.

DUTY TO USE CARE IN CONSTRUCTION AND MAINTENANCE.

the street in repair, and so a city may have action against a railway company for the sum it may be compelled to pay by failure of the railroad company to keep the bridge in repair. *People v. Troy & B. R. R. Co.*, 37 How. 427; *Wilson v. City of W.*, 3 Hun, 508; *Tierney v. Troy*, 41 id. 120, rev'g nonsuit.

Citing *Wilson v. Watertown*, 3 Hun, 508; *People ex rel. Mackey v. Brooklyn*, 65 N. Y. 349.

City not liable for injury from excavation by water company, refilled and apparently safe till a heavy rain. *Riley v. Eastchester*, 18 App. Div. 94.

Sluice in course of repair on an unfrequented road was guarded by tiling placed across the road some distance from it. Held sufficient. *Snowden v. Somerset*, 52 App. Div. 84.

Wire across the street without warnings was negligence. *Anderson v. Wilmington*, 2 Penn. (Del.) 28.

Failure of a street railway to pave as agreed was no excuse for city leaving the street unpaved during the controversy. *Peoria v. Gerber*, 168 Ill. 318; aff'g s. c., 68 Ill. App. 255.

A drop of two feet in a crosswalk required warnings. *Canton v. Dewey*, 71 Ill. App. 346.

Omitting to see that an excavation of its contractor was guarded, made the city a joint tortfeasor. *Alexandria v. Young*, 20 Ind. App. 672.

See, also, *Baker v. Grand Rapids*, 111 Mich. 447; *Walker v. Ann Arbor*, 111 Mich. 1.

Otherwise, where workmen are at work in the day time and leave it momentarily. *Jones v. Clinton*, 100 Iowa, 333.

Excavation was insufficiently lighted. City was liable. *Fox v. Chelsea*, 171 Mass. 297.

That the plumber making a defective connection was licensed, was no defense. *Monje v. Grand Rapids*, (Mich.) 81 N. W. Rep. 574.

City liable for unguarded pond left on filling street. *Bowman v. Omaha*, 59 Neb. 84.

Bridging a ditch with planks and hanging up a red lantern was not sufficient. *Foy v. Winston*, 126 N. C. 381.

Necessity of the improvement, no defense to dangerous obstruction. *Moon v. Middletown*, 14 Oh. C. C. 498.

Guthrie v. Swan, 3 Okla. 116.

A hole within a few feet of a footway was left unguarded. City was liable. *Oklahoma v. Meyers*, 4 Okla. 686.

So, where the work had been accepted from the contractor and the street opened. *Burger v. Philadelphia*, 196 Pa. St. 41.

DUTY TO MAINTAIN IN REASONABLY SAFE CONDITION FOR ORDINARY USE.

Barrier was removed during the watchman's momentary absence. City was not liable. *O'Neil v. Bates*, 20 R. I. 793.

Where a pile of dirt is high enough to overturn a carefully driven carriage, absence of a light was negligence. *Norfolk v. Johnakin*, 94 Va. 285.

2. DUTY TO MAINTAIN IN REASONABLY SAFE CONDITION FOR ORDINARY USE.

Gas escaped from sagging pipe into the man-hole of a steam plant in the street and exploded. There was a proper construction of the steam pipes, under municipal authority. The enterprise was new and conducted according to the best knowledge of the subject. The defendant was not liable. The fact that perforated holes were used afterwards was immaterial. *Hunt v. Mayor &c.*, 109 N. Y. 134, aff'g 20 J. & S. 198, and nonsuit.

From opinion.—"The mere existence of a defect from which a traveller sustains injury, does not, independently of negligence, establish a culpable breach of duty on the part of a municipality. The cases of injuries from obstructions placed in streets by third persons without the consent of the municipality, of which it has no notice, are illustrations of the principle that the liability of a municipality for the unsafe condition of its streets rests upon the basis of negligence, and not upon an obligation assumed or imposed by law to keep the streets at all times and at all hazards in an absolutely safe condition for travel. Where an injury happens from the defect of a roadway itself, or from a dangerous condition of the street created by the act or consent of the municipality, negligence, as in the other cases mentioned, is the ground of liability. In the one class of cases the conclusion of negligence may be reached more easily than in the other, but the principle upon which the liability depends is the same in both, notwithstanding the difference in the circumstances. Where the defect is known, rendering the streets unsafe and dangerous, the municipality is bound to be prompt and vigilant in remedying it. It is at all times bound to exercise due care that the streets are safe and free from dangerous defects, and that they shall not become unsafe or dangerous. To this extent its duty is absolute. The language of the cases expressing the measure of duty resting upon a municipal corporation in respect to its streets, sewers, &c., has not always been carefully guarded, but the doctrine has been frequently reiterated in this court that there is no absolute guaranty or undertaking on the part of a municipal corporation that its street or other constructions shall at all times and under all circumstances be in a safe and proper condition, and that its obligation and duty extend only to the exercise of reasonable care and vigilance. *McCarthy v. Syracuse*, 46 N. Y. 194; *Smith v. Mayor &c.* 66 id. 295; *Ring v. Cohoes*, 77 id. 83; *Hubbell v. Yonkers*, 104 id. 434. There must be willful misconduct or culpable neglect to create liability."

Trench was so filled with water as to conceal the danger. Was not reasonably safe. *Denver v. Moewes*, 15 Colo. App. 28.

DUTY TO MAINTAIN IN REASONABLY SAFE CONDITION FOR ORDINARY USE.

Safety for "carriages" does not extend to bicycles. *Richardson v. Danvers*, 176 Mass. 413; s. c., 50 L. R. A. 127.

The reasonable safety required does not prevent the maintenance of such dangers as are incidental to necessary improvement. *McDonald v. St. Paul*, 82 Minn. 308.

The duty is not increased by the taking of an indemnity bond from one whom it permits to excavate. *Terry v. Richmond*, 94 Va. 537.

Animals beyond control:

A street was thirty feet wide, and ashes extended eleven feet into the street, and a wagon stood next to the ashes, leaving about twelve feet of roadway. In passing the wagon a blind runaway horse, uncontrolled by a driver, ran so near a hydrant on the opposite curb which was four inches over gutter as to hit it and injury resulted. The defendant was not liable for the injury resulting from the hydrant, but was on account of the ashes. *Ring v. City of Cohoes*, 77 N. Y. 83, rev'g 13 Hun, 77, and judg't for pl'ff.

From opinion.—"In Massachusetts, Maine and Wisconsin, it is held that municipal corporations are not bound so to make their roads that travelers shall be safe when their horses are frightened, unmanageable or running away. *Moulton v. Inhab. of Sanford*, 51 Me. 127; *Nicholas v. Inhab. of Athens*, 66 id. 402; *Perkins v. Inhab. of Fayette*, 68 id. 152; *Davis v. Inhab. of Dudley*, 4 Allen, 558; *Titus v. Inhab. of Northbridge*, 97 Mass. 258; *Fogg v. Inhab. of Nahant*, 98 id. 578; *Murdock v. Inhab. of Warwick*, 4 Gray, 178; *Dreher v. Inhab. of Fitchbury*, 22 Wis. 675; *Houfe v. Inhab. of Fulton*, 29 id. 296. In *Titus v. Inhab. of Northbridge*, Chapman, J., said: 'When a horse, by reason of fright, disease or viciousness, becomes actually uncontrollable, so that his driver cannot stop him or direct his course, or exercise or regain control over his movements, and in this condition comes upon a defect in the highway, by which an injury is occasioned, the town is not liable for the injury, unless it appears that it would have occurred if the horses had not been so uncontrollable.' In such cases it is said that the conduct of the horse is the primary cause of the accident; that there are two efficient, independent proximate causes, the primary cause being one for which the corporation is not liable, and as to which the traveler himself is in no fault, and the other being a defect in the highway; and hence, that it is impossible to determine that the accident would have happened but for the primary cause. But within the rule laid down in those states, a horse is not to be considered uncontrollable that merely shies or starts, or is momentarily not controlled by his driver. *Titus v. Inhab. of Northbridge*, *supra*; *Stone v. Inhab. of Hubbardston*, 100 Mass. 54. But in Vermont, New Hampshire, Connecticut, Missouri, Pennsylvania and Upper Canada, a different rule prevails upon this subject. *Baldwin v. Turnpike Co.*, 40 Conn. 238; *Hull v. City of Kansas*, 54 Mo. 601; *Hunt v. Town of Pownal*, 9 Vt. 411; *Winship v. Enfield*, 42 N. H. 197; *Hey v. City of Philadelphia*, 81 Penn. St. 44; *Sherwood v. City of Hamilton*, 37 Upper Can. (Q. B.) 410. In these states it is held that when an accident happens from a negligent defect in the highway, the fact that the horse was, at the time uncontrollable or running away, furnishes no defense to an action for the injury."

Dillon's Munic. Corp., Sec. 1015, states that municipalities are under no duty to provide for everything that may happen, but for such things as ordinarily exist or may be reasonably expected to occur, and hence are not bound to so care for the streets that "damage may not be caused thereon by horses which have escaped from the control of the driver, and are running away."

Citing *Moss v. Burlington*, 60 Iowa, 438; *Titus v. Northbridge*, 97 Mass. 258; *Stone v. Hubbardston*, 100 id. 54.

Highway commissioners took up a plank from each end of a bridge and used it to barricade each end while making repairs. Horses ran away and ran upon the bridge and into the hole. Commissioners not liable. *Lane v. Wheeler*, 35 Hun, 606, rev'g judg't for pl'ff.

From opinion.—"In *Ring v. City of Cohoes*, 77 N. Y. 83, the cases are reviewed and the rule adopted with apparent approval is 'that when two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate—the one being a culpable defect of the highway, and the other some occurrence for which neither party is responsible—the municipality is liable provided the injury would not have been sustained but for such defect.' And this proposition is repeated in *Ehrgott v. Mayor*, 96 N. Y. 283.

In *Baldwin v. The Greenwoods Turnpike Company*, 40 Conn. 238; 16 Am. R. 33, the defendant was held liable for an injury to a runaway team which had escaped from the driver and was injured on a defective bridge which it was the duty of the defendant to keep in repair. The cases of *Hunt v. Pownall*, 9 Vt. 411; *Houfe v. Town of Fulton*, 29 Wis. 296; 9 Am. R. 568; *Page v. Bucksport*, 64 Me. 51; 18 Am. R. 239; *Hull v. City of Kansas*, 54 Mo. 598; 14 Am. R. 487; *Hey v. Philadelphia*, 81 Penn. St. 44; 22 Am. R. 733, tend in the same direction, with the difference in the facts that the drivers were with the teams when the injuries were sustained, but lost control of their movements for the time being; and such was the case of *Ring v. City of Cohoes*.

In *Palmer v. Andover*, 2 Cush. 600, the town was held liable for an injury occasioned by a defect in the highway, although the primary cause was a disconnected accident. Which case is approved in *Davis v. Dudley*, 4 Allen, 557, and distinguished from the latter, where it was held that the plaintiff could not recover because the horse broke away and escaped from the driver before he was injured. And the same distinction is observed in *Stone v. Hubbardston*, 100 Mass. 49, where the horse escaped from the control of the driver, but did not get away from him, and was injured by a defect in the highway outside the traveled track.

In *Kennedy v. Mayor*, 73 N. Y. 368, the right to recover for an injury, occasioned by defect in a highway, to a horse which has escaped from the driver and is running away, is by *dictum* questioned."

A highway bridge having been taken away by a freshet the commissioners of highways proceeded to erect a new one and put in a new stone abutment on the north side of the stream. In doing this they caused to be made an excavation, which left, when the abutment was constructed, a space of from four to five feet wide at the top and about six feet in depth north of and between it and the roadway, the abutment itself extending three feet above the surface of the highway.

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During the progress of the work upon the bridge there was a place a short distance north of it where teams left the highway and forded the stream at another point, which gave reasonable accommodations to the public travel; there was, however, at the time of the accident, no obstruction placed upon the highway to prevent a team from proceeding to the abutment, nor anything to guide a team into the passageway departing from the highway other than the track there made by its use for travel. Duty of the commissioners did not require them to guard against the fury of a runaway team. Burden was on plaintiff to show that omission caused the injury. *Stacy v. Town of Phelps*, 47 Hun, 54, rev'g judg't for pl'ff.

Fright of horse was no defense, where a defect in the street contributed to the injury. *Peoria v. Gerber*, 68 Ill. App. 255; s. c. aff'd, 168 Ill. 318.

Rock Falls v. Wells, 65 Ill. App. 557; *Vogelgesang v. St. Louis*, 139 Mo. 127; *Dillon v. Raleigh*, 124 N. C. 184; *contra*, *Ritger v. Milwaukee*, 99 Wis. 190; *McFarlane v. Sullivan*, 99 Wis. 361.

Though fright was not caused through city's fault. *Belleville v. Hoffman*, 74 Ill. App. 503.

Not bound to guard against remote danger from fright. *Dixon v. Butler*, 4 Pa. Super. Ct. 333.

Where well broken horse shied at a bird in a bush and, jumping broke through a defective bridge the town was liable. *Aldrich v. Gorham*, 77 Me. 287.

Pedestrians in street:

Use of street by pedestrians is not negligence; it simply imposes care in proportion to the dangers incident thereto. *Junction City v. Blades*, 59 Kan. 774.

Defect in the street was dangerous to pedestrians only. City's liability was for the jury. *Dallas v. Webb*, 22 Tex. Civ. App. 48.

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Obstructions incident to building operations:

The plaintiff, in the night time, ran into a lumber pile occupying half of the street and was hurt. What was sufficient presentation of claim to the city? Custom of depositing lumber in the street not proper. Evidence of another team being upset on the night before was upheld. The city cannot permit such lumber in the street. Notice of the condition of the street must exist, but may be implied from continuous condition. *Magec v. Troy*, 48 Hun, 383, aff'g judg't for pl'ff.

Plaintiff, in the night time, ran into a lumber pile occupying half of

the street, and was injured. The city cannot permit such lumber in the street; notice of the condition of the street must exist, but may be implied from continuance of condition. The judge remarked to the jury that, as a citizen, he wouldn't turn his back on the share of the taxes he would have to pay to meet the verdict. *Proper. Magee v. Troy*, 48 Hun, 383.

Action was for injuries alleged from defendant's negligence in permitting a pile of dirt to remain in one of its streets, in the night time, without a light or other danger signal. "F.," who owned a lot fronting on said street, had been engaged in filling up the same. Earth for that purpose was unloaded in the street and taken thence in wheelbarrows to the lot. While at times dirt was drawn to the street faster than it was wheeled away, there was no substantial proof that the dirt drawn on any one day to the street was not removed on the same day, with the exception of the one preceding the night of the accident. There was no evidence that defendant had any actual notice of the pile of dirt. There was nothing to charge defendant with constructive notice; the evidence failed to make out a cause of action. *Briel v. Buffalo*, 144 N. Y. 163; rev'g 68 Hun, 219, and judg't for pl'ff.

Temporary obstruction of highway with building materials is not a nuisance. *Johnson Chair Co. v. Agresto*, 73 Ill. App. 384.

Strauss v. Louisville, (Ky.) 55 S. W. Rep. 1075; *Floyd v. Henderson &c. Road Co.*, (Ky.) 56 S. W. Rep. 6; *Bueschell v. Sutherland*, 79 Mo. App. 459.

But it is necessary for it to see that they are lighted. *Koch v. Williamsport*, 195 Pa. St. 488.

City held liable for permitting obstructions for private purposes on the street. *Mischke v. Seattle*, 26 Wash. 61.

Hub stones and other protecting obstructions:

Private parties built a bridge over a highway laid out by the defendant. A driver of a circus wagon containing lions, and drawn by six horses, came around the turn that led to the bridge, and while the driver was looking back to see if his wagon was making the turn correctly, he hit the bridge and was hurt. The defendant was liable on verdict. *Sewell v. Cohoes*, 75 N. Y. 45, aff'g 11 Hun, 621, and judg't for pl'ff.

The placing of a stepping stone of ordinary size and proper construction, at the edge of a walk, in front of a public building, is not an unlawful obstruction, although others had fallen over it. The plaintiff was running to a fire. *Dubois v. Kingston*, 102 N. Y. 219, rev'g judg't for pl'ff.

A hubstone was placed at the side of a private dwelling to project beyond its edge. City was not liable to one colliding with it where there

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was ample room in which to drive without striking it. *Dougherty v. Horseheads*, 159 N. Y. 154; rev'g s. c., 5 App. Div. 625.

Jordan v. New York, 60 N. Y. Supp. 696; aff'g s. c., 26 Misc. 53.

Horse shied at barking dog and ran into stone set to protect fence cover. Recovery denied. *Hulse v. Goshen*, 71 App. Div. 436.

Water hydrant properly placed need not be guarded. *Vincennes v. Thuis*, 28 Ind. App. 523.

While attempting to avoid a passing car plaintiff collided with a post set by the city in the street to protect its piping and sidewalks. Negligence and contributory negligence were for the jury. *Meridian v. McBeath*, 80 Miss. 485.

It was for the jury to say whether city was negligent in allowing an abutting owner to place a stone against his gate to keep it closed. *Stein v. Koster*, 66 N. J. L. 155.

Rocks, stumps, posts and other projections:

A turnpike company placed a pile of stones beside the traveled part of the road to be used for repairing the same. They had a tendency to, and did, frighten horses, of which, company, through its secretary and treasurer, had notice. The company was liable for damages for the injury received by the frightening of a horse after the lapse of a reasonable time (four or five days) after such notice. Reversal on error in admission of evidence. *Eggleston v. Columbia Turnpike Co.*, 82 N. Y. 278, rev'g 18 Hun, 146, and judg't for plaintiff.

From opinion.—"If the pile of stones had a tendency to frighten horses and was of a dangerous character, although not technically a defect or obstruction in the highway, I entertain no doubt that the defendant could be made liable for damage caused to travelers thereby, after notice of its character and neglect to remove the same. *The Waterford & Whitehall Turnpike Co. v. The People*, 9 Barb. 161; *Wendel v. The Mayor of Troy*, 39 id. 329; *Davis v. City of Bangor*, 42 Me. 522; *Dimock v. Town of Suffield*, 30 Conn. 129; *Winship v. Enfield*, 42 N. H. 199; *Bartlett v. Hooksett*, 48 id. 18; *Morse v. Town of Richmond*, 41 Vt. 435; *Shearm & Redf. on Neg.* 445-466."

Earth was thrown upon the sidewalk in making post holes, and the plaintiff, while going over it, was hurt. If there was any necessity for placing it there temporarily, in order to enable the adjoining owner in a reasonable manner to construct his fence, then it was justifiable. *Callanan v. Gilman*, 107 N. Y. 360. Although the plaintiff knew the obstruction was there, the question of contributory negligence was for the jury. *Shook v. City of Cohoes*, 108 N. Y. 648, aff'g judg't for pl'ff.

The plaintiff was riding in a cutter along a main street, whereupon the cutter struck against a large stone or rock from whence the injury arose.

The stone was sixteen inches across east and west, and twenty inches north and south, and one foot through up and down, and was placed in the street to protect a tree from being driven against by persons driving upon the street. The north end of the stone was five or six feet south of the regular beaten track and was covered with snow. Questions of negligence were for the jury. *Dougherty v. Horseheads*, 73 Hun, 443, rev'g nonsuit.

A city is bound to exercise reasonable diligence in the care of its streets, and if it fails to do so it is liable for injuries sustained by reason of the improper condition thereof, whether the act of omission which caused the injury is that of the city or of some third person.

A city cannot escape liability for damages sustained by reason of personal injuries received from the overturning of a buggy caused by a pile of sand in its street, on the ground that the neglect to light or guard such pile of sand on the night of the accident was the omission of some person who had previously assumed to place lights thereon. *Tiers v. New York*, 74 Hun, 452.

See *Hoyer v. City of Tonawanda*, 79 Hun, 39.

Manhole projected six inches above the street. City liable. *Schafer v. New York*, 12 App. Div. 384.

Piling earth incident to the construction of a sewer did not create a liability against the city. *Swart v. District of Columbia*, 17 App. D. C. 407.

Inclined plane from street car tracks to those of an elevated road were an obstruction. *Eldert v. Long Island Electric R. Co.*, 28 App. Div. 451.

A tree with no exterior signs of decay but rotten at the roots fell doing injury. The liability of the municipality was a question for the jury. *Vosper v. New York*, 49 Supr. Ct. 296.

A child was injured by water pipe in the street. No recovery. *Stafford v. Rubens*, 115 Ill. 196.

The fact that iron rails of a street car company authorized to construct its line, projects four inches above the planked surface of the street, places upon the municipality the responsibility for injuries caused thereby. *Michigan City v. Boeckling*, 122 Ind. 39.

A hitching post in the usual location was not an obstruction. *Weinstein v. Terre Haute*, 147 Ind. 556.

A nut to a hydrant projecting from one to three inches over the curb into the street was. *St. Germanin v. Fall River*, 177 Mass. 550.

Without the defendant's fault and without notice of the event a lamp-post was thrown down whereby the plaintiff was injured. No recovery. *Lampert v. Laclade &c. County*, (Mo.) 7 W. 145.

A wall fell on private property injuring a person who was not using

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street for any particular purpose. No recovery. *Kiley v. Kansas City*, 87 Mo. 103.

A tree dangerously near a traveled path places liability for injuries upon the township. *Griffin v. Auburn*, 58 N. H. 121.

So as to fall of a dead limb in a public square. *Jones v. New Haven*, 34 Conn. 1.

Leaving a pile of stone at the side of a street for two months was not negligence, where the paving was going on. *Pinnix v. Durham*, 130 N. C. 360.

Where charter imposed obligation of keeping streets safe, a city ordinance permitting accumulation of sand, by reason of which plaintiff sustained injuries, does not avoid city's liability for said injuries. *McCoull v. Manchester*, 85 Va. 579.

Obstruction within a few inches of the traveled way rendered city liable. *Slivitski v. Wien*, 93 Wis. 460.

Stricker v. Reedsburg, 101 Wis. 457; *Carpenter v. Rolling*, 107 Wis. 559.

Otherwise, where boulders, acting as a barrier to an embankment, are 18 feet therefrom. *Waterhouse v. Calef*, 21 R. I. 470.

Whether a stump 18 inches high, two feet from the edge and more than eight from the center of a traveled way was a defect was for the jury. *Hinkley v. Rosendale*, 95 Wis. 271.

Excavations and dangerous places unguarded:

A municipality is liable for failure to keep proper lights and guards about an excavation in a street, whether or not the contractor for the work has agreed to provide the same. *Storrs v. Utica*, 17 N. Y. 104, aff'g judg't for pl'ff.

Where streets or sidewalks of New York are out of repair, through its negligence, it is liable for injuries therefrom whether from acts done or omission suffered.

An excavation in front of a house was left unguarded, and the plaintiff, on the sidewalk, fell into it. The owner of the house, not in possession, who had promised to repair it, and the city were held liable. *Davenport v. Reichman and The Mayor &c.*, 37 N. Y. 568, aff'g judg't for pl'ff.

The obligation to keep streets in repair requires that ordinary and expected travel may pass with reasonable ease and safety. In case of repairs, the public must be guarded against harm and delay. Action may be brought against the contractor for negligence in this regard.

Defendant contracted with the city of New York to pave the streets whereon its tracks were laid. "in and about the rails," and to "keep the same in repair." Under a license from the city, one "R.," who owned

a lot adjoining the street, dug a trench across a portion of the street and under defendant's tracks, to connect his lot with a sewer in the street. Defendant laid down planks or joists to bridge the excavation. Plaintiff was driving a truck along the street and across this bridge when the planks, not being properly fastened, slipped, and one wheel of the truck, at a point about one foot outside the rails of defendant's track, went into the excavation, throwing plaintiff from his truck and injuring him. *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231, aff'g 11 Hun, 347, and judg't for pl'ff.

The plaintiff was injured by falling into an unfenced area, in front of a house on the street, which was opened by a license from the defendant. The defendant's negligence was for the jury. Judgment was reversed as evidence was allowed that fence was subsequently built. *Corcoran v. Peekskill*, 108 N. Y. 151, rev'g judg't for pl'ff.

Notice is essential to liability when corporation is not in fault. *Dillon's Munic. Corp.*, sec. 1025, cases cited.

The state erected a new highway bridge over the Erie canal, which, being wider than the old one, rendered a widening of the approaches necessary. The approach at one end was not graded up to the bridge for some days, and thus a hole was left which was unsafe and dangerous, without proper guards. No guards or lights were furnished, and plaintiff, in crossing the bridge on a very dark night, stepped into the hole and was injured. *Chisholm v. State*, 141 N. Y. 216, aff'g award.

The Legislature may authorize municipalities to grant a limited use of sidewalks in front of buildings in cities and villages, for cellar openings.

The authorities of the city of New York have power from its ancient charter, as modified and enlarged by subsequent statutes, to permit the construction of cellarways extending into sidewalks under reasonable regulations. Section 86, chap. 410, Laws of 1882.

Numbers 201, 202 of revised ordinances, which prohibit the construction of a cellar door extending more than five feet into a street, and directing that every uncovered entrance or flight of steps projecting into a street shall be inclosed with a railing, imply permission to construct cellarways within that limit.

In an action against the owner and lessees of certain premises in the city of New York, to recover for injuries caused, as alleged, by the giving away of cellar doors upon which plaintiff was standing, it appeared that the cellarway covered by the doors projected about five feet into the street and had so existed for more than twenty years. The court erroneously charged that the cellarway was a nuisance; that if the accident happened as claimed by plaintiff, defendants were liable irrespective of any question of negligence. Such a long user without any objection having been made

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by the city authorities, was presumptive evidence of consent on their part to the construction of the cellarway without regard to the city ordinances. *Jorgenson v. Squires*, 144 N. Y. 280.

From opinion.—"There can be no controversy as to the rule that an unauthorized obstruction or excavation in a public street, impairing its safety, constitutes a public nuisance and subjects the person or body creating or maintaining it to indictment and to liability in a civil action to any person sustaining special injury therefrom. The space occupied for sidewalks in city or village streets is as much a part of the street as the part used for horses and vehicles. The owner of a building abutting on a street may use the sidewalk in front of his premises as any other citizen, and, in addition, for the usual purposes of his business, although it may occasion temporary obstruction, provided he does not interfere unreasonably with the public right. There are many special and incidental uses of the sidewalk founded upon vicinage and business necessity permitted to him by implication, beyond the bare right to pass and repass upon it. He may load and unload his goods in front of his store, subject to municipal regulation, and for this he needs no authority beyond that implied from common usage and the purposes for which streets are opened and dedicated, and many other similar privileges might be mentioned.

But an adjoining owner cannot, upon the plea of convenience or necessity, make an excavation in the street in front of his premises or construct a cellarway extending into the sidewalk, except by permission of a competent authority. The authority to construct vaults under sidewalks, or to make openings therein for a cellarway, or to inclose an area within the line of a street, is not an incident of ownership of the adjacent premises, or implied from such ownership, however convenient or even necessary the exercise of such an authority may be to their full enjoyment. The implication of such a right, as one annexed to the land and arising out of ownership merely, would or might lead to embarrassing conflicts and interfere with the control and regulation of the streets which in the interest of the public is reposed in public authorities. But it is competent for the legislature to authorize a limited use of sidewalks in front of buildings in cities and villages for stoops or cellar openings, or underground vaults, for the more convenient and beneficial enjoyment of the adjacent premises. While such uses may restrict somewhat the free and unembarrassed use of the streets for pedestrians, the general interests are subserved by making available to the greatest extent valuable property, increasing business facilities, giving encouragement to improvements and adding to taxable values.

* * * * *

The cellarway had existed at the place in question for more than twenty years, and the defendant corporation, when the ground lease fell in 1889, purchased the building which had been erected by the tenant to which this cellarway was appurtenant, and leased the premises in their existing state to the other defendants. Such a long user without, so far as appears, any objection having been made to the cellarway by the authorities of the city, was evidence from which their consent to its construction might reasonably be inferred. *Jennings v. Van Schaick*, 108 N. Y. 530; *Babbage v. Powers*, 130 id. 281; *Chicago City v. Robbins*, 2 Black, 418. It is a matter of observation that openings for cellarways extending into the sidewalk in cities or villages in front of business

buildings are very common. They afford access to the basements of such buildings and render them much more valuable for business purposes. It would be an unnatural inference that, in the city of New York, where so many of such openings are found, they exist by sufferance merely and were tolerated, but not permitted, by the public authorities. In the absence of affirmative proof of permission, it should be implied, if there is nothing to disprove it, either in the character of the structure or in the actual circumstances disclosed. It is unreasonable to suppose that a usage so general and unchallenged did not have its origin in municipal consent. We have said that it seemed to be assumed on the trial that the city authorities had power to permit the construction of cellarways extending into the sidewalk, under such reasonable regulations as they might prescribe. There can, we think, be no doubt of the existence of this power. The broad powers for purposes of municipal government possessed by the common council of the city of New York derived from its ancient charters and modified and enlarged by subsequent statutes, include, to the fullest extent consistent with constitutional limitations, the power to control and regulate the public streets.

By section 86 of the Consolidation Act of 1882, the common council is invested with power to enact ordinances on a great variety of subjects, and, among others, by subd. 3, 'to regulate the use of sidewalks and prevent the extension of building fronts and house fronts within the stoop line.' This power was also given by the charter of 1873, and doubtless by still earlier legislation.

It is said that no ordinance has been enacted prescribing that the owner of a building may construct a cellarway extending to any distance into the sidewalk. It does not appear that there is any ordinance granting such power in express language. But such permission is implied in the ordinances Nos. 201 and 202. (See vol. of Revised Ordinances.) The first prohibits the construction of a cellar door 'which shall extend more than one-twelfth part of any street, or more than five feet into any street,' and section 202 prescribes that 'every entrance or flight of steps projecting beyond the line of the street and descending into any cellar or basement story, * * * where such entrance or flight of steps shall not be covered, shall be inclosed with a railing,' &c. These prohibitions imply permission to construct cellarways within the limit of five feet, not in other respects transgressing the ordinances. The evidence is convincing and undisputed that the city officials, architects and owners, have acted upon this construction of the ordinances. No express permits have been issued by the city for more than twenty years, and builders and architects regarded them as unnecessary where the proposed construction was within the limit and of the character specified. Sections 33 and 64 of the Revised Ordinances relate to a different subject, and in no respect qualify the terms of the ordinances, sections 201 and 202, or the implications following from them. We are of the opinion that there was evidence tending to show that the construction of the cellarway in question was authorized by the city, and that the charge that it was an unlawful structure and a nuisance *per se*, was erroneous. The question whether it was carefully constructed or maintained is not presented."

It was for the jury to say whether an excavation across a road was properly guarded at night by placing unlit tiles across the road at a point 72 feet distant therefrom on each side. *Snowden v. Somerset*, 171 N. Y. 99.

Where proper barrier, properly erected to prevent travelers entering

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streets undergoing repairs, had been removed by an unauthorized person, and, before notice to defendant, and a traveler entered the street and was injured, the city was not liable. *Parker v. Cohoes*, 10 Hun, 531, rev'g judg't for pl'ff.

Citing *Doherty v. Inhabitants of Waltham*, 4 Gray, 595; see *State v. Bangor*, 30 Me. 341; *McGinty v. Mayor*, 5 Duer, 674.

One "L." agreed with the defendant to grade streets, which was to be done under the direction and to the satisfaction of certain officers, and "L." agreed to take all necessary precaution to prevent accidents. Plaintiff fell into a wholly unguarded hole made in the course of the work. Defendant was liable. The accident was from the nature of the improvements. *Dressel v. Kingston*, 32 Hun, 533, aff'g judg't for pl'ff.

From opinion.—"On the other point, that the negligence complained of was that of Langan, for which the city was not responsible, the case falls directly within the decision in *Storrs v. The City of Utica*, 17 N. Y. 104, where the defendant's liability was declared, in a case much like the present, on the facts. The question discussed in the case cited was also considered in *McCafferty v. S. D. and P. M. Railroad Company*, 61 N. Y. 178, and so also in *Vogel v. The Mayor*, 92 id. 10-17, &c., where the difference was again noted between a case like the present and that of *Blake v. Ferris*, 5 id. 48; that of *Pack v. The Mayor*, 8 id. 222, and that of *Kelly v. The Mayor*, 11 id. 432. See, also, *Brusso v. City of Buffalo*, 90 id. 679, and *Smith v. Simmons*, 29 Alb. L. J. 109. The doctrine of the case last cited is this, that where the injury occurs by reason of the negligent acts of workmen, over whom the corporation has no control, and done by them in the performance of the work contracted for, as in the case of negligently blasting out rocks under a contract with the corporation for grading streets, the latter is not liable. But, as stated by Judge Comstock, in *Storrs v. The City of Utica*, where the accident does not occur because of the manner in which the work is carried on by the laborers, but because of the result of the work itself, however skillfully performed, creating in itself a nuisance, liability of the employer or ultimate superior ensues. The learned judge in *Storrs'* case says, that 'although the work may be let out by contract, the corporation still remains charged with the care and control of the streets in which the improvement is carried on. The performance of the work necessarily renders the street unsafe for night travel. This is a result which does not at all depend on the care or negligence of the laborers employed by the contractor. The danger arises from the very nature of the improvement, and if it can be averted only by special precautions, such as placing guards or lighting the street, the corporation which has authorized the work is plainly bound to take these precautions.' The true rule is very plainly stated by Clifford, J., in *Water Company v. Ware*, 16 Wall. 566, where the learned judge says, that 'where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but when the obstruction or defect which occasioned the injury results directly from

the acts which the contractor agreed and was authorized to do, the person who employs the contractor and authorized him to do those acts, is equally liable to the injured party.' It may also be noted that in such case the duty of notice to the corporation of the existence of the obstruction or defect is removed, inasmuch as the thing itself contracted to be done creates the liability. The point now under discussion has been so fully considered by Judge Comstock and Judge Earle in the cases cited, that further comment here is quite unnecessary, if not actually presumptuous. The liability of the city for the negligence, charged in this case, is put beyond cavil by the decisions in the cases cited, and this too, irrespective of the fact whether or not the contractor, in and by his contract, stipulated to conduct the work with all needful care and prudence, and further to save the city harmless from all claims for injuries which should be caused thereby.

The appellant's counsel refers us to *Norton v. Wiswall*, 26 Barb. 618; *Schular v. Hudson River R. Co.*, 38 id. 653, and *Sweet v. Village of Gloversville*, 12 Hun, 302, as cases supporting his alleged ground of error. But in this he is under mistake, or if it be as he claim, these cases must yield to the superior authority of those referred to in the court of appeals."

Defendant's common council awarded one "C." a contract, to extend the water main, and he, under the supervision of the superintendent of the water works of the city, and by direction of the executive board of common council, proceeded with the work. He left the excavation so unguarded that, late at night, a lady fell in it. Defendant was liable, although having no actual notice. The fact that the contractor had failed to comply with certain provisions of the charter did not excuse the city. Executive board was the agent of the city. The rule is different where the duty is vested by statute in officers or departments of municipal corporations as distinguished from the corporation itself. *Groves v. Rochester*, 39 Hun, 5, aff'g judg't for pl'ff.

The long continued existence of an unguarded excavation, to the actual knowledge of one of the commissioners of highways, establishes negligence and liability upon the town under sec. 16, chap. 568, Laws 1890, for injury sustained therefrom by a traveler. *Smith v. Clarkstown*, 69 Hun, 155, aff'g judg't for pl'ff.

City knew that railway had not properly guarded its excavations. Recovery was permitted. *Lane v. Syracuse*, 12 App. Div. 118.

Otherwise, where it has no notice of the licensee's failure. *Morgan v. Penn Yan*, 42 App. Div. 582.

Sluiceway along the road partially concealed by grass and weeds was left for months unguarded. Question was for the jury. *Rankert v. Junius*, 25 App. Div. 470.

But town was chargeable with notice where the excavations were made with the approval of its selectmen and under their supervision. *Cars-tesen v. Stratford*, 67 Conn. 428.

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Injury to plaintiff's land from an unreasonable excavation by a city gives him a right of action. *Durango v. Luttrell*, 18 Colo. 123.

A cellar in a sidewalk in front of demised's premises was defectively protected to the knowledge of the city. The city and owner were jointly and severally liable to one injured thereby. *Peoria v. Simpson*, 110 Ill. 294.

City was liable for leaving a ditch unguarded and unlighted. *Salem v. Webster*, 192 Ill. 369; aff'g s. c., 95 Ill. App. 120.

A city was liable for leaving an excavation for a bridge unprotected where children were attracted and injury happened. *Indianapolis v. Emmelman*, 108 Ind. 530.

Negligence in failing to guard at night a ditch along a cross walk was for the jury. *Goucher v. Sioux City*, 115 Iowa, 639.

See, also, *Bridgeman v. Missouri Valley*, 88 N. W. Rep. 1069.

It was for the jury to say whether warnings which failed to attract attention were sufficient. *Wetmore v. Chamberlain*, 64 Kan. 324.

City liable for stretching a barbed wire to close a street during repair. *Glasgow v. Gillenwater*, (Ky.) 67 S. W. Rep. 381.

Small openings in barriers, held not to extend an invitation to pass through them. *Jones v. Collins*, 177 Mass. 444.

City had placed barriers with appropriate notice thereon before excavations, obviously dangerous. Its duty was discharged. *Martin v. Chelsea*, 175 Mass. 516.

City held liable for the negligent bridging of an excavation made by a contractor engaged by the city to do the work. *Beattie v. Detroit*, (Mich.) 88 N. W. Rep. 71.

Where injury arose from an excavation in the street it was no defense that there was a safe sidewalk on the other side. *Stuart v. Havens*, 17 Neb. 211.

Though a county undertakes to construct, the city must guard after notice of danger. *Newark v. McDowell*, 16 Oh. C. C. 556; *Newark v. Jones*, 16 Oh. C. C. 563.

If it has notice, the fact that the excavator is a trespasser, is immaterial. *Boyle v. Hazleton*, 171 Pa. St. 167.

Temporary necessity may excuse the maintenance of an obstruction if it be properly guarded. *Arthur v. Charleston*, 51 W. Va. 132.

Failure to guard a street which was not graded though well traveled was negligence. *Rowe v. Ballard*, 19 Wash. 1.

Hildman v. Phillips, 106 Wis. 611.

Holes:

The accident happened December 12, 1849, in the night, when it was very dark. It was proved that the excavation in the avenue (which was thirty-five or forty feet deep) was made by the Harlem Railroad Company several years prior to the accident; that the space between the edge of the avenue and the curb-stone, along the avenue, was from six to twelve feet wide, and the accident happened at the narrowest place, where there was a gully washed out by the rains, which rendered it dangerous for a carriage to pass. It appeared that the carriage was driven as closely as possible to the curb-stone. *Hutson v. The Mayor &c.*, 9 N. Y. 163, aff'g judg't for pl'ff.

A plank-road company is bound to use reasonable care and diligence to render ordinary public travel safe, while constructing its plank road on a highway, acquired pursuant to statute. The duties are similar to those of commissioners, while repairing highways.

The evidence tended to show that the plaintiff was sitting on one side of his hay rack, driving his team, and that he took the old track at the point where it separated from the new, and proceeded along it to near the point where it ended, where he was thrown from the wagon by means of the descent from the old track to the new, as the team was descending from the former to the latter. *Ireland v. The Oswego &c. R. Co.*, 13 N. Y. 526, aff'g judg't for pl'ff.

That the defect, a hole in manhole cover, had never yet caused accident did not disprove negligence. *Wood v. Third Ave. R. Co.*, 91 Hun, 276.

A hole three to five feet long, two and one-half wide and one foot deep was left in a crowded street for a month. Negligence was for the jury. *Smith v. New York*, 17 App. Div. 438.

But a hole or rut in a country road held not a defect, though ten inches deep. *Osterhout v. Bethlehem*, 55 App. Div. 198.

A depression near a manhole was. *Wilkins v. Wilmington*, 2 Marv. (Del.) 132.

Pierce v. Wilmington, 2 Marv. (Del.) 306.

Railing protecting an elevated sidewalk was removed by adjoining owner, leaving post holes, and some two months thereafter a boy of six years playing on the sidewalk stepped backward into one of the holes and was injured. *Kunkel v. Chicago*, 37 Ill. App. 325.

Citing *Powers v. Chicago*, 20 Ill. App. 178, where plaintiff was injured through negligence of defendant in permitting one of its fire-plugs to discharge water in freezing weather, which mixed with snow and formed ridges of ice, rendering street bad and dangerous for thirty-six hours before the accident and causing plaintiff to fall.

WHAT CONSTITUTES REASONABLY SAFE CONDITION.

City held liable for a deep hole near the center of a principal street. *Decatur v. Stoops*, 21 Ind. App. 397.

A hole near the sidewalk three feet long, four to six inches wide and eight inches deep, was held a defect. *Finnegan v. Sioux City*, 112 Iowa, 232.

City held liable for a defective cover to an opening in the street to admit surface water. *Gale v. Dover*, 68 N. H. 403.

Ditches:

Reasonable care in the construction and maintenance of highways rests upon the highway commissioner of a town, and municipalities are not liable for injuries resulting from accidents which are not, by the exercise of reasonable forethought and prudence, to be anticipated.

A commissioner of highways owes no more care to bicycle riders than to persons traveling in ordinary vehicles; he is only bound to keep the highways in a condition which is reasonably safe for general and ordinary travel.

The fact that a gutter was constructed on a country highway, two and one-half feet below the crown of the road, with a vertical side of a foot or eighteen inches next to the roadway, with no rail or guard erected between the gutter and the road, does not render the road unsafe for travel in ordinary vehicles, and on foot, where the highway was twenty-five feet wide, in good order, and safe for the ordinary use of a highway.

When a bicycle rider falls to observe conditions which are open to his observation, and which he could have seen if he had looked, if an accident results therefrom he is guilty of such carelessness as deprives him of the right to recover for his injuries. *Sutphen v. Town of North Hempstead*, 80 Hun, 409.

Child of four years was drowned by falling into an unguarded ditch bordering a very narrow sidewalk in front of its parents' residence. The city was liable. *City of Chicago v. Hesing*, 83 Ill. 204.

A municipality is liable for injuries caused by a horse breaking through a plank culvert running across a street. *Danville v. Vangundy*, 29 Ill. App. 187.

Ditches were dug three to four feet wide and $1\frac{1}{2}$ to $2\frac{1}{2}$ feet deep in each side of a road 12 feet wide where it ran down a hillside through a deep cut. Negligence was for the jury. *Lincoln v. Koenig*, 10 Kan. App. 504.

Bodah v. Deer Creek, 99 Wis. 509.

So, as to a runway or drain in the street, next the curb. *Shampay v. Chicago*, 76 Ill. App. 429.

So, where within six or eight inches of the edge of a highway 17 feet wide, are ditches about three feet deep with sides sloping at an angle of 45 degrees. *Harris v. Great Barrington*, 169 Mass. 271.

That no permits were issued was no defense where city knowingly suffered the digging without them. *Foy v. Winston*, 126 N. C. 381.

Highway held defective, where there was a ditch four or five feet deep by the side of it, and partly under it, concealed by weeds, though it only gave way under the weight of a heavy traction engine. *Stawffacher v. Sylvester*, 113 Wis. 559.

Wires:

A wire broken down by a storm overhung the street for four months. Recovery allowed. *District of Columbia v. Dempsey*, 13 App. D. C. 533.

Recovery was allowed for permitting the continued use of an uninsulated trolley wire. *Decatur v. Hamilton*, 89 Ill. App. 561.

Or old, rotten and rusted telephone wires. *Id.*

As to unprotected guy wire to trees along the street. See *McDonald v. St. Paul*, 82 Minn. 308.

Vehicles standing in the street:

Vehicles standing by the side of the street in a country village do not constitute an obstruction. *Studeor v. Gouverneur*, 15 App. Div. 229.

Otherwise as to a city. *Sullivan v. McManus*, 19 App. Div. 167.

The defendant was not obliged to prevent the invasion of dirt cars by children, but when their presence was discovered to use care to prevent injury to them. *Emerson v. Peteler*, 35 Minn. 481.

Refuse:

Refuse containing glass was allowed to remain in the street. Recovery was permitted. *Galveston v. Reagan*, (Tex. Civ. App.) 43 S. W. Rep. 48.

Unlighted barriers:

Unlighted toll gate was a defect. *Stewart v. Chester &c. Road Co.*, 6 Del. Co. Rep. 434; s. c., aff'd, 3 Pa. Super. Ct. 86.

So was barbed wire used in closing a road. *Bills v. Kaukauna*, 94 Wis. 310.

For two days and nights a rope was stretched across a portion of a thoroughfare in Chicago, whereby plaintiff was thrown from her carriage and injured. The finding of the jury that the city had constructive notice of the defect and judgment for plaintiff was sustained. *Chicago v. Fowler*, 60 Ill. 322.

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Some inhabitants, to hold rafts of logs, stretched a rope connected with them across the road and tied it to a tree, and during the evening the man left to watch it having temporarily gone away, a horse was caught by the rope and his rider thrown and injured. The town was liable. *Vrench v. Brunswick*, 21 Me. 29.

Citing *Springer v. Bowdoinham*, 7 Greenl. 442.

A rope was stretched across a highway and was fastened to a derrick, and was in use to lift some heavy stones. While it was, and had been, in use for some two hours and a half, in the evening it came in contact with a vehicle and person therein driving along the road and injury done. It was not such a defect in the highway as to make city liable. *Barber v. Roxbury*, 17 Allen, 318.

Relevant evidence of defective condition:

In an action against a town for the negligence of the commissioner of highways, the declarations of the latter, made after the accident, are incompetent. Evidence of repairs shortly after the accident is not competent to charge the defendant with negligence, yet, a witness may incidentally mention such repairs in describing the condition of the highway after the accident, or such repairs may be shown to prove that the commissioners were in possession of funds to make the needed repairs. (*Getty v. Town of Hamlin*, 28 N. Y. St. Repr. 275.) *Stone v. Poland*, 58 Hun, 21, aff'g judg't for pl'ff.

Citing *Stephens v. Vroman*, 16 N. Y. 383, 384; *Waldele v. N. Y. C. & H. R. R. Co.*, 95 id. 274; *People v. Beach*, 87 id. 508; *Whitaker v. Eighth Ave. R. R. Co.*, 51 id. 295; *People v. Davis*, 56 id. 95; *Tilson v. Terwilliger*, id. 273; *Corcoran v. Village of Peekskill*, 108 id. 151.

Shortly after an accident the approach to bridge was covered with plank, and about a year after the accident a witness who had observed a hole on the day the accident occurred, and also shortly after it, went to the place of the accident with an engineer, took out some of the plank and examined the hole. He was asked upon the trial to state the condition of the same, to which objection was taken. The plaintiff's counsel stated that he expected to prove that the hole was there in the same condition in which it was at the time of the accident. The court held that the evidence was admissible only for the purpose of identifying the condition of the hole when the accident occurred.

The witness testified that it was just the same except that one more chunk had been put into it, and that the surface of the approach was the same as it then was; that planks were taken up to make measurements, and that he pointed out the hole to the person with him who made the

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measurements. The evidence was proper for the purpose specified. *Stone v. Poland*, 81 Hun, 132.

4. DUTY OF MAINTENANCE REQUIRES REASONABLE INSPECTION AND SUPERVISION.

Plaintiff was driving along Railroad street in Cooperstown, on a stormy winter's day, when his cutter struck the stick of timber which was covered with snow; the cutter was upset and broken and plaintiff injured. It did not appear who placed the timber in the street, or when or under what circumstances, or that any of the village authorities or agents had any notice or knowledge of the obstruction before the injury; simply the fact that the timber was there at the time of the accident. Defendant was not liable. *Gorham v. Cooperstown*, 59 N. Y. 660, aff'g judg't for def't.

The defendant was not liable for the act of one of its citizens in obstructing the street when notice of same had not been received by it (*Griffin v. Mayor &c. of New York*, 9 N. Y. 456), but it was liable if it *should* have known of it and did not through the fault of its inspector or other cause. A counter on a street fell over and killed a child five or six years old. A municipality cannot act with the promptness of an individual. *Kunz v. City of Troy*, 104 N. Y. 344, rev'g 36 Hun, 615, and nonsuit.

But, see, *contra*, *Chicago v. Starr*, 42 Ill. 174.

City is bound to exercise reasonable diligence to discover defect caused by excavations of a railroad company. *Carsteen v. Stratford*, 67 Conn. 428.

City must have notice of an obstruction by a private party, though delivering goods to it. *Evansville v. Senhenn*, 151 Ind. 42; s. c., 41 L. R. A. 728.

The duty enjoins inspection to detect the removal of barriers so as to secure their replacement. *Fox v. Chelsea*, 171 Mass. 297.

By authorizing an excavation a town assumes the duty of supervision. *Seamons v. Fitts*, 20 R. I. 443.

Denver v. Sherrett, 88 Fed. Rep. 226.

Where the obstruction is made by a trespasser, city must have notice. *Davis v. Omaha*, 47 Neb. 836.

But city was not negligent, where the light to an obstruction had been burning an hour before the accident. *Mills v. Philadelphia*, 187 Pa. St. 287.

5. AND REASONABLE DILIGENCE IN REPAIRING AFTER NOTICE OF THE DEFECT, ACTUAL OR CONSTRUCTIVE.

A corporation, after notice of a dangerous obstruction in the street, is not excused from using due care by the fact that it did not know the same to be dangerous. The negligence was that of a policeman. *Rehberg v. Mayor &c.*, 91 N. Y. 137, rev'g nonsuit.

From opinion.—"Where the defect or obstruction which has caused the injury was created or placed therein by the unlawful and unauthorized act of persons not officers of the city, the duty of the city to repair the defect or remove the obstruction only arises after actual notice of its existence, or after such a lapse of time as would justify the imputation of negligence, if the defect or obstruction had not been discovered, and what is such reasonable time, is a question for the jury. *Hume v. The Mayor*, 47 N. Y. 640; s. c., 74 id. 264; *Reed v. Northfield*, 13 Pick. 94; 2 Dillon on Mun. Corp. sec. 1026."

City must have a reasonable opportunity after notice to remedy the defect. *Farley v. New York*, 152 N. Y. 222; rev'g s. c., 9 App. Div. 536.

Cummings v. Hartford, 70 Conn. 115.

But, after such opportunity, failure to do so constitutes negligence. *Dayton v. Taylor*, 62 Oh. St. 11.

What constitutes actual notice:

Where a village is invested with general powers over streets and highways, there is a corresponding duty that it exercise the proper care to keep the same in repair. In such a case the defendant was held liable for the negligence of its trustees. Notice of the dangerous condition of a grating to the street to commissioners of the village, employed to superintend and examine the streets and sidewalks, was notice to the corporation. *McSherry v. Canandaigua*, 129 N. Y. 612, aff'g judg't for pl'ff.

Where a city makes its streets dangerous by its own act, notice of the defect to the city is not necessary.

An excavation was made in a street in the city of Troy for the purpose of laying pipe to conduct water from the main laid in the street to a private residence. The owner thereof employed a firm of plumbers to do the work of conducting the water to his house. The city water works are the property of the municipality, and under the management and control of a board of water commissioners, who appoint a superintendent of the water works. Said firm applied to that officer for men to dig the trench; he directed men in the employ of the city to do this, they were paid by the day, the firm refunding to the city the amount so paid. The excavation was left without proper guards and lights, and a horse belong-

ing to "L," plaintiff's assignor, while being driven along the street at night fell into the opening and was injured. *Wilson v. Troy*, 135 N. Y. 96, aff'g 60 Hun, 183, and judg't for pl'ff.

Notice to a patrolman is notice to the city after he has had an opportunity to report. *Farley v. New York*, 152 N. Y. 222; rev'g s. c., 9 App. Div. 536.

Gas company, by permit, excavated for its pipes and was required to keep proper lights; the city reserved no supervision. The city was not liable for a person falling into the excavation, unless from the negligent manner in which the excavation was made and left, and it had notice, actual or constructive, thereof. Fact that an alderman saw it is not *per se* evidence of negligence. *McDermott v. Kingston*, 19 Hun, 198, rev'g judg't for pl'ff.

No notice required of defect from excavation made by city. *Akers v. New York*, 14 Misc. 524.

See, also, *Oklahoma City v. Welsh*, 3 Okla. 288; *Pratt v. Cohasset*, 177 Mass. 488; *Boltz v. Sullivan*, 101 Wis. 608.

Ordinance charging an officer of the city with supervision of electric appliances in the street was admitted on issue of notice to him as notice to the city. *Decatur v. Hamilton*, 89 Ill. App. 561.

Notice that defect is likely to cause injury is sufficient. *Odon v. Dobbs*, 25 Ind. App. 522.

Notice to a *de facto* highway surveyor was notice to the city. *Pease v. Parsonsfield*, 92 Me. 345.

Notice of a washout was not notice of danger subsequently arising. *Smith v. Walker*, 117 Mich. 14.

Notification by city's auditor to land owner to remove defect was evidence of notice to the city. *Toledo v. Nitiz*, 23 Oh. C. C. 350.

Notice to a councilman as a private citizen was not notice to the city. *Frazier v. Butler*, 172 Pa. St. 407.

Notice to its supervisor of highways was notice to the town. *Platz v. McKean*, 178 Pa. St. 601.

So, as to notice to inspectors and supervising agents. *Burger v. Philadelphia*, 196 Pa. St. 41.

So, as to notice to commissioner charged with the duty of repair. *Seamons v. Fitts*, 20 R. I. 443.

So, as to notice to street gang boss charged with the duty of looking after its repairing. *Garmany v. Gainesville*, (Tex. Civ. App.) 41 S. W. Rep. 730.

Notice of a defect is notice of the natural and probable consequences which may follow therefrom. *Brown v. Swanton*, 69 Vt. 53.

Permission to excavate charged city with knowledge of the existence

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of an excavation allowed to remain unguarded for several days. *Noll v. Seattle*, (Wash.) 69 Pac. Rep. 382.

Statutes requiring actual notice:

Actual notice for a sufficient time to enable city to repair was required by city charter. *Tarba v. Rochester*, 41 App. Div. 188.

Notice two months before to the only clerk in charge of the city's office at the time was sufficient thereunder. *Elias v. Rochester*, 49 App. Div. 597.

A statutory requirement of five days' notice construed to mean actual and not constructive notice. *Hari v. Ohio*, (Kan. App.) 62 Pac. Rep. 1010.

Knowledge by a township trustee for two years that stumps existed in the highway held to satisfy the statutory prerequisite to municipal liability of actual notice. *Madison v. Scott*, 9 Kan. App. 871.

Notice of general defectiveness was not actual notice of a particular defect under such a provision. *Hurley v. Borwoinham*, 88 Me. 293.

So, as to notice of a cause likely to produce a defect. *Gurney v. Rockport*, 93 Me. 360.

Misstating the date in notice by a day under such statute was immaterial. *Marcotte v. Lewiston*, 94 Me. 233.

So, as to a clerical error which could mislead no one. *Althouse v. Jamestown*, 91 Wis. 46.

Notice to an alderman of the presence of a steam engine in the street was actual notice to the city that in its ordinary use it might cause injury. *Ham v. Lewiston*, 94 Me. 265.

Failure to give such notice under a provision exempting city from liability for "gross negligence" only precluded the recovery of exemplary damages. *Peacock v. Dallas*, 89 Tex. 438.

Charter provision relieving a city unless the defective condition continued ten days after notice did not apply to the creation of a defect by a party acting for it. Post hole was left unfilled by one directed to remove a fence. *Still v. Houston*, (Tex. Civ. App.) 66 S. W. Rep. 76.

Requirement that notice of injury from defect in city's streets be given within five days of the injury does not apply if the same was due to an act of malfeasance, such as leaving a large wooden roller in the street, by reason of which plaintiff's horse was frightened. *Hughes v. Fond du Lac*, 73 Wis. 380.

What constitutes constructive notice:

It was the duty of the defendant to remedy a defect in the street caused by the excavation, whereby there was an abrupt descent from the public

alley to the street. The duty arose from the power to superintend the street. If the excavation be bridged by a volunteer and the city allow it to remain for years, it adopts it.

The plaintiff was injured at a bridge by the removal of planks by an unknown person, and ample time had elapsed since the removal to make the fact notorious, and the city was not entitled to actual notice thereof. *Requa v. Rochester*, 45 N. Y. 129, aff'g judg't for pl'ff.

A culvert in Sixth avenue was formerly covered by two iron plates; one was destroyed, and somebody placed a stone over the dangerous hole, where it remained for some months. The plaintiff fell into the hole in the dark, and a recovery for injuries was sustained, although the court seemed to think the case was like *Requa v. City of Rochester*, 45 N. Y. 129, but there was no exception to raise the question. *Ploedterll v. Mayor &c.*, 55 N. Y. 666, aff'g judg't for pl'ff.

See *Griffin v. Mayor*, 9 N. Y. 456.

If the abutting owner, without permission, makes an excavation and the municipality knew of it, the latter is liable.

Plaintiff, in the evening, while driving along one of defendant's streets, drove into a trench and was injured. The trench had been dug before May first by the owner of a lot adjoining the street, without permission of the village authorities. The excavation was left with slabs laid across it, with boxes and a barrel thereon, and sometimes a light was placed there. The night of the accident was dark; the street lamps were not lighted, and there was no light at the excavation. The street was the principal thoroughfare of the village. Several of the village trustees had knowledge of the excavation some days before the accident. Plaintiff was familiar with the street, and had seen the excavation several times prior to the accident.

The facts justified the findings, charging defendant with notice of the existence of the excavation, and with negligence in not abating the nuisance, or so guarding it as to prevent accident. The question of contributory negligence was one of fact. *Weed v. Ballston Spa.*, 76 N. Y. 329, aff'g judg't for pl'ff.

Batty v. Duxbury, 14 Vt. 155; *Murphy v. Gloucester*, 165 Mass. 410.

The plaintiff stepped through a hole four or five inches wide by ten or twelve inches long in a plank walk or bridge over a gutter. The side and cross walks had been built by the property owners under the authority of chap. 61, Laws 1850, chap. 93, Laws 1863, chap. 233, Laws 1881. The road-bed was in good condition. The failure of the officials of the town to discover the defect in the bridge did not establish negligence. *Clapper v. Waterford*, 131 N. Y. 382, rev'g judg't for pl'ff.

The plaintiff brought her suit to recover damages from the defendant,

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the city of Lockport, for injuries received on account of a crosswalk in that city, which was allowed to remain in an unsafe condition for about a year, and plainly observable by all who passed it. *Hines v. Lockport*, 5 Lansing, 16, rev'g nonsuit.

Commissioners of highways must use active foresight and constant vigilance to keep bridges in repair, and a reasonable degree of watchfulness, from time to time, to ascertain condition and prevent damage. Mere omission to receive notice of defect will not exculpate them. *Bostwick v. Barlow*, 14 Hun, 177, aff'g judg't for pl'ff.

A horse stepped through a hole in a hedge made by the absence of a plank. No proof of why or how long the plank had been gone, of defendant's knowledge of it, etc. *Herrington v. Phoenix*, 41 Hun, 270, rev'g judg't for pl'ff.

From opinion.—"The plaintiff says that the horse stepped on the docking, which was rotten, and his foot went through. We do not understand that all of the docking on the south side gave way, or that the foot went through the docking; but infer that the upper surface of the top timber was rotten, and that a piece crumbled out and let the foot down by the side of the docking. It also appears, inferentially, that the plank of the bridge had covered the docking, but on the occasion in question, the south or first plank was gone, leaving the dock exposed, and also an uncovered space between the docking and the second plank, into which the horse's foot slipped from the docking.

There is no evidence that the bridge was defective in design or construction; it was not shown how, when or by whom the plank was displaced. For aught that appears, it might have been displaced by a trespasser, or accidentally by the last team crossing the bridge before the accident. The plaintiff lived in the village near the bridge, but does not claim to have discovered the defect before the accident. The age of the bridge was not shown, nor were any facts tending to establish negligence on the part of defendant's officers, except that at the time of the accident a plank was displaced, and that the top timber of the docking was rotten, but to what extent does not appear."

A municipality ordering an improvement, which must obstruct the highway, is liable, without notice, for failure of contractor to provide suitable safeguards. A bridge was authorized to be built and maintained by two counties; both were liable for failure to erect barriers in either county.

Held, that as the very nature of the improvement which the city and county undertook to make, involved danger to persons lawfully on the highway, who might approach the bridge at night and attempt to cross it, they were bound to see that proper safeguards were provided while the work was going on, so as to afford reasonable protection to the public, and that the court erred in charging that the city had a right to presume, in the absence of notice, that the contractor had properly guarded the approach to the bridge, and was not liable, without either express or

constructive notice, for the negligence of the contractor, and that, in the absence of actual or express notice, it must appear that the neglect on the part of the contractor had continued for so long a period that the authorities could be charged, under the circumstances, with notice of the condition of affairs. *Hawthurst v. Mayor &c.*, 43 Hun, 588, rev'g judg't for def't.

Following *Storrs v. City of Utica*, 17 N. Y. 104; *Dressell v. City of Kingston*, 32 Hun, 533; *Brusso v. City of Buffalo*, 90 N. Y. 679, and distinguishing *Reed v. The Mayor*, 31 Hun, 313.

Presence of a pile of earth in street for three or four days was constructive notice. *Briel v. Buffalo*, 90 Hun, 93.

Otherwise, where the dirt was not all placed in the pile at once. *Bagley v. St. Louis*, 149 Mo. 122.

Likewise, as to a truck left in the street on a particular night not left there habitually. *Farley v. New York*, 9 App. Div. 536.

Existence of a hole from three to five feet wide, one to two and one-half feet long and one foot deep for a month in much used street, was constructive notice. *Smith v. New York*, 17 App. Div. 438.

So, as to existence of a sluiceway 2 or 3 feet wide, 1½ to 2½ deep, along a road, for years. *Rankert v. Junius*, 25 App. Div. 470.

So, as to encroachment of a telegraph pole for a year or more. *Fisher v. Mt. Vernon*, 41 App. Div. 293.

Otherwise, though a rut existed for two weeks, where it did not present an appearance of danger. *Osterhout v. Bethlehem*, 55 App. Div. 198.

Presence of a timber in a street for several months was constructive notice. *Murphy v. Seneca Falls*, 57 App. Div. 438.

To collect and hold water for city purposes, a tank, sunk several feet below and elevated three feet above grade, was placed upon a street, and was so insecurely protected that boy of four passing along the street slipped and fell in and was drowned. City claimed that some unknown and unauthorized person tore off covering, of which it had not notice. A long and unreasonable delay in repairing the tank would justify the jurors in presuming that the city had been notified of its defects and was negligent in omitting to repair it. *Chicago v. Moyer*, 18 Ill. 349, aff'g recovery.

Notice was not presumed where the city's officers failed to discover the alleged defect upon examination for that purpose after the accident. *Williams v. Carterville*, 97 Ill. App. 160.

A "long time" was a sufficient allegation to charge constructive notice. *Mt. Vernon v. Hoehn*, 22 Ind. App. 282.

Dean v. Sharon, 72 Conn. 667; *Frazier v. Butler*, 172 Pa. St. 407, ("long continued, conspicuous and noticeable").

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The existence of a broken electric light wire in the street for three weeks was sufficient. *Kansas City v. File*, 60 Kan. 157.

Existence for number of years was long enough to raise a presumption of notice. *Junction City v. Blades*, 1 Kan. App. 85.

Proof was insufficient which did not show how long the defect existed. *Parker v. Boston*, 175 Mass. 501.

Existence of a ditch a foot wide and six or eight inches deep for several months was constructive notice. *Aiken v. Philadelphia*, 9 Pa. Super. Ct. 541.

A city which by its charter is given control of its streets, etc., is liable in damages to any one injured by reason of failure to repair the same. Notice of defects is presumed where the defects are visible. *Klein v. Dallas*, 71 Tex. 280.

So where improvements are being made although under contract. *Wilder v. St. Paul*, 40 Minn. 460.

Existence of a cavity in a sewer 10 or 12 feet long for two months, was constructive notice. *Dallas v. McAllister*, (Tex. Civ. App.) 39 S. W. Rep. 173.

City is chargeable with notice where the defect has existed a long enough time to enable city with reasonable care to discover it. *Lorence v. Ellensburg*, 13 Wash. 341.

See, also, *Allen v. East Buffalo*, 22 Pa. Co. Ct. 346; *Carroll v. Allen*, 20 R. I. 541; *Brown v. Mt. Holley*, 69 Vt. 364.

General bad condition in the vicinity was admissible on issue of notice. *Conrad v. Ellington*, 104 Wis. 367.

What constitutes reasonable diligence in repairing:

The plaintiff, on September 5th, was injured by the washout of the highway on August 23d, on which day the commissioner sent word to the overseer of highways to fix it, which he did on September 7th. Verdict for plaintiff sustained; because the statute made it the duty of the overseer to do the work, it is none the less the duty of the commissioner to see that his orders for doing it are carried out. *Farman v. Ellington*, 46 Hun, 41.

City must have a reasonable opportunity after notice in which to repair. *Smith v. Walker*, 117 Mich. 14; *Natchez v. Shields*, 74 Miss. 871.

Denver v. Moewes, 15 Colo. App. 28.

Burden is on the city to show lack of it. *Covington v. Diehl*, (Ky.) 59 S. W. Rep. 492.

But failure to repair within such time is negligence. *Dillon v. Raleigh*, 124 N. C. 184.

CONTRIBUTORY NEGLIGENCE.

Long continued neglect, after notice, to repair a leak in a street gas main, gives action to one injured by it against a city. *Ottersbach v. Philadelphia*, 161 Pa. St. 111.

6. CONTRIBUTORY NEGLIGENCE.

Right to rely upon presumption that street is reasonably safe:

A traveler on foot in a street, night or day, may assume that the crossings and also other parts of the street are in a safe condition. The municipality is not excused from its duty to see that an excavation in the street is guarded because it has employed a contractor to do the work. *Brusso v. City of Buffalo*, 90 N. Y. 679, aff'g judg't for pl'ff.

Chapter 700, Laws 1881, charging town with damages by reason of negligence of highway commissioners is constitutional. If the bridge be apparently safe a traveler may assume, ordinarily, that it is in repair. Character and weight of vehicle, and load, etc., should be taken into consideration in crossing a bridge, and may require care. The declaration of a commissioner of highways made the summer before the accident, that he must repair the bridge, is competent. *Bidwell v. Town of Murray*, 40 Hun, 190, aff'g judg't for pl'ff.

From opinion.—"The duty was with the commissioner of highways of the town, to use ordinary care to keep the bridges in the town in suitable repair for the purposes of the public travel over them, if he had the funds or the means of obtaining them for such purpose, and for failure in that respect, he is chargeable with negligence, and liable if injuries result occasioned by such neglect to parties lawfully passing over them, without fault on their part. *Hover v. Barkhoof*, 44 N. Y. 113; *Bryan v. Landon*, 3 Hun, 500; s. c., 5 T. & C. 594.

And this is an active duty of the commissioners, in so far that they are required to use active diligence to ascertain the situation of the bridges and highways of their respective towns, and although they do not have actual notice of defective condition, they may be chargeable with notice of the defects which would have come to their observation by the use of reasonable diligence. *Bostwick v. Barlow*, 14 Hun, 177; *Todd v. Troy*, 61 N. Y. 506; *McCarthy v. Syracuse*, 46 id. 194.

* * * * *

The towns, as such, are mere civil divisions, except so far as they are invested by statute with corporate powers. They possess no corporate power in respect to the highways. And the highway commissioners are public officers, and as such have the entire care of the construction and repair of the highways, and at common law the towns are in no manner chargeable with the consequences to individuals of their neglect or misconduct in their management of the highways within the town. *Morey v. Town of Newfane*, 8 Barb. 645; *Lorillard v. Town of Munroe*, 11 N. Y. 392; *People ex rel. Van Keuren v. Town Auditors*, 74 id. 310; *People ex rel. Loomis v. Town Auditors*, 75 id. 316; *People ex rel. Everett v. Supervisors*, 93 id. 397."

CONTRIBUTORY NEGLIGENCE.

Light was insufficient to enable cyclist to discern obstruction to cycle path. Whether he was entitled to rely on an assumption of safety was for the jury. *Collett v. New York*, 51 App. Div. 394.

Pedestrian has the right to assume that streets are safe. *Pierce v. Wilmington*, 2 Marv. (Del.) 306.

Carswell v. Wilmington, 2 Marv. (Del.) 360; *Baker v. Grand Rapids*, 111 Mich. 447.

And he need not search for defects. *Wilkins v. Wilmington*, 2 Marv. (Del.) 132.

The presumption applies throughout the width of a street. *Spring Valley v. Garvin*, 81 Ill. App. 456.

Including platform of scales in the street. *Kokomo v. Boring*, 24 Ind. App. 552.

Likewise he may assume that an obstruction is not dangerous unless it so appears from casual observation. *Atchison v. Plunkett*, 8 Kan. App. 308.

So, he may assume that a defect has been repaired after a lapse of a week. *Simonds v. Baraboo*, 93 Wis. 40.

Spring Valley v. Garvin, 182 Ill. 232; aff'g s. c., 81 Ill. App. 456.

Unless he has knowledge to the contrary. *Rock Falls v. Wells*, 59 Ill. App. 155.

Effect of knowledge of defect:

Not necessarily negligent to use street with such knowledge.—On each day for seven days prior to the injury the inspecting patrolman reported that snow and ice had not been removed from the walk when the plaintiff was hurt. The court charged that such report did not charge the city with negligence. Error. *Two good v. Mayor*, 102 N. Y. 216, rev'g judg't for def't.

Citing *Rehberg v. Mayor*, 91 N. Y. 173, 138.

Knowledge of defect simply imposes additional care in use. *Bunnell v. Berlin Iron Bridge Co.*, 66 Conn. 24.

Question was for the jury, where plaintiff assumed a less safe position in his wagon for a seat, with such knowledge. *Aurora v. Scott*, 185 Ill. 539; aff'g s. c., 82 Ill. App. 616.

So, where plaintiff drove down a steep hill with a stump in the middle of the road, familiar but forgotten. *Nebraska Tel. Co. v. Jones*, 60 Neb. 396.

Likewise, where he drove down a hill known to be icy and having a gulch in a turn part way down, without britching or sharp-shoeing. *Gardner v. Wasco County*, 37 Ore. 392.

So, where plaintiff attempted to pass a pile of snow knowing its dangerous character. *Stanton v. Scranton Co.*, 11 Pa. Super. Ct. 180.

Use, with knowledge of defect, is not negligence *per se*. *Peoria v. Gerber*, 68 Ill. App. 255; s. c. aff'd, 168 Ill. 318.

Harvey v. Clarinda, 111 Iowa, 528; *Citizens' Street R. Co. v. Sutton*, 148 Ind. 169; *Houston City Street R. Co. v. Medlenka*, 17 Tex. Civ. App. 621; *Pierson v. Lebanon*, 69 Mo. App. 321.

General knowledge of improvements, not notice of a particular excavation. *Hall v. Manson*, 99 Iowa, 698; s. c., 34 L. R. A. 207.

Knowledge of the presence of a hydrant by the street was not necessarily notice that the nut thereof projected into the street. *St. Germain v. Fall River*, 177 Mass. 550.

Knowledge together with temporary forgetfulness are elements of consideration. *Cowie v. Seattle*, 22 Wash. 659.

But knowledge does not make temporary forgetfulness negligence *per se*. *Doan v. Willow Springs*, 101 Wis. 112.

So, knowledge on one morning did not make forgetfulness on the following night, such. *Bouga v. Weare*, 109 Mich. 520.

But care must be used commensurate with known danger.—The ordinary care required is care in proportion to the danger. *Spring Valley v. Garvin*, 182 Ill. 232; aff'g s. c., 81 Ill. App. 450.

Gardner v. Wasco County, 37 Or. 392.

No negligence in using street with knowledge of defect where the danger is not such as to make use imprudent. *Seybold v. Terre Haute &c. R. Co.*, 18 Ind. App. 367.

Such care used.—Plaintiff was watching for the defect when he ran over it. It was dark at the time. Error not to submit the question of contributory negligence to the jury. *Rysdyke v. Mt. Hope*, 46 App. Div. 624.

Pratt v. Cohasset, 177 Mass. 488.

Plaintiff used a road which was reasonably safe to avoid a dangerous sidewalk. *East St. Louis v. Dougherty*, 74 Ill. App. 490.

Plaintiff turned out to within one and one-half or two feet of the edge of a road next to steep bank to pass a team. The road was but 17 feet wide. *Harris v. Great Barrington*, 169 Mass. 271.

Maintaining a mud hole in a highway was the efficient cause of injury to plaintiff's horse, where he reasonably believed he could get out with the assistance of another's horse. *Davis v. Longmeadow*, 169 Mass. 551.

CONTRIBUTORY NEGLIGENCE.

Such care not used.—Of 230 miles of road in a town 80 were along duckways and up steep ravines; a road passed over a mountainous, wooded region, used mainly for drawing heavy loads and wood, and for five miles but two or three families lived upon it. Twenty years before the accident the road was properly constructed along the side of a steep hill, with a retaining wall below and guards of logs thereon. At the foot of the hill, the road nearly level, had become filled up nearly to the top of the guard and there was a slope of eighteen inches towards its lower side; it was twelve to fifteen feet wide, and with the lower wagon track about four feet from the guards. So it remained eight years without accident. Previous to the accident ice had formed upon a water bar which ordinarily discharged the water over the wall, and shortly before there had been an extraordinarily severe storm, whereby the snow had drifted deeply into the road and was soft from falling. The deceased came down the hill on a load of logs on two bobs; the rear bob slid on the ice and snow, the lower runner went over the wall, the load was overturned, and the deceased was killed.

A nonsuit should have been granted. *Lane v. Hancock*, 142 N. Y. 510, rev'g 67 Hun, 623, and judg't for pl'ff.

Driving along a ridge of earth at night having piles of earth along it. *Morgan v. Penn Yan*, 42 App. Div. 582.

Conductor of a street car persisted in getting within reach of the trestle timbers of a sewer excavation. *Columbia v. Ashton*, 14 App. D. C. 571.

Where plaintiff not only could have seen, but knew, the conditions. *Cloney v. Kalamazoo*, 124 Mich. 655.

King v. Colon, 125 Mich. 511.

Driving a timid horse on a narrow road adjoining a railroad with knowledge that it was torn up. *Snyder v. Penn*, 14 Pa. Super Ct. 145.

Standing up in a wagon to steady a barrel of liquid mortar, on a bad road. *Walters v. Wayne*, 16 Pa. Co. Ct. 613.

Choice of ways.—Plaintiff unnecessarily used the unfamiliar side of an unimproved street in deep shadow on a dark night. No recovery. *McNish v. Peekskill*, 91 Hun, 324.

Choice of a slightly defective but familiar way rather than those not familiar was not negligence *per se*. *Carsteen v. Stratford*, 67 Conn. 428.

Douglass v. Monongahela City Water Co., 172 Pa. St. 435.

Plaintiff was not negligent *per se* in crossing a dangerous depression instead of passing around it. *Kassmann v. St. Louis*, 153 Mo. 293.

Otherwise, as to crossing an excavation at night. *Boyd v. Springfield*, 62 Mo. App. 456.

Pedestrian held to assume the risk of falling into a catch basin by crossing elsewhere than at a crossing. *Dayton v. Taylor*, 62 Oh. St. 11.

So, where he voluntarily and without an excuse took unsafe instead of a safe way. *Smith v. New Castle*, 178 Pa. St. 298.

Obvious defects:

The plaintiff, riding on a load of hay, was injured by being swept from the load by the limbs of a tree, overhanging the traveled track of the highway. The court charged, at the request of the defendant, that the jury in determining whether the commissioners were chargeable with notice that the obstruction was dangerous, might consider the fact that people driving on loads of hay had passed under this tree without difficulty, and also the fact that no complaint had been made to the commissioners. It had been therefore charged that "it is nothing of any consequence that thousands have passed there without injury." The plaintiff had occasionally traveled on this highway, but never before on a load of hay, nor had he occasion to observe how low the branches of the apple tree hung or how far they extended. The highway commissioners testified that they had never known any difficulty from said tree and that no danger therefrom was obvious to them.

The plaintiff was not *per se* chargeable with negligence, and recovery was upheld, and the charge proper. *Embler v. Walkill*, 132 N. Y. 222, aff'g 57 Hun, 384, and judg't for pl'ff.

Diversion of attention from obvious defect was not a defense to contributory negligence. *Wilkins v. Wilmington*, 2 Marv. (Del.) 132.

See, also, *Benton v. Philadelphia*, 198 Pa. St. 396; *Graham v. Philadelphia*, 19 Pa. Super. Ct. 292; *O'Neil v. Hanscom*, 175 Mass. 313.

As, where excavation was well lighted and guarded also, but plaintiff was heedless. *Maloney v. Hansom*, 175 Mass. 313.

To prevent recovery the defect must have been obvious to one using reasonable care in use of the street. *Pierce v. Wilmington*, 2 Marv. (Del.) 306.

Jegglin v. Roeder, 79 Mo. App. 428; *Bruch v. Philadelphia*, 5 Pa. Dist. 718.

That warnings were not given by authorities was no defense to contributory negligence. *Carswell v. Wilmington*, 2 Marv. (Del.) 360.

Though knowledge of defect was evidence of negligence, it was not equivalent to the statutory warning required. *Wasco County v. Gardner*, 37 Ore. 392.

Failure to guard was no defense where a boy of 12 voluntarily ran and jumped. *Butz v. Cavanagh*, 137 Mo. 503.

No contributory negligence, where defect was concealed by snow. *Waters v. Kansas City*, 94 Mo. App. 413.

CONTRIBUTORY NEGLIGENCE.

No recovery for injury due to unlit pile of stone 150 yards from an electric light. *Pinnix v. Durham*, 130 N. C. 360.

Boy attempted to rescue a comrade overcome by gas at the bottom of a deep ditch, where he had gone to recover a ball, and was himself overcome. Negligence and contributory negligence were for the jury. *Corbin v. Philadelphia*, 195 Pa. St. 461; s. c., 49 L. R. A. 715.

Negligent conduct in use of street:

Where building materials so obstruct the street that room for one vehicle only remains, a person attempting to pass another in such a space, thereby driving over the obstruction, does so at his peril, as he is not using ordinary care. *Griffin v. Mayor &c.*, 9 N. Y. 456, aff'g nonsuit.

Where the proof shows that the proximate cause of a person's injury was occasioned by her stumbling or tripping over a curbstone, and not by a defect in the sidewalk of a city, as claimed in the complaint, such person has no cause of action against such city. *O'Bryan v. Amsterdam*, 74 Hun, 136.

Plaintiff relied on the instinct of his horses and the tilt of his wagon where he could not see on account of the darkness. Not negligent conduct. *Titus v. New Scotland*, 11 App. Div. 266.

Otherwise, where plaintiff drove an extremely wide truck over a driveway guarded by hubstones and designed only for ordinary use. *Jordan v. New York*, 44 App. Div. 149; s. c. aff'd, 26 Misc. 53.

Negligent to unnecessarily force a horse past an object causing fright. *Salem v. Walker*, 16 Ind. App. 687.

But stepping into the street to place an article in his conveyance was not. *Finnegan v. Sioux City*, 112 Iowa, 232.

Nor stepping off the walk onto the cover of a catch basin beside it to let another pass. *Mattoon v. Worland*, 97 Ill. App. 13.

Turning out without necessity so far as to run off edge of a culvert was negligent. *Tasker v. Farmingdale*, 88 Me. 102.

So, as to failing to keep a horse in the traveled road. *Carey v. Hubbardson*, 172 Mass. 106.

So, to strike a horse shying toward a curb, where there is a projecting hydrant. *St. Germain v. Fall River*, 177 Mass. 550.

So, in using an electric light pole as a hitching post. *Ryther v. Austin*, 72 Minn. 24.

That a catch basin had no cover was no ground of recovery, where plaintiff voluntarily took advantage of it to rescue a child. *Kelley v. Boston*, 180 Mass. 233.

Pedestrian passed through a barricade and used planking over an ex-

cavation designed for the use of the city's employes only. No recovery. *Merriam v. Stainback*, 79 Miss. 447.

Riding a bicycle in a bent position was not *per se* negligence. *North Jersey Street R. Co. v. Mohart*, 62 N. J. L. 236.

A danger light was not sufficient, where it was 20 to 40 feet away from the unguarded ditch. Did not charge an equestrian with contributing negligence *per se*. *Oklahoma City v. Welsh*, 3 Okla. 288.

Not negligence *per se* to drive over a hole filled with water. *McLaughlin v. Philadelphia T. Co.*, 175 Pa. St. 565.

Nor, upon unexpectedly meeting an obstacle in one side of the road, to quickly pull the horse to the other. *Hookey v. Oakdale*, 5 Pa. Super. Ct. 404.

Nor in driving in the dark over logs upon turning a corner. *Slivitzki v. Wein*, 93 Wis. 460.

Nor where the stump was only a few inches beyond the road. *Boltz v. Sullivan*, 101 Wis. 608.

Defective persons:

Negligence of one impaired in strength and defective in sight in attempting to drive on the street was not proximate cause of injury, where horse took fright at a steam engine. *Ham v. Lewiston*, 94 Me. 265.

Speed:

Plaintiff drove a loaded truck at a gallop toward an obstruction in plain sight not 20 feet away. No recovery. *Schafer v. New York*, 12 App. Div. 384.

Recovery allowed for injury received while driving on a trot in the dark through a space left for passage in a street in process of improvement. *Tompert v. Hastings Pavement Co.*, 35 App. Div. 578.

Plaintiff was not negligent *per se* in driving on a trot over switch rails running diagonally across the street. *Central R. Co. v. State*, 82 Md. 647.

No recovery allowed where plaintiff was racing. *Oliver v. Nashville*, 106 Tenn. 273.

A rate of speed in violation of an ordinance causing an accident prevents recovery. *Luke v. El Paso*, (Tex. Civ. App.) 60 S. W. Rep. 363.

Six miles an hour, not knowing of defect, was not negligence. *Bills v. Kaukauna*, 94 Wis. 310.

Intoxication:

Intoxication, to bar recovery, must have contributed to the injury. *Ashborn v. Waterbury*, 70 Conn. 551.

PROXIMATE CAUSE.

Driver, killed by being thrown from his wagon when it struck a log on the roadside was so intoxicated that he could not control his team. No recovery allowed. *Carpenter v. Rolling*, 107 Wis. 559.

Violation of ordinance:

Fire department is excepted from ordinance as to speed. *Farley v. New York*, 152 N. Y. 222; rev'g s. c., 9 App. Div. 536.

The rules of a fire department to drive in middle of the street, held not to impose more than ordinary care on fireman. *Kansas City v. McDonald*, 60 Kan. 481; s. c., 45 L. R. A. 429; *State v. Sheppard*, 64 Minn. 287.

The exemption did not apply where driver of a fire engine was racing with another. *Carswell v. Wilmington*, 2 Marv. (Del.) 360.

Violation of speed ordinance contributing to the injury prevented recovery. *Anderson v. Wilmington*, 2 Penn. (Del.) 28.

Luke v. El Paso, (Tex. Civ. App.) 60 S. W. Rep. 363.

A statute requiring passing to right on highways construed not to apply to city streets. *Decatur v. Stoops*, 21 Ind. App. 397.

7. PROXIMATE CAUSE.

Plaintiff must show at least a casual connection between an excavation or obstruction about it and the injury. *Southworth v. Shea*, 131 Ala. 419.

Bodah v. Deer, 99 Wis. 509.

Reckless speed was the proximate cause of injury and not the presence of a hydrant in the street. *Vincennes v. Thuis*, 28 Ind. App. 523.

Material contribution to the injury is sufficient. *Clay Center v. Jevons*, 2 Kan. App. 568.

Rut in a road held proximate cause of injury from a frightened horse running into it. *Henderson &c. Road Co. v. Crosby*, (Ky.) 44 S. W. Rep. 639.

Vogel v. West Plains, 73 Mo. App. 588.

A horse switched his tail over the lines and so diverted the carriage into a defect as to produce injury. The town was not liable. *Fogg v. Nahant*, 98 Mass. 578.

Same principle, 106 Mass. 278.

Not the stopping a car for a person near a trench, but the failure to have it guarded, was the proximate cause of the accident. *Monje v. Grand Rapids*, 122 Mich. 645.

DANGEROUS PLACES BEYOND THE LIMITS OF THE HIGHWAY.

That a swing several feet from the curb might be pushed out so as to strike a vehicle was too remote a contingency. *Shotwell v. Reading*, 4 Oh. Dec. 326.

Horse, frightened by obstacles in the street, ran away and went on railroad track and was killed, five miles from cause of fright. No recovery. *Mahanoy v. Watson*, 11 Pa. St. 574.

Question is for the jury where plaintiff was struck by a passing street car as he drove into an unlighted obstruction. *Koch v. Williamsport*, 195 Pa. St. 488.

Momentary forgetfulness of a known danger is an element of consideration for the jury. *Knoxville v. Cox*, 103 Tenn. 368.

(o). DANGEROUS PLACES BEYOND THE LIMITS OF THE HIGHWAY.

Where the dangers are beyond the traveled way on the path of the city, stricter proof is imposed on plaintiff. *McFarland v. Emporia*, 59 Kan. 568.

No liability attaches to a city for injuries received by a citizen while passing a vacant lot where blasting was being done with city's consent. *James v. Harrodsburg*, 85 Ky. 191.

When an open, well-beaten path led from the traveled part of a road to an apparently safe watering place by the side of the way, and within the limits of the road as laid out, but where was a deep, miry pit, and the horse of a traveler turned toward the place to drink and was drowned, the town was liable. *Cobb v. Standish*, 14 Me. 198.

A town is not bound to erect barriers of any kind to prevent or warn travelers from straying off the side of a highway and falling into a dock twenty-five feet distant, although the intervening land is on a level with the way and open. *Murphy v. Inhabitants of Gloucester*, 105 Mass. 470; *City of Sparhawk v. Salem*, 1 Allen, 30, where it is said: "But none of these cases cited sanction the doctrine that railings are necessary merely to prevent travelers from straying out of the highway, when there is no unsafe place immediately contiguous to the way, on the contrary, these cases require the party to show that the defect which caused the injury existed either in the highway, or so immediately contiguous to it as to make it dangerous to travel on the highway itself." *Alger v. Lowell*, 3 Allen, 402, where it is said: "The true test is not whether the dangerous place is outside of the way, or whether some small strip of ground not included in the usual way must be traversed in reaching the dangers, but whether there is such risk of a traveler using ordinary care in passing along there, being thrown or falling into the dangerous place, that a

LIGHTING STREETS.

railing is requisite to make the way itself safe and convenient." *Adams v. Natick*, 13 Allen, 429.

An action will lie against a city for permitting a school house wall, which had fallen without plaintiff's fault, upon land, to continue there. *Miles v. Worcester*, 154 Mass. 511.

Town required to guard excavation for cellar 12 feet from the street. *Tisdale v. Bridgewater*, 167 Mass. 248.

Barriers are not required to keep people in the street where there is no necessity to go beyond it. *McHugh v. St. Paul*, 67 Minn. 441.

City was not negligent in failing to post warning of basin filled with water, and covered with a crust of debris supporting a growth of weeds. It had never been used as a thoroughfare. *Dehanitz v. St. Paul*, 73 Minn. 385.

City not bound to grate entrance to sewer creek to protect children playing therein. *Nutting v. St. Paul*, 73 Minn. 371.

City not liable for death of child in pond on private property not in dangerous proximity to the street. *Omaha v. Bowman*, 52 Neb. 293; s. c., 40 L. R. A. 531.

The alleged defect in a highway was the absence of a railing on the south side of the street to keep travelers out of a cellar, which was *outside of* and near the street, and the judgment for injury thereby was sustained. *Stack v. Portsmouth*, 52 N. H. 221, reviewing *Davis v. Hill*, 41 id. 333; *Hayden v. Attleborough*, 7 Gray, 338.

A derrick in operation close to the road on one side required town to guard precipitous descent on the other. *Kitchen v. Union*, 171 Pa. St. 145.

Township not liable for injury to one leaping from his carriage in fear of collision with logs descending a chute on private property adjacent to highway. *Haines v. Barclay*, 181 Pa. St. 521.

City was liable for its scavengers depositing offensive material upon its lot adjoining plaintiff's dwelling. *Stephenville v. Bower*, (Tex. Civ. App.) 68 S. W. Rep. 833.

(p). LIGHTING STREETS.

Existence of a defect for a year at a place which was without light at night charged the city with negligence. *Brewer v. New York*, 31 App. Div. 244.

So, where a line of curbing of the same color as the surrounding roadway was placed dangerously near the entrance to a bicycle path and the place so poorly lighted as to prevent detection by the exercise of ordinary care. *Collett v. New York*, 51 App. Div. 394.

For discretionary acts a municipality is not liable; and when it is under no statutory obligation to light highways, it cannot be liable for failure so to do. *Gaskins v. City of Atlanta*, 73 Ga. 746.

Where an arc light was placed 150 feet on each side of the place where the injury occurred with a row of trees between, plaintiff was not chargeable with contributory negligence. *Ft. Wayne v. Durnell*, 13 Ind. App. 669.

But the mere failure to light does not of itself show negligence. *Oliver v. Denver*, 13 Colo. App. 345.

If there is no defect there is no common law duty to light. *McHugh v. St. Paul*, 67 Minn. 441.

See, also, *Vincennes v. Thuis*, 28 Ind. App. 523; *Canavan v. Oil City*, 183 Pa. St. 611.

Otherwise, where it is required by the regulations of the lighthouse board. *Smith v. Shakopee*, 103 Fed. Rep. 240.

Municipality may be liable for not giving warning of excavation in a street by lighting it. *Butler v. Bangor*, 67 Me. 385.

While a municipality is not liable for failure to avail itself of its power to light its streets, yet when it assumes to light a street or bridge, and does it in such a negligent manner as not to afford proper security from danger, and in consequence a person is injured by falling into an excavation in the night-time, the omission may be shown on the question of negligence. The city had lamp-posts and other facilities but had abandoned the use of them, and it was held that it had a right so to do. *City of Freeport v. Isbell*, 83 Ill. 440, distinguishing *City of Chicago v. Powers*, 42 Ill. 169, where the city had lighted a certain bridge where the accident occurred, as well as the street; but the injury arose from the fact that the light furnished was insufficient to afford proper protection.

See, also, *Winchester v. Carroll*, 99 Va. 727.

A municipality is not negligent in not lighting its highways. *Randall v. Eastern R. Co.*, 106 Mass. 276.

Citing *Sparhawk v. Salem*, 1 Allen, 30; *Macomber v. Taunton*, 100 Mass. 255; *Lyon v. City of Cambridge*, 136 id. 419; *City of Freeport v. Isbell*, 83 Ill. 440.

A city is under no greater liability by reason of an ordinance requiring the superintendent of streets to place lights there. *Lyon v. Cambridge*, 136 Mass. 419.

Citing *Lorillard v. Monroe*, 1 Kernan, 392, 396; *Fowle v. Alexandria*, 3 Pet. 398, 409; 2 Dillon Mun. Corp. (3d ed.) sec. 950.

Plaintiff was not negligent in proceeding in the dark, where he was familiar with the street and ignorant of any danger. *May v. Anaconda*, 26 Mont. 140.

(q). PURITY OF WATER.

A municipality must use reasonable care to keep the water wholesome in a well used by the public, but it does not insure a proper condition. The well had been used for years and had been good until the month of the injury. There was no liability. *Danaher v. Brooklyn*, 119 N. Y. 241, aff'd 51 Hun, 563, and judg't for def't.

From opinion.—"This water was not furnished for a compensation paid for its use, and so there was no contract relation between the city and those who used it. The well was for public gratuitous use, and hence, nothing that was said or intimated in *Milnes v. Mayor of Huddersfield*, L. R. (10 Q. B. Div.) 124; 12 id. 443, has any pertinency here.

* * * Hence, there was no willful misconduct or culpable neglect on the part of the city as to this well. Trees, bridges and other wooden structures will necessarily decay and become unsafe, and where they may thus become dangerous to human life, the duty devolves upon the municipality to make tests and examinations, using reasonable diligence to ascertain whether they are safe or not. *Vosper v. Mayor &c.*, 17 J. & S. 296; *Howard v. Legg*, 11 N. E. 614; *Jones v. New Haven*, 34 Conn. 13; *Norristown v. Moyer*, 67 Penn. St. 355. But this case is not analogous to those. Here, there is no proof justifying the inference that the water of this well was constantly and inevitably exposed to impurities which would render it dangerous to human life. On the contrary, evidence shows that up to about the first of August its waters were wholesome and free from dangerous impurities.

This is not like the cases where a city creates or permits a nuisance, or turns a stream of mud or water upon the premises of private individuals. In such cases it is held responsible for the nuisance which it creates or permits, and for its wrongful acts. *People v. Albany*, 11 Wend. 539; *Nevins v. City of Peoria*, 41 Ill. 502; *Shawneetown v. Mason*, 82 id. 337.

There was no proof in this case that the city in any way polluted or poisoned the water of this well, or permitted others to do so, and hence, the case of *Rex v. Medley*, 6 C. & P. 292; *Goldsmid v. Turnbridge Wells I. Co.*, L. R. (1 Eq. Cas.) 161; *Charles v. Hinkley Local Board*, 52 L. J. (N. S.) 554; *Brown v. Illius*, 27 Conn. 84; *Ballard v. Tomlinson* L. R., 29 Ch. Div. 115, are not in point.

III. Public Improvements.*

A municipality or a person appointed or authorized by law to perform a public duty, or to do acts of a public character, unless otherwise provided by statute, is not answerable for consequential damages therefrom to private property, if the work be done within due public authority, and with due care and skill. Under this rule a corporation is not liable for injury to private property by surface water, as the result of the improvement of one of its streets. But this rule does not justify actual invasion of private rights, as by depriving a person of his due enjoyment of a natural stream,

*NOTE.—As to negligence in construction and repair, see *ante*. p. 1809. As to negligence in plan see *ante*. p. 1809.

NOT LIABLE FOR MERELY CONSEQUENTIAL DAMAGES.

or by collecting, diverting or emptying upon private premises, where it would not naturally flow, large and injurious quantities of surface water, through the insufficiency of its artificial channels or otherwise.

(a). NOT LIABLE FOR MERELY CONSEQUENTIAL DAMAGES FROM PUBLIC IMPROVEMENTS.

That which the law authorizes cannot be a nuisance such as to give a common-law right of action.

A municipal corporation, authorized by law to improve a street by building on the line thereof a bridge over, or a tunnel under, a navigable river, where it crosses the street, incurs no liability for the damages unavoidably caused to adjoining property by obstructing the street or the river, unless such liability be imposed by statute.

If the fee of the street is in the adjoining lot-owners, the state has an easement to adapt the street to easy and safe passage over its entire length and breadth. When making or improving the streets within its limits, in the exercise of an authority conferred by statute, a city is the agent of the state, and, if it acts within that authority, and with due care, dispatch, and skill, it is not, at common law, answerable for consequential damages.

Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, although their consequences may impair its use, are not a taking within the meaning of the constitutional provision which forbids the taking of such property for public use without just compensation therefor. *Transportation Co. v. Chicago*, 99 U. S. 635.

From opinion.—"It is undeniable that in making the improvements of which the plaintiffs complain, the city was the agent of the state, and performing a public duty imposed upon it by the legislature; and that persons appointed or authorized by law to make or improve a highway, are not answerable for consequential damages if they act within their jurisdiction and with care and skill, is a doctrine almost universally accepted alike in England and in this country. It was asserted unqualifiedly in *The Governor & Company of the British Cast-Plate Manufacturers v. Meredith*, 4 Durnf. & E. 794; in *Sutton v. Clarke*, 6 Taun. 28; and in *Boulton v. Crowthen*, 2 Barn. & Cres. 703. It was asserted in *Green v. The Borough of Reading*, 9 Watts. (Pa.) 382; *O'Connor v. Pittsburg*, 18 Penn. St. 187; in *Callendar v. Marsh*, 1 Pick. (Mass.) 418, as well as by the courts of numerous other states. It was asserted in *Smith v. The Corporation of Washington*, 20 How. 135, in this court; and it has been held by the supreme court of Illinois. The decisions in Ohio, so far as we know, are the solitary exceptions. The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The state holds its highways in trust for the public. Improvements made by its direction or by its

NOT LIABLE FOR MERELY CONSEQUENTIAL DAMAGES.

authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the state to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the state is compelled to employ. The remedy, therefore, for consequential injury resulting from the state's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta and the restriction to be found in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions, will find them collected in Cooley on Constitutional Limitations, page 542 and notes. The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly v. Green Bay Company*, 13 Wall. 166, and in *Eaton v. Boston, Concord & Montreal Railroad Co.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a *physical invasion* of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

A municipality or person appointed or authorized by law to perform a public duty or to do acts of a public character, is not answerable for consequential damages if they act within their jurisdiction and with care and skill. *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Conklin v. N. Y. O. & W. R. Co.*, 102 id. 105; *Bohan v. Port Jervis, G. I. Co.*, 122 id. 18; *Cooley on Const. Law* (5th ed.) 678; *Dillon's Mun. Corp.* 987; *Alexander v. Milwaukee*, 16 Wis. 247.

A municipality is not liable for damages for consequential injury in the due and proper execution of public authority to grade or change the grade of streets. *Heiser v. New York*, 104 N. Y. 68.

Citing *Conklin v. Railroad Co.*, 102 N. Y. 107, 109; *Radcliff's Exrs. v. Mayor*, 4 id. 195; *Wilson v. Mayor*, 1 Denio, 595; *Lynch v. Mayor*, 76 N. Y. 60.

See *Dillon's Mun. Corp.*, sec. 989; *Chicago v. Rumsey*, 87 Ill. 348; *Pye v. City of Mankato*, 36 Minn. 373.

In the absence of statute no liability attaches to a municipality for injuries caused by reason of failure to repair its streets. *Arkadelphia v. Windham*, 49 Ark. 139.

Hill v. Boston, 122 Mass. 357; *Detroit v. Blakely*, 21 Mich. 106; *Young v. Charleston*, 20 S. C. 116; *Navasota v. Pearce*, 46 Tex. 526; *Pray v. Jersey City*, 32 N. J. L. 394; *Winbigler v. Los Angeles*, 45 Cal. 36; *Oliver v. Worcester*, 102 Mass. 499; *Mitchell v. Rockland*, 52 Me. 123; *Hyde v. Jamaica*, 27 Vt. 443.

FLOW OF SURFACE WATER.

So, where sewer was being constructed by city marshal. *Chope v. Eureka*, 78 Cal. 588.

Access to premises was cut off causing loss of rent. No liability. *Chicago v. McGuirl*, 86 Ill. App. 392.

No recovery for injury from step in sidewalk between grades. *Teager v. Flemingsburg*, (Ky.) 60 S. W. Rep. 718.

City liable for negligent execution of public improvement. *Peck v. Michigan City*, 149 Ind. 670.

See, also, *Cummings v. Toledo*, 12 Oh. C. C. 650; *Hirth v. Indianapolis*, 18 Ind. App. 673; *New Albany v. Lines*, 21 Ind. App. 380; *Cooper v. Cedar Rapids*, 112 Iowa, 367; *Powell v. Wytheville*, 95 Va. 73.

Where no grade has been established, the city was liable for the cost of a retaining wall and of erecting a means of access to the dwelling as well as damages to trees. *Richardson v. Webster City*, 111 Iowa, 427.

See, also, *Ludlow v. Mackintosh*, (Ky.) 53 S. W. Rep. 524.

The interruption of public travel held an incident of public improvement for which city was not liable; but the obstruction of the means of access to private property held an invasion of a private right imposing liability. *Chicago v. Baker*, 98 Fed. Rep. 830.

See, also, *Norman v. Ince*, 8 Okla. 412.

Authority to construct a dam is no excuse for not clearing the bed of the stream of debris, caused by its erection. *Baltimore v. Merryman*, 86 Md. 584.

If a city, while properly repairing its streets, lays bare the pipes of a water company, no liability attaches to it for the damage caused. *Rockland Water Co. v. Rockland*, 83 Me. 267.

See *Koelsch v. The Philadelphia Co.*, 152 Pa. St. 355.

In grading, a cut was made above plaintiff's land. He recovered for injury to his spring. *O'Neil v. Ben Avon*, 9 Pa. Dist. 130.

Even if the street be graded to the outer line thereof, so as to deprive the abutting owner of lateral support to his premises, the city is not liable for injury to a building erected thereon. *North Transp. Co. v. Chicago*, 99 U. S. 635; *Quincy v. Jones*, 76 Ill. 231, reviewing cases.

Dillon's Mun. Corp., sec. 991.

1. FLOW OF SURFACE WATER.

Where injury is done to private property by surface water as the result of the improvement of a street, the city is not liable unless so declared by statute. *Gould v. Booth*, 66 N. Y. 62.

Watson v. Kingston, 114 N. Y. 88; *Callahan v. Des Moines*, 63 Iowa, 705;

FLOW OF SURFACE WATER.

Bowlsby v. Speer, 2 Vroom. 351; Parks v. Newburyport, 10 Gray, 29; Dillon's Mun. Corp. 1039; Pye v. Mankato, 36 Minn. 373.

The owner of property may so arrange his property as to keep surface water off from him or turn it back into the street. *Wilson v. N. Y.*, 1 Denio, 595, 598.

Lynch v. N. Y., 70 N. Y. 60; Stanchfield v. Newton, 142 Mass. 110.

Increase of flow of surface water merely incident to grading does not impose liability; but systematic collection and diversion does. *Carll v. Northport*, 11 App. Div. 120.

Sweetwater v. Pate, (Tenn.) 59 S. W. Rep. 480, where no outlet for the increase is provided; Flanders v. Franklin, 70 N. H. 168.

Otherwise, where a city's ditch only collected water without changing the course or increasing the volume of the natural surface drainage. *Keithsburg v. Simpson*, 70 Ill. App. 467.

See, also, *Jordan v. Benwood*, 42 W. Va. 312; *McCray v. Fairmont*, 46 id. 442.

Though plaintiff's land would not have been flooded except for the barrier of an adjoining owner, recovery was not denied, where such barrier was erected by the latter to protect himself. *Martin v. Brooklyn*, 32 App. Div. 411.

There is no liability for collection of water on lot as the effect of grading on surface drainage. *Lampe v. San Francisco*, 124 Cal. 546.

Hoster v. Philadelphia, 12 Pa. Super. Ct. 224; *Harp v. Baraboo*, 101 Wis. 368.

Especially where the grade does not collect water so as to increase its volume or change the direction of its natural flow. *Hirth v. Indianapolis*, 18 Ind. App. 673.

Warner v. Muncie, 18 Pa. Co. Ct. 582.

One improves property below an established grade at his own risk. *Aicher v. Denver*, 10 Colo. App. 413.

So, where unimproved property left below grade is damaged. *Hoffman v. Muscatine*, 113 Iowa, 332.

City changed the grade it had established which adjoining owners had made their premises conform to. City was liable for damage consequent upon the change. *Keehn v. McGillicuddy*, 15 Ind. App. 580.

Under Kentucky Constitution city is liable for flooding of premises by change of grade. *Mount Sterling v. Jephson*, (Ky.) 53 S. W. Rep. 1046.

Otherwise, where town, from reasonable necessity, turns the water from its highway into a natural drain. *Oftelie v. Hammond*, 78 Minn. 275.

City was liable where the overflow was due to unskillful grading and the obstruction of natural outlet. *Dallas v. Cooper*, (Tex. Civ. App.) 34 S. W. Rep. 321.

LIABLE IF IT CONSTITUTES AN INVASION OF PRIVATE PROPERTY RIGHTS.

2. EFFECT OF STATUTES REQUIRING COMPENSATION.

Obstruction of access to property and changes in the flow of water considered the taking of private property for public use, requiring the compensation provided for by statute. *Ludlow v. Detweller*, (Ky.) 47 S. W. Rep. 881.

Mass. Pub. Stat. ch. 49, a statute gives damages for injury by alteration in streets, held not to apply, where city gave a railroad the right to change the grade thereof. *Vigeant v. Marlboro*, 175 Mass. 450.

The constitution of some states provide that private property shall not be taken or *damaged* for public purposes without compensation. Under such a provision recovery may be had where private property has sustained substantial damages by the making and using a public improvement, and it is not necessary that the damage be caused by trespass or an actual physical invasion; but recovery may be had for consequential damages. *Chicago v. Taylor*, 125 U. S. 161.

Rigney v. Chicago, 102 Ill. 64, 74, 80; *Chicago &c. R. Co. v. Ayers*, 106 id. 518.

Judge Dillon (Mun. Corp. 1236) is of the opinion that if, after the natural surface of a street has been adjusted to a grade and improvements made on adjacent property, conformed thereto and improved, any injurious change of grade should bring the owner within the constitutional protection.

(b). BUT LIABLE IF IT CONSTITUTES AN INVASION OF PRIVATE PROPERTY RIGHTS, TRESPASS OR NUISANCE.

Discharge of a sewer near a residence held such an invasion. *Moody v. Saratoga Springs*, 163 N. Y. 581; aff'g s. c., 17 App. Div. 207.

See, also, *Martin v. Brooklyn*, 32 App. Div. 411; *Hession v. Wilmington*, 1 Marv. (Del.) 122; *King v. Kansas City*, 58 Kan. 334.

Entry on private premises to construct drain without protest from owner was not trespass. *In re Lent*, 47 App. Div. 349.

Ivey v. Macon, 102 Ga. 141; *Dell Rapids Mer. Co. v. Dell Rapids*, 11 S. D. 116; see, however, *Cooper v. Cedar Rapids*, 112 Iowa, 367; *Jordan v. Mount Pleasant*, 15 Utah, 449.

Obstruction of light, air and access by structure in front of premises gives the owner damages. *Sauer v. New York*, 60 N. Y. Supp. 648.

Jarbee v. Carrollton, 73 Mo. App. 347; *Hall v. Austin*, 20 Tex. Civ. App. 59; *Cummins v. Sammunduwot Lodge No. 3*, 9 Kan. App. 153.

LIABLE IF IT CONSTITUTES AN INVASION OF PRIVATE PROPERTY RIGHTS.

So, where an excavation wholly obstructed a street. *Van Siclan v. New York*, 32 Misc. 403.

So, as to an open wooden trough through which the sewage of the city passed for a space of 450 yards a short distance from a dwelling. *Adams v. Modesto*, 131 Cal. 501.

Otherwise, where the improvement was planned in good faith. *Hession v. Wilmington*, 1 Marv. (Del.) 122.

Knostman &c. Fur. Co. v. Davenport, 99 Iowa, 589.

So, as to drain pipe which the city had itself laid for the sole purpose of abating a nuisance on the premises in question. *Ivey v. Macon*, 102 Ga. 141.

Draining a highway in such a way as to injure private property entitled owner to compensation. *Barfield v. Macon County*, 109 Ga. 386.

The right to drain does not include the right to discharge sewage. *Robb v. La Grange*, 158 Ill. 21.

A prescriptive right is no defence. *Bloomington v. Costello*, 65 Ill. App. 407.

So, where a sewer empties into a harbor basin so as to interfere with dockage rights, deposit sewage, &c. *Peck v. Michigan City*, 149 Ind. 670.

That plaintiff himself contributed to the offensive odors complained of, by the deposit of his garbage, was not a defense in action against city. *Correll v. Cedar Rapids*, 110 Iowa, 333.

Where private right is invaded, adequacy of plan is no defense. *King v. Kansas City*, 58 Kan. 334.

Extension of fill in grading onto plaintiff's property without her permission held an invasion of a private right. *Ludlow v. Frost*, (Ky.) 45 S. W. Rep. 661.

A municipality is liable in *tort* for the negligent uncovering of a pipe leading to a green house by reason of which the pipe froze and plants were destroyed. *Stock v. Boston*, 149 Mass. 410.

City was not bound to require a private person diverting a stream to restore it to its natural course. *Allebrand v. Duqueen*, 11 Pa. Super. Ct. 218.

That the work is a public one is no defense to a nuisance. *Chattanooga v. Dowling*, 101 Tenn. 342.

City was liable for using private premises for public dumping ground. *San Antonio v. Mackey*, 14 Tex. Civ. App. 210.

See, also, *Correll v. Cedar Rapids*, 110 Iowa, 333; *San Antonio v. Smith*, 94 Tex. 266.

That the cause of a nuisance was situated entirely on the city's own property held no defense. *Willett v. St. Albans*, 69 Vt. 330.

1. COLLECTION AND DIVERSION OF WATER.

In Dillon's Mun. Corp., sec. 1041, it is denied as adjudged by some authorities, that a municipality may collect and divert water from a street by artificial means upon property to its injury.

If, in consequence of street improvements, water be cast upon and collected upon adjoining premises, the corporation is not liable, even if it could have been avoided by drains, openings, etc. *Wilson v. N. Y.*, 1 Denio, 595.

Mills v. Brooklyn, 32 N. Y. 489.

But this is not the present doctrine in New York and several other states. *Seifert v. Brooklyn*, 101 N. Y. 136.

See this case and others, *ante*, p. 1901.

Private rights were violated where, in course of grading, surface water was collected and conducted onto plaintiff's land. *McCarthy v. Far Rockaway*, 3 App. Div. 379.

Magee v. Brooklyn, 18 App. Div. 22; *Bedell v. Sea Cliff*, id. 261; *Robbins v. Wilmar*, 71 Minn. 403; *Schutte v. Stillwater*, 80 Minn. 287; *King v. Granger*, 21 R. I. 93; *Cannon v. St. Joseph*, 67 Mo. App. 367; *Clay v. St. Albans*, 34 W. Va. 539; *Jordan v. Benwood*, 42 W. Va. 312.

So, where water allowed to accumulate in a trench on the street percolated into private premises. *Schumacher v. New York*, 40 App. Div. 320.

So, as to diversion of water from its channel in the street. *Larrabee v. Cloverdale*, 131 Cal. 96.

Holmes v. Calhoun County, 97 Iowa, 360; *Hoffman v. Muscatine*, 113 Iowa, 332; *Gift v. Reading*, 3 Pa. Super. Ct. 359; *Beach v. Scranton*, 5 Lack L. News, 25.

By collecting and diverting water from its natural flow, a city becomes bound to provide an outlet for it. *Effingham v. Surrells*, 77 Ill. App. 460.

Stanford v. San Francisco, 111 Cal. 198; *New Albany v. Lines*, 21 Ind. App. 380; *Louisville v. Siebert*, (Ky.) 51 S. W. Rep. 310. Under ordinary conditions, not exceptional ones. *Keithsburg v. Simpson* 70 Ill. App. 467.

Plaintiff must show, however, that the fact of his premises being below grade made no difference. *Knostman &c. Fur. Co. v. Davenport*, 99 Iowa, 589.

Negligence is not the gist of plaintiff's case. *Guest v. Church Hill*, 90 Md. 689.

Village held liable for removal of provisions it made to keep water off plaintiff's land. *Morley v. Buchannon*, 124 Mich. 128.

Robbins v. Wilmar, 71 Minn. 403.

INTERFERENCE WITH NATURAL STREAMS.

So, where a city utilized a natural outlet for a certain district for general drainage. *Flander v. Franklin*, 70 N. H. 168.

When, from the cutting by a city of a sewer, the collection of large quantities of water which would not have flowed there are thrown upon private premises to their injury, the city is liable therefor. *Ashley v. City of Port Huron*, 35 Mich. 295.

Citing as favoring the holding, *Proprietors of Locks &c. v. Lowell*, 7 Gray, 223; *Franklin v. Fisk*, 13 Allen, 211; *Haskell v. New Bedford*, 108 Mass. 208; *Lacour v. New York*, 3 Duer, 406; *Conrad v. Ithaca*, 16 N. Y. 158; *Rochester White Lead Co. v. Rochester*, 3 id. 463; *Nevins v. Peoria*, 41 Ill. 502; *Aurora v. Gillett*, 56 id. 132; *Aurora v. Reed*, 57 id. 30; *Alton v. Hope*, 68 id. 167; *Jacksonville v. Lambert*, 62 id. 519; *Pettigrew v. Evansville*, 25 Wis. 223; *Vincennes v. Richards*, 23 Ind. 381; *Merrifield v. Worcester*, 110 Mass. 216; *St. Peter v. Denison*, 58 N. Y. 416.

While a city is not liable for wholly failing to provide drainage or sewerage, nor probably for the insufficient capacity of its sewers, provided the adjoining property is not left in any worse condition than if no sewers had been constructed, yet if it intercept the natural flow of surface water, and gathering it divert it in artificial channels of insufficient capacity, whereby the water is cast in large and injurious quantities upon the premises of another, this is a positive trespass for which the city is liable. *Pye v. Mankato*, 36 Minn. 373.

Citing several cases of the same state.

City liable for obstruction forcing surface water back on plaintiff's premises. *Toledo v. Lewis*, 17 Oh. C. C. 588; s. c. aff'd, 52 Oh. St. 624.

Liability rests upon a municipality for damages to plaintiff's land caused by changing the course of water collecting on its streets, so that it flowed upon the plaintiff's land. *Weir v. Plymouth*, 148 Pa. St. 566.

So, where drain to take off surface water became clogged and, after notice, defendant neglected to repair it, the city was liable for the injury to plaintiff's property caused by its being flooded. *Wessman v. Brooklyn*, 40 N. Y. St. R. 698.

2. INTERFERENCE WITH NATURAL STREAMS.

A municipality, in the absence of lawful authority, cannot change the flow of water in a *natural* stream so as to injure the rights or property of others, without incurring liability. *Kellogg v. Thompson*, 66 N. Y. 88.

Gould v. Booth, 66 N. Y. 62; *Moran v. McClearns*, 63 Barb. 185; *Stanchfield v. Newton*, 142 Mass. 110; *Pye v. Mankato*, 36 Minn. 373; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Rochester &c. Co. v. Rochester*, 3 N. Y. 463; *Dillon's Mun. Corp.*, sec. 1039.

POLLUTION OF NATURAL STREAMS.

City was liable for diverting a well defined water course along a gutter onto plaintiff's land. *Larrabee v. Cloverdale*, 131 Cal. 96.

City not liable for failure to enlarge a brook for surface drainage, where it was not shown that the increase in the flow came from its direct act. *Wilson v. Waterbury*, 73 Conn. 416.

Obstruction of water course, while constructing a sewer gave damages. *Bloomington v. Costello*, 65 Ill. App. 407.

3. POLLUTION OF NATURAL STREAMS.

That a stream is the natural drainage of the city, is a defense to an action for pollution. *Richmond v. Test*, 18 Ind. App. 482.

Owen v. Lancaster, 14 Lanc. L. Rev. 94; otherwise if it is not, *Kewanee v. Ladd*, 68 Ill. App. 154; *Commonwealth v. Yost*, 11 Pa. Super. Ct. 323.

IV. Public Officers, Liability for Acts of.

A municipality has two capacities, one private in its nature, as in the case of the ownership of property, the operation of gas works or water works, and the other public, as in the case of the control and maintenance of its public buildings, streets, sewers, and other instrumentalities purely municipal. In addition, the legislature often employs the machinery of a municipality for purposes of general public benefit, as in the assessments and collection of taxes, the preservation of property from fire through a fire department, the maintenance of public order through a police department, etc. A municipality is not responsible for the wrongs of public officers, whom, at the instance of the state, it may have thus elected or appointed for public but not purely municipal duties. But whenever the municipality is negligent with reference to its private affairs, or its municipal duties, it is liable within the rules elsewhere considered for injuries arising therefrom; and as a corporation can act only through its agents, it is liable for the negligence of its agents, in connection with those duties the performance of which is imposed upon it. Therefore, in determining the liability of a municipality for the acts of an officer or employe, the primary inquiry is, whether he did the wrong in the course of his employment and whether the act was such as would have made the municipality liable, if it could directly have done it, and done it negligently. In other words, did it relate to a purely municipal duty or its private affairs.

"To determine whether there is a municipal responsibility, the inquiry must be whether the department, whose misfeasance or nonfeasance is complained of, is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality." The separation of municipal duties from those rendered for the people at large, in some instances, seems shadowy, and indeed conventional, but the nature of the

duty out of which the injury arises, furnishes the proper rule for determining the question.

It sometimes happens that a municipality is authorized to use, for its own purposes, an officer, for whose negligence in his general employment, it would not be liable. This is illustrated in the case of *Rehburg v. Mayor, &c.* 91 N. Y. 137, where the police officers were charged by statute with the duty at all times to remove nuisances existing on public streets. This made the municipality liable for the negligence of a policeman respecting an obstruction of the street, although it might not be liable for the negligence of the same officer in respect to matters of police.

It is considered that whenever the common council of a municipality exceeds the powers conferred by the charter of the city, or is negligent in the management of its property, the corporation is not responsible for such negligence; but that it must appear that for the act, in connection with which the wrong was done, there was express authority in the charter, or that it was done in pursuance of some general authority to act for the corporation in reference to such matters. The rule is otherwise stated that the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*; unless it appear that they were expressly authorized to do the acts, by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city on the subject to which they relate; or, that, in either case, the act was adopted and ratified by the corporation.

Within the rules above, a municipality, like a natural person, is liable for the wrongful acts or negligences of its servants or agents, done in the course and within the scope of their employment, whether such wrongful acts be in the nature of frauds, deceits, concealments, misrepresentations, torts, negligences or other malfeasances and misfeasances.

If a municipality has received the proceeds of the wrongful act of an officer, although not responsible for the act, it may be liable to make restitution of whatever it has so received.

Judge Dillon states the rule as follows: "If the corporation appoints or elects them, can control them in the discharge of their duties, can continue or remove them, can hold them responsible for the manner in which they discharge their trust, and if their duties relate to the exercise of corporate powers, and are for the peculiar benefit of the corporation in its local or special interest," they are its agents under the rules of *respondeat superior*. "But if, * * * they are elected or appointed by the corporation, in obedience to the statute; to perform a *public service* not peculiarly local or corporate, but because this mode of selection has been deemed expedient by the legislature in the distribution of the powers of government, if they are independent of the corporation as to the tenure of their office and manner of discharging their duties, they are not to be regarded as the servants or agents of the corporation for whose acts or negligence it is impliedly liable, but as public or state officers." Dillon's *Mun. Corp.* sec. 974.

All corporations must act through governing councils, boards, officers, or agents, and it is often important to know to what extent the torts of these agents impose liability on the occupation for injury to private

rights. It is admitted that a municipality is not and cannot be made liable.

(1) For such acts of agents as are necessarily beyond the powers, general or special, of the corporation itself; nor,

(2) For acts performed by officers, appointed or elected by means of its machinery, but for the performance of a public purpose, and from which it receives no local or special benefit.

In some jurisdictions, notably but not exclusively, those of New England, it is affirmed that school districts, counties, towns and cities erected from towns, like Boston, are not municipal corporations proper, but are *quasi* corporations, or public corporations, established as mere subdivisions of the state, primarily for public purposes, and hence, that like the state, they are not amenable to a private person for damage for injury to him or his property through the mere negligence of its officers, or bodies, unless a remedy be expressly given by the statute. To this doctrine are several allowable exceptions, viz., that such corporations are liable for direct injury, as when the officers place obstructions in the street, (Dillon's Mun. Corp., sec. 1024); also for the negligence of officers in connection with duties pertaining to the use of, what is described as the private corporative property, like gas or water works; also for similar neglect in connection with the construction and maintenance of improvements, undertaken by the municipality voluntarily, and especially when a pecuniary benefit flows to it therefrom. By the New England rule, all public corporations are formed, all departments thereof created, and all officers, agents and employes are appointed or elected primarily for general public purposes, and for their mere negligence the corporation is not impliedly liable, and is liable only when so declared by statute, save, of course, in the instances falling within the exceptions above named. In some states the rule is confined to school districts, towns, counties, and does not extend to cities, which, for some reason, are regarded as municipalities proper, albeit equipped with similar powers. The diligent student may *sometimes*, not always, understand that an officer, chosen by a municipality, paid from its moneys, and acting entirely within its governmental system, is not its agent, but a public officer with functions devoted to the general interests of the whole people of the state; but even a careful examiner may dimly, if at all, perceive the reason for the distinction between a town or county vested with powers similar to cities, whereby the former is not and the latter are denominated, municipalities proper. The New England rule, including all political subdivisions in the same disability to be sued without authority of the state, is at least consistent. As the matter involves the question of what are and what are not public as distinguished from

municipal duties, and hence for the breach of what duties by an officer a municipality is liable, the decision of the supreme court of the United States in *Barnes v. District of Columbia*, 91 U. S. 540, and a criticism thereof and presentation of the New England doctrine in *Hill v. Boston*, 122 Mass. 344, are given, preliminary to the decisions in New York and other states.

A municipal corporation in the exercise of its duties is a department of the state. Its powers may be large or small; they may be increased or diminished from time to time, at the pleasure of the state, or the state may itself directly exercise, in any locality, all the powers usually conferred upon such a corporation, but its fundamental character is unaltered.

A municipality may act through its subordinate agents, or its mayor, or its common council, its superintendent of streets or its board of public works. The question whether the persons thus acting are parts of the corporation and its agents, is not affected by their being appointed by the governor or president, or elected by the people, nor is it material from what source they receive their compensation.

The act of congress (Feb. 21, 1871 [16 Stat. 419]) creating a "municipal corporation" called the "District of Columbia," creates a board of public works invested with the entire control of the streets, their regulation and repair, and is composed of the governor of the district and four other persons appointed by the president, etc.; is empowered to disburse all moneys devoted to the improvement of streets, to make reports thereof, etc. This board is not an independent body, but is a part of the municipal corporation, and the latter is responsible to an individual who has suffered injury from the defective and negligent condition of the streets.

A municipal corporation holding a voluntary charter as a city or village, is responsible for its mere negligence in the care and management of its streets. In this respect there is a distinction between the liability of such a corporation and that of a *quasi* corporation like a county, town or district. Whether or not this distinction is founded on sound principle, it is too well settled to be disturbed. *Barnes v. District of Columbia*, 91 U. S. 540.

From opinion.—"It is denied that a municipal corporation (as distinguished from a corporation organized for private gain) is liable for the injury to an individual arising from negligence in the construction of a work authorized by it. Some cases hold that the adoption of a plan of such work is a judicial act; and, if injury arises from the mere execution of that plan, no liability exists. *Child v. City of Boston*, 4 Allen, 41; *Thayer v. Boston*, 19 Pick. 511. Other cases hold that for its negligent execution of a plan good in itself, or for mere negligence in the care of its streets or other works, a municipal corporation

cannot be charged. *City of Detroit v. Blackely*, 21 Mich. 84, is of the latter class, where it was held that the city was not liable for an injury arising from its neglect to keep its sidewalks in repair. The authorities establishing the contrary doctrine that a city is responsible for its mere negligence, are so numerous and so well considered, that the law must be deemed to be settled in accordance with them.

English authorities: *Mayor v. Henley*, 2 Cl. & Fin. 331; *Mersey Docks v. Gibbs*; *Same v. Penhallow*, 1 H. Ld. Cas. (N. S.) 93; 1 H. & N. 439; *Lan. Canal Co. v. Parnably*, 11 Ad. & Ell. 223; *Scott v. Mayor*, 37 Eng. Law & Eq. 465.

United States authorities: *Weightman v. Washington*, 1 Bl. 39; *Nebraska v. Campbell*, 2 id. 590; *Robbins v. Chicago*, 4 Wall. 658; *Supervisors v. U. S.*, id. 435; *Mayor v. Sheffield*, id. 194.

New York: *Davenport v. Ruckman*, 37 N. Y. 568; *Requa v. Rochester*, 45 id. 129; *Rochester W. L. Co. v. Rochester*, 3 id. 463; *Conrad v. Ithaca*, 16 id. 158; *Barton v. Syracuse*, 36 id. 54.

Illinois: *Browning v. City of Springfield*, 17 Ill. 143; *Claybury v. City of Chicago*, 25 id. 535; *City of Springfield v. Le Claire*, 49 id. 476.

Alabama: *Smoot v. Mayor of Wecumpka*, 24 Ala. (N. S.) 112.

Connecticut: *Jones v. City of New Haven*, 34 Conn. 1.

North Carolina: *Meares v. Wilmington*, 9 Ired. 73.

Maryland: *County Commissioners of Anne Arundel County v. Duchett*, 20 Md. 468.

Pennsylvania: *Pittsburg City v. Grier*, 22 Penn. 54; *Erie City v. Schwingle*, id. 388.

Wisconsin: *Cook v. City of Milwaukee*, 24 Wis. 270; *Ward v. Jefferson* id. 342.

Virginia: *Sawyer v. Corse*, 17 Gratt, 241; *City of Richmond v. Long*, id. 575.

Ohio: *Western College v. Cleveland*, 12 Ohio, (N. S.) 377; *McCombs v. Akron*, 15 id. 476; *Rhodes v. Cleveland*, 10 id. 159."

See a review of these decisions in *Hill v. Boston*, *post*, p. 1972.

The action was for injury to a child while attending a public school, which the city was bound by law to keep and maintain. The staircase was winding and the railing thereof so low as to be dangerous, whereby the child fell over the railing and was hurt. It was charged that the city improperly constructed the school house, and had knowledge or notice of its dangerous condition. The duty to provide and maintain school houses was imposed by general statutes upon all towns and cities. *Hill v. Boston*, 122 Mass. 344.

The court (Gray, Ch. J., writing the opinion) held that the plaintiff could not recover, and rested the decision upon the doctrine that no private action, unless authorized by express statute, could be maintained against a city for the neglect of a public duty imposed upon it by law for the benefit of the public, and from the performance of which the corporation receives no profit or advantage.

The following is a summary of the opinion:

"Although the English books contain numerous cases of indictments or informations for neglect to repair highways and bridges, no instance has been referred to, in the frequent discussions of the subject in England and in this

country, in which an English court has sustained a private action against a public or municipal corporation or *quasi* corporation for such neglect, except under a statute expressly or by necessary implication, giving such remedy."

"The towns and cities of Massachusetts have been established by the legislature for public purposes and the administration of local affairs, and embrace all persons residing within their respective limits." By enactment, "the inhabitants of any town within this government are hereby declared to be a body politic and corporate," "and towns, counties, territorial parishes and school districts, by virtue of their existence as *quasi* corporations, were capable of holding property and making contracts for the purposes for which they were established; and the estate of any inhabitant thereof was liable to be taken on execution on a judgment against the corporation; but the payment of such a judgment has never been compelled by mandamus against the corporation. From a very early period towns have been, by *general* laws, required to keep highways and bridges in repair, and made liable to actions for defects therein, by persons sustaining special damage in their person or property; but as early as 1810 it was decided and has ever since been considered as the general doctrine in Massachusetts, that a private action could not be maintained against a town or other *quasi* corporation, for neglect of corporate duty, unless such action was given by statute (citing cases); and that the doctrine had been approved and followed throughout New England, citing *Adams v. Wiscasset Bank*, 1 Greenl. 361, 364; *Reed v. Belfast*, 20 Me. 246, 248; *Farnum v. Concord*, 2 N. H. 392; *Eastman v. Meredith*, 36 id. 284, 297-300; *Hyde v. Jamaica*, 27 Vt. 443, 457; *State v. Burlington*, 36 id. 521, 524; *Chidsey v. Canton*, 17 Conn. 475, 478; *Taylor v. Peckham*, 8 R. I. 349, 352. In *Bartlett v. Crozier*, 17 Johns. 439, overruling 15 id. 250, it was held that an action against a surveyor of highways, under a statute imposing the duties of repairing highways and bridges on commissioners of highways, and surveys could not be maintained, as there was no precedent for it, although from ancient times officers had existed charged with repairing roads and bridges. It has been held in other states that counties and towns, although by statute made corporations capable of suing and being sued and making contracts, were exempt from liability to private actions for defects in highways and bridges, except when the right of action has been expressly given by statute. *Cooley v. Freeholders of Essex*, 3 Dutcher, 415; *Livermore v. Freeholders of Camden*, 5 id. 245; 2 Vroom. 507; *Freeholders of Sussex v. Strader*, 3 Harrison, 108; *Commissioners of Highways v. Martin*, 4 Mich. 557; *Hedges v. Madison*, 1 Gilman, 567; *White v. Bond*, 58 Ill. 297; *Waltham v. Kemper*, 55 id. 346; *Bussell v. Steuben*, 57 id. 35. And so as to neglect in construction or keeping in repair court houses and jails. *Freeholders of Sussex v. Strader*, 3 Harrison, 108; *Hamilton Commissioners v. Mighels*, 7 Ohio St. 109. And town house (floor gave way at town meeting). *Eastman v. Meredith*, 36 N. H. 284. And so as to dangerous excavation in school-house yard. *Bigelow v. Randolph*, 14 Gray, 541."

"The act establishing the city of Boston did not discontinue the town of Boston, but the latter was continued a municipal corporation with a change of form and organization only, and hence the rule laid down was applicable to it. An act of the legislature of Massachusetts changing a town into a city, does not enlarge civil remedies for neglect of corporate duty, and it has been constantly held that a city, like a town, is not liable to an action for a defect in a

highway, except so far as the right to maintain such an action has been clearly given by statute (citing *Brady v. Lowell*, 3 Cush. 121; *Harwood v. Lowell*, 4 id. 310; *Hixon v. Lowell*, 13 Gray, 59, 64; *Oliver v. Worcester*, 102 Mass. 489. The same view has been taken in certain other states. *Morgan v. Hallowell*, 57 Me. 375, 378; *Jones v. New Haven*, 34 Conn. 1313; *Hewison v. New Haven*, 37 id. 475; *Pray v. Jersey City*, 3 Vroom. 394; *Detroit v. Blackeby*, 21 Mich. 84; *Winbigler v. Los Angeles*, 45 Cal. 36. The duty of the city of Boston to repair highways and to provide school houses, depends upon general laws applicable to all cities and towns alike, and the only remedy given for refusal or neglect, is by indictment. The cases in which the supreme court of Massachusetts has held cities liable to actions of tort by individuals are distinguishable as follows:

(1) *Wrongful acts doing direct injury and not neglect of corporate duty.*—If a city or town negligently constructs or maintains the bridges or culverts in a highway across a navigable river, or a natural water course, so as to cause the water to flow back upon and injure the land of another, it is liable to an action of tort, to the same extent that any corporation or individual would be liable for doing similar acts.

Anthony v. Adams, 1 Met. 284, 285; *Lawrence v. Fairhaven*, 5 Gray, 110; *Perry v. Worcester*, 6 id. 544; *Parker v. Lowell*, 11 id. 353; *Wheeler v. Worcester*, 10 Allen, 591.

(2) *Sewers.*—If a city, by its agents, without authority of law, makes or empties a common sewer upon the property of another to his injury, it is liable to him. *Proprietors of Locks &c. v. Lowell*, 7 Gray 223; *Hildreth v. Lowell*, 11 id. 345; *Haskell v. New Bedford*, 108 Mass. 208.

The power of determining when sewers shall be made involves the exercise of quasi judicial discretion, and no action lies for a defect or insufficiency in the plan or system of drainage adopted within the authority so conferred; but as the sewer acts are only applicable to a city, when accepted by it, and as sewers built under it are the property of the city, and the city is authorized to assess the expense of construction upon lands immediately benefited, and as the duty of constructing and keeping sewers in repair is merely ministerial, therefore neglect in the construction and repair of any particular sewer, causing injury to private property, is actionable against the city. *Child v. Boston*, 4 Allen, 41; *Emery v. Lowell*, 104 Mass. 13; *Merrifield v. Worcester*, 110 Mass. 216.

(3) *Property owned by city.*—When a city holds and deals with property as its own, not in the discharge of a public duty, nor for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as a private owner might, the city has been held liable to the same extent as a private owner would be, for negligence in the use or management to the injury of others. *Thayer v. Boston*, 19 Pick. 511; *Oliver v. Worcester*, 102 Mass. 489.

The distinction between acts done by a city in discharge of a public duty, and acts done for its private advantage or emolument, was clearly pointed out in *Bailey v. Mayor &c. of New York*, 3 Hill, 531, 539; *Western Saving Fund Society v. Philadelphia*, 31 Penn. St. 185, 189; *Scott v. Mayor*, 2 H. & N, 204, 210.

(4) *English cases.*—The claim that a municipal corporation, required by law to construct and keep in repair highways, buildings or public works, for the benefit of the public, is liable to an action for negligence in such construction

and repair causing special injury to an individual, is erroneously claimed to be supported by *Henly v. Mayor of Lyme* (C. P.) 5 Bing. 91; 3 Mo. & P. 278; (K. B.) 3 B. & Ad. 77; (H. L.) 2 Cl. & Fin. 331; 8 Bligh, N. R. 690; 1 Bing. N. C. 222; 1 Scott, 29.

The corporation was held liable to a private action for damages for neglect to repair sea walls, upon the ground that the royal charter, accepted by the corporation, manifested an intention to render the corporation liable to such suits, because the charter showed that the duty to make such repairs was the condition and consideration upon which the corporation was granted certain franchises and acquitted of certain rents. This is directly stated in certain of the opinions. The words of Mr. Justice Parks, in the course of his opinion (2 Cl. & Fin. 354), "It is clear and undoubted law, that whenever an indictment lies for non-repair, an action on the case will lie at the suit of a party sustaining any peculiar damage," were used when speaking only of liability arising by prescription, from which a liability proved by the terms of the charter could not be distinguished.

Young v. Davis, 7 H. & N. 760; 2 H. & C. 197. It was held that under a statute requiring every parish maintaining its own highways to elect annually a *surveyor*, who should "repair and keep in repair the several highways in the said parish," no action could be maintained against the surveyor for neglect to repair, as the statute was passed not for the purpose of creating a new liability, either in the parish or any other persons, but simply to provide machinery whereby the existing duty to repair might be conveniently fulfilled.

Southampton &c. Bridge v. Southampton Board of Health, 8 E. & B. 801. The mayor, aldermen &c. of Southampton having by statute been made a local board of health, were liable to an action for negligence in constructing and managing a sewer, whereby the sewer obstructed plaintiff's bridge and created offensive and pernicious stench, the judgment proceeding upon the ground that the liability depended upon the interpretation of the statute, which manifested an intention that the board might be sued.

Hartnall v. Ryde Commissioners, 4 B. & S. 361, and *Ohrby v. Same*, 5 id. 743. Commissioners, by special statute, intrusted with the management of highways in a town, and declared *surveyors of highways* therein, and to be guilty of a misdemeanor if they should refuse or neglect to repair any public highway, and empowered to levy a rate for general purposes, were liable to actions by travelers injured by defects in the highway. The statute required the commissioners to pay and make good to all persons, damages sustained "by reason or in consequence of the bursting, leaking, failure or insufficiency" of any works constructed by them. These cases were distinguished in *Parsons v. St. Matthews' Vestry*, L. R. 3 C. P. 56, 59, 60; *Wilson v. Mayor &c.*, L. R. 3 Ex. 114, 119; *Gibson v. Mayor*, L. R., 5 Q. B. 218, 223, which held that under a statute incorporating vestries and boards of health in each parish in and about London, and vesting in them the power of commissioners of sewers, having commissioners and surveyors of highways, and of paying the expenses out of rates levied by them, they were not liable to an action to a traveler for injury for defect in a highway.

Foreman v. Mayor of Canterbury, L. R., 6 Q. B. 214. Surveyors of highway were liable, not because they were surveyors of highway, but because they had put and left unguarded in the highway a heap of stones.

White v. Hindley Local Board, L. R., 10 Q. B. 219. Local board of health

were liable as owners of a sewer to person injured by grating in highway, to drain water into a sewer, and which was held to be a part of the sewer.

Whitehouse v. Fellowes, 10 C. B. (N. S.) 765. Trustees of a turnpike road negligently draining and casting water into and drowning the plaintiff's colliery. *Liabilities*.

Brownlow v. Metropolitan Board of Works, 13 C. B. (N. S.) 768, and 16 id. 546. A public board authorized to construct sewers, in excess of authority, made an obstruction in the bed of a navigable river and injured a vessel, for which they were liable.

Parnaby v. Lancaster Canal, 11 A. & E. 223; s. c., 3 N. & P. 523, and 3 P. & Dav. 162. Defendant was held to be a private corporation, and liable for negligence in keeping its canal in repair.

Scott v. Mayor, 1 H. & N. 59, and 2 id. 204. A municipal corporation empowered by statute to construct gas works and supply gas to individuals &c., and apply profits to improvement of the town, was liable for personal injury caused by negligence of its workmen in laying gas pipes.

Cowley v. Mayor of Sunderland, 6 H. & N. 565. Defendants were liable for personal injury from negligent and dangerous condition of machines in work houses, which they had been empowered to erect, and for the use of which plaintiff and others made compensation.

Mersey Docks v. Gibbs and another, L. R., 1 H. L. 93; 11 H. L. Cas. 686; aff'g 3 H. & N. 164, and 7 id. 329, rev'g 1 id. 439. The members of the town council of Liverpool formed by acts of parliament into a corporation under the name of Trustees of the Liverpool Docks, were liable for injury to a vessel from a bank of mud negligently suffered to remain in the docks. The decision proceeded upon the ground that the corporation was formed for trading and other profitable purposes, and were in their very nature substitutions on a large scale for individual enterprise, and in the absence of any contrary intention appearing in the statutes, their liability should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works.

Coe v. Wise, 5 B. & S. 440. and L. R., 1 Q. B. 711. Commissioners for executing local act for the drainage and navigation of a particular part of country, were liable for flooding adjoining lands from negligence in keeping a cut and sluice in proper repair, which they were required to make and maintain, and where the act vested the land and chattels in the defendants, and provided that they might be sued by their clerk, and execution should go against the goods and chattels belonging to the commissioners by virtue of their office, etc.

Winch v. Conservators of the Thames, L. R., 7 C. P. 458; L. R. 9 id. 378, where the defendants, under statutory authority, constructed a tow path, of which they had the care, and for use of which they took tolls and were liable to one using it for toll, for negligence in repair.

See *Fowler v. Alexandria*, 3 Pet. 398, 409; *Providence v. Clapp*, 17 How. 161, 167.

Richardson v. Boston, 19 How. 263, 270, an action was maintained for so constructing a sewer as to cause an accumulation of matter at the end of plaintiff's wharf and so obstruct vessels.

Weightman v. Washington, 1 Black. 39. The city, by its charter, had the sole control and management of a bridge, and was chargeable with expense of maintenance, and the burden of repairing and rebuilding was imposed upon the de-

fendant in consideration of privileges in its charter, which charged it with damages from defects.

Nebraska City v. Campbell, 2 Black. 590, 592; *Chicago City v. Robbins*, id. 418, 422, where it is said to be well settled that public municipal corporations, upon which the duty is imposed to keep in repair streets and bridges, and means are conferred to accomplish the duty, are liable for special damages from neglect to keep the same in proper condition, in the first of which cases the provisions of the charter on the subject are not fully reported, and the second of which was by the city to recover over against a third person, who, having had notice of action in which judgment was recovered against the city, could not contest its liability in the second action.

Barnes v. District of Columbia, 91 U. S. 540. So far as this case held the board of public works to be an agent of the corporation, for whose act or neglect the corporation was responsible, it was avowedly opposed to the decisions in *Thayer v. Boston*, 19 Pick. 511, and *Walcott v. Swampscott*, 1 Allen 101; *Fisher v. Boston*, 104 Mass. 87, 95, and cases there referred to, and it seems inconsistent with the judgment of the house of lords in *Duncan v. Findlater*, 6 Cl. & Fin. 894, as explained in *Mersey Docks v. Gibbs*, L. R., 1 H. L. 116, 117, and other decisions in England already cited.

The following review of the cases relied upon by the Supreme Court of the United States, and other authorities was then given:

The decision in *Jones v. New Haven*, 34 Conn. 1, where the city was held liable to an action in negligence in permitting a dead limb to remain upon a tree in a public street, until it fell and did injury to a passer-by, was put upon the ground that the duty of keeping the trees in proper condition was imposed by the charter, in consideration of the benefit received by it, and the same court in a decision coming first before them at the same term (*Hewison v. New Haven*, 34 Conn. 136, 139; 37 id. 475), held that no action could be maintained against a city for neglect of a public governmental duty, such as keeping the highways free from nuisances, except so far as such remedy was given by statute.

"Of the New York cases referred to, those decided in 1850 or earlier were before this court at the time of the decisions in *Child v. Boston*, 4 Allen 41; *Emery v. Lowell*, 104 Mass. 13, and *Oliver v. Worcester*, 102 id. 489, and we have supposed them to be in entire accord with those decisions. In *Bailey v. Mayor &c. of New York*, 3 Hill 531 and 2 Denio 433, the city of New York was held liable for negligence in the construction of the dam of the Croton water works; which, under a special act, voluntarily accepted by the city, had been constructed by the city council, and which became the property of the city, and from which it derived pecuniary profits and emoluments. In *Mayor, &c., of New York v. Furze*, 3 Hill 612, the city of New York was held liable for negligence in not keeping a sewer in repair, which, under statutes applying to that city only, the city had built and owned, and for the expenses of constructing which the city was authorized to lay assessments upon the estates benefited thereby. In *Wilson v. Mayor, &c., of New York*, 1 Denio 595, it was held, overruling a dictum to the contrary in *Mayor, &c., of New York v. Furze*, that a city was not liable for a neglect to make a sufficient sewer, that being a question upon which the decision of the municipal authorities was conclusive, the subsequent cases of *Lloyd v. Mayor, &c., of New York*, 1 Selden 369, and *Barton v. Syracuse*, 36 N. Y. 54, were, like *Mayor &c., of New York v. Furze*, actions for negligence in repairing sewers.

It is said by Mr. Justice Hunt that the decision in *Child v. Boston*, 4 Allen 41,

so far as it was held that the city was not responsible for any deficiency in the plan of drainage adopted 'is in hostility to *Rochester White Lead Co. v. Rochester*, 3 N. H. 463, where the city was held liable because it constructed a sewer which was not of sufficient capacity to carry off the water draining into it; the work was well done, but the adoption and carrying out of the plan was held to be an act of negligence,' 91 U. S. 556. But the report of *Rochester White Lead Co. v. Rochester*, states that 'the referees,' whose statement of the facts was incorporated into the record upon which the case was heard, 'found that the culvert, in consequence of the smallness of its size and the want of skill in its construction, was insufficient to carry off the water,' &c., 3 Comst. 465. And in *Mills v. Brooklyn*, 32 N. Y. 489, 497, 499, in which the only objection to a sewer was that it was not sufficiently large to carry off the water, and there was no want of skill in its construction, it was held that no action would lie; and Denio, Ch. J., delivering the unanimous opinion of the Court of Appeals, said that the decision in *Wilson v. Mayor, &c. of New York*, *ubi supra*, had always been referred to as an accurate exposition of the law; and in support of this statement cited, among other cases, *Rochester White Lead Co. v. Rochester*, and pointed out that in that case the action was maintained upon the ground of negligence and unskillfulness in the construction of the culvert.

In *Hutson v. Mayor &c. of New York*, 5 Sandf. 289, in 1851, a majority of the superior court of the city of New York, against an exceedingly able dissenting opinion of Mr. Justice (formerly vice-chancellor) Sandford, held the city of New York liable to an action for neglect of a duty imposed by its charter to repair a highway, and the decision was affirmed by the Court of Appeals. 5 Seld. 163. And the other cases referred to show that the same rule has been since held in that state to apply both to cities and to incorporated villages, charged by their acts of incorporation with the duty of repairing highways. *Hickok v. Trustees of Plattsburgh*, 15 Barb. 427, and 16 N. Y. 161, note; *Conrad v. Trustees of Ithaca*, id. 158; *Storrs v. Utica*, 17 id. 104; *Davenport v. Ruckman*, 37 id. 568; *Requa v. Rochester*, 45 id. 129. The ground of those decisions is that stated by Selden, J., in an opinion which was approved by the Court of Appeals, as follows: 'The surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking on the part of the corporation to perform with fidelity the duties which the charter imposes.' *Weet v. Brockport*, 16 N. Y. 161, 171, note. It was admitted in that opinion and had been previously decided by the same learned judge in *Morey v. Newfane*, 8 Barb. 645, which does not appear to have ever been overruled, that a town was not liable to such an action.

Of the two Pennsylvania cases cited, the one was the case of a city being in possession of a public wharf, exercising exclusive supervision and control over it, and receiving tolls for its use, and therefore rightly held liable to an action for special injury to an individual in consequence of its neglect to keep the wharf in proper condition for use. *Pittsburg v. Grier*, 22 Penn. St. 54. In the other, a city which was bound by its charter to keep the streets in repair, was held liable to an action for injury occasioned by its neglect to do so. *Erie v. Schwingle*, 22 Penn. St. 384. But in Pennsylvania, towns and counties are held liable to similar actions. *Dean v. New Milford*, 5 W. & S. 545; *Humphreys v. Armstrong*, 56 Penn. St. 204; *Rapho v. Moore*, 68 id. 404, 407. The single case referred to in Maryland shows that in that state also counties are held to be so liable. County commis-

sioners v. Duckett, 20 Md. 468. Where towns and counties are held liable to such actions, there is, of course, no reason why cities should be exempt; but the assertion of such a liability in counties or towns, when not declared by statute, is, as we have already seen, and as is distinctly admitted in *Barnes v. District of Columbia*, 91 U. S. 552, opposed to the well-settled law.

In the two Virginia cases referred to, the test of the liability of a municipal corporation is stated in exact accordance with the decisions in England and in Massachusetts. In the first case, it was said that 'Where the authority, though for the accomplishment of objects of a public nature and for the benefit of the public, is one from the exercise of which the corporation derives a profit, or where the duty, though of a public nature and for the public benefit, may fairly be presumed to have been enjoined upon the corporation in consideration of privileges granted to and accepted by it, the exemption does not apply; and the reason is that, in such cases, the corporation is not acting merely as an agent of the public, and with a view solely to the public benefit, but that in the former it is pursuing its own interest and profit, and in the latter is executing a contract for which it has received a consideration.' *Sawyer v. Corse*, 17 Gratt. 230, 241. In the second case the duties for breach of which a municipal corporation was said to be liable to private action, were defined as 'those ministerial specified duties, which are assumed in consideration of the privileges conferred by their charter.' *Richmond v. Long*, 17 Gratt. 375, 379. And in both cases the judgment of the Court of Appeals was in favor of the original defendant. The decisions in North Carolina and Alabama appear to have proceeded upon the ground that the corporation had received a peculiar benefit in the special privileges and immunities granted to it. In *Meares v. Commissioners of Wilmington*, 9 Ind. 73, the action was not for an injury resulting from the plaintiff's use of a defective way or public building, but for causing the plaintiff's house to fall, by the unskillful and careless cutting down of the grade of a street, for which no compensation was provided by the statutes under which the work was done; and the opinion was based upon the fallacies that there was no difference in liability to action, between a municipal and a private corporation, and that the fact that the corporation was at the expense of making the work was the surest test by which to find out for whose benefit the work was done. In *Smoot v. Mayor &c. of Metumpka*, 24 Ala. 112, the action was for neglect of a duty to repair highways, imposed by special charter, in the same section which released the inhabitants 'from working on roads and highways out of the said city, and from patrol duty, except under authority of said city.' Three Ohio cases are referred to: *Rhodes v. Cleveland*, 10 Oh. 159; *McCombs v. Akron*, 15 id. 474; *Western College v. Cleveland*, 12 Oh. St. 375. In *Rhodes v. Cleveland*, the report shows nothing of the nature of the suit, except that it was 'an action on the case for cutting ditches and water courses in such a manner as to cause the water to overflow and wash away the plaintiff's land;' and the point decided was, that the plaintiff need not show that the corporation acted illegally or maliciously. In *McCombs v. Akron*, an action on the case was sustained for an injury to the plaintiff's property by the cutting down and grading of a street of a city strictly within the scope of its legal authority, and unattended by any circumstances of negligence or malice—a conclusion inconsistent with the decision of the Supreme Court of the United States, of this court and of the courts of about every other state where the question has arisen. *Smith v. Washington*, 20 How. 135; *Callender v. Marsh*, 1 Pick. 418; *Dillon on Mun. Corp.*, sec. 783, note. In *Western College v. Cleveland*, the point decided was that a city,

whose charter made it its 'duty to regulate the police of the city, preserve the peace, prevent riots, disturbances and disorderly assemblies,' was not liable to an action for the destruction of property in a riot, or for the neglect of the police officers in not preserving the peace and preventing such destruction. In Illinois, as shown by the cases referred to, incorporated cities are held liable to actions for neglect of duties imposed by their charters to repair highways and bridges. *Browning v. Springfield*, 17 Ill. 143; *Springfield v. Le Claire*, 49 id. 476; although in earlier and later cases in that state, cited in the former part of this opinion, counties and towns have been held not to be liable under general laws for like neglect. In *Pekin v. Newell*, 26 Ill. 320, cited for the present plaintiff, the city assumed to act under a special statute in constructing and taking tolls upon the way, for a defect in which it was held liable; and the only defense made was that the city had constructed the way on a pile bridge, when the authority conferred by the statute was to make an embankment and plank road at that place. In the remaining case referred to in Illinois, the court sustained an action on the case against a city for negligence of the city council in failing to collect an assessment, laid by way of betterment upon estates benefited by the laying out of a street, to compensate the plaintiff and others for the damages sustained by them for such laying out. *Clayburgh v. Chicago*, 25 Ill. 530; of that decision, it is enough to say that it is wholly inconsistent with the system of judicial remedies in this commonwealth.

The cases in Wisconsin, referred to by Mr. Justice Hunt, arose under statutes similar to this and other New England states, expressly making all towns and cities liable to actions for damages for defects in highways. *Cook v. Milwaukee*, 24 Wis. 270; *Ward v. Jefferson*, id. 342.

In *Alexander v. Milwaukee*, 16 Wis. 247, cited in the plaintiff's brief, the action was for consequential damages for the proper construction of a public work; there had been no neglect of duty, and there was held to be no liability on the part of the city. The result of this review of the American cases may be summed up as follows: There is no case in which the neglect of a duty, imposed by general law upon all cities and towns alike, has been held to sustain an action by a person injured thereby against a city, where it would not against a town. The only decisions of the state courts, in which the mere grant by the legislature of a city charter, authorizing and requiring the city to perform certain duties, has been held sufficient to render the city liable to a private action for neglect in their performance, when a town would not be so liable, are in New York since 1850, and in Illinois. The cases in the Supreme Court of the United States, in which private actions have been sustained against a city for neglect of a duty imposed upon it by law, are of two classes: 1st. Those which arose under the peculiar terms of special charters, in the District of Columbia, as in *Weightman v. Washington*, and *Barnes v. District of Columbia*, or in a territory of the United States, as in *Nebraska City v. Campbell*.

2d. Those which, as in *Mayor &c. of New York v. Sheffield*, and *Chicago City v. Robbins*, arose in New York and Illinois, and in which the general liability of the city was not denied or even discussed, and apparently could not have been, consistently with the rule by which the Supreme Court of the United States, upon questions of the construction and effect of the constitution and statutes of a state, follows the latest decisions of the highest court of that state. * * * In the absence of such binding decisions, we find it difficult to reconcile the view that the non-acceptance of a municipal charter is to be considered as conferring such a

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benefit upon the corporation as will render it liable to private action for neglect of the duties thereby imposed upon it, with the doctrine that the purpose of the creation of municipal corporations by the state is to exercise a part of its powers of government, a doctrine universally recognized, and which has nowhere been more strongly asserted than by the Supreme Court of the United States in the opinions delivered by Mr. Justice Hunt in *United States v. Railroad Co.* 17 Wall. 322, 329, and by Mr. Justice Clifford, in *Larami v. Albany*, 92 U. S. 307, 308."

(a). QUASI-MUNICIPAL CORPORATIONS.

The department of public instruction of New York city formerly a part of the city government, is charged with the performance of duties not local or corporate, but belonging to the administrative branch of the state government, and the defendant was not liable for the negligence of the department nor that of the employes of that department. *Ham v. Mayor &c.*, 70 N. Y. 459, aff'g 5 J. & S. 458, and order setting aside verdict for pl'ff.

Citing 2 Dillon's Munic. Corporation, sec. 772.

So, as to Board of Health. *Bryant v. St. Paul*, 33 Minn. 289.

Town is not liable for the act of its highway commissioner where he would not himself be personally. *Riley v. East Chester*, 18 App. Div. 94. *Young v. McComb*, 11 App. Div. 480.

County held not liable for malfeasance. *People v. Westchester County*, 57 App. Div. 135.

So, as to school district. *McClure v. Clifton*, 79 Mo. App. 80.

Board of county commissioners were not liable for failure to take a bond of a contractor, where it could not exact indemnity for negligence therein. *Schnurr v. Huntington County*, 22 Ind. App. 188.

Nor a board of education, for neglect or misconduct. *Rock Island &c. Co. v. Elliott*, 59 Kan. 42.

School district held liable for failure to take a bond from public contractors. *Hydraulic &c. Brick Co. v. School Dist.*, 79 Mo. App. 665.

Board of education was liable for negligent excavation. *Bolk v. Board of Education*, 7 Oh. N. P. 164.

Failure of officers to take bond from public contractors did not charge the county. *Rhea County v. Sneed*, 105 Tenn. 581.

A draining district held not liable for negligence. *Sels v. Greene*, 81 Fed. Rep. 555.

A municipality is not liable for the neglect of a public duty imposed by statute, as in the execution of deeds of land sold for taxes by the reeve and treasurer, unless the statute fixes the responsibility upon it. *McLellan v. Assiniboia*, 5 Manitoba L. R. 265.

(b). MUNICIPAL CORPORATIONS NOT LIABLE FOR NEGLIGENCE IN EXERCISE OF PUBLIC FUNCTION.

Where, by act, a municipality is required to elect an officer to perform public duties laid, not upon it, but upon the officer, and in which it has no private interest, it is not liable for the negligence of such officer, or that of his subordinates. The rule was applied to the commissioners of public charities and correction, whose ambulance driver was negligent. *Maxmilian v. Mayor &c.*, 62 N. Y. 160, aff'g 2 Hun, 263, and non-suit.

From opinion.—"This rule of *respondeat superior* is based upon the right which the employer has to select his servants, to discharge them if not competent, or skillful or well behaved, and to direct and control them while in his employ. *Kelly v. The Mayor*, 11 N. Y. 432. The rule has no application to a case in which this power does not exist. *Blake v. Ferris*, 5 N. Y. 48. It results from the rule being thus based, that there can be but one superior at the same time and in relation to the same transaction (*Langher v. Pointer*, 5 Barn. & Cres. 560); as the law does not recognize two principals who are unconnected and severally responsible. *Hobbit v. L. & N. W. Railway*, 4 Exch. 253; *Pack v. The Mayor*, 8 N. Y. 222. And yet there may be sub-agents, servants under a servant; and whether they be appointed by the master or principal directly, or immediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. *Quarnan v. Burnett*, 4 Mees. & Wells. 499. That a municipal corporation, as is the defendant, may be placed by the facts of a certain case under the effect of this rule, and made answerable for the negligent use of its well adapted personal property by its servant or sub-servant, need not be denied. *Lee v. Sandy Hill*, 40 N. Y. 442; *Clark v. Washington*, 12 Wheat. 40; *Scott v. The Mayor &c.*, 37 Law & Eq. 495. The difficulty is not here; it is in determining, in a particular case, whether the negligent employé is the servant of the municipality, for it is not every one who has in charge personal property owned by the municipality, and sets about some lawful act with it within the municipal bounds, that is its servant; nor even if his appointment comes intermediately or immediately from the municipality itself. If the act of the officer or the subordinate of the officer thus appointed, is done in the attempted performance of a duty laid by the law upon him and not upon the municipality, then the municipality is not liable for his negligence therein. Such is the general principle laid down in *Martin v. The Mayor*, 1 Hill 545; and reasserted in *Lorillard v. The Town of Monroe*, 11 N. Y. 392, and in other cases. See, also, *Russell v. The Mayor*, 2 Denio 461; *Bank Comm. v. Mayor &c.*, 43 N. Y. 184-189. There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is liable and is used for public purposes. *Lloyd v. The Mayor*, 5 N. Y. 374. The former is not held by the municipality as one of the political divisions of the state, the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure

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to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the state, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents. *Eastman v. Meredith*, 36 N. H. 284. Where the duties which are imposed upon municipalities are of the latter class, they are generally to be performed by officers who, though deriving their appointment from the corporation itself, through the nomination of some of its executive agents, by a power devolved thereon as a convenient mode of exercising a function of government, are yet the officers, and hence the servants, of the public at large. They have powers and perform duties for the benefit of all the citizens, and are not under the control of the municipality which has no benefit in its corporate capacity from the performance thereof. They are not then the agents or servants of the municipal corporation, but are public officers, agents or servants of the public at large, and the corporation is not responsible for their acts or omissions, nor for the acts or omissions of the subordinates by them appointed. *Fisher v. Boston*, 104 Mass. 87. And where a municipal corporation elects or appoints an officer, in obedience to an act of the legislature, to perform a public service in which the corporation has no private interest, and from which it derives no special benefit or advantage in its corporate capacity, such officer cannot be regarded as a servant or agent of the municipality for whose negligence or want of skill it can be held liable. It has appointed or elected him in pursuance of a duty laid upon it by law, for the general welfare of the inhabitants or of the community. *Hafford v. New Bedford*, 16 Gray 297. He is the person selected by it as the authority empowered by law to make selections; but when selected and its power exhausted he is not its agent, he is the agent of the public for whom and for whose purposes he was selected."

County not liable for negligent maintenance of machinery in state asylum for insane. *Hughes v. Monroe County*, 147 N. Y. 49; s. c., 39 L. R. A. 33.

No liability for maintenance by board of education, of school in defective condition, though title to school property was vested in mayor &c. of the city. *Brown v. New York*, 32 Misc. 571.

So, as to failure of a superintendent of streets to see that the grade of a street conformed to the official grade. *Sievers v. San Francisco*, 115 Cal. 648.

That the performance of the work is mandatory, is immaterial. *Millwood v. Dekalb County*, 106 Ga. 743.

So, where the city's only connection with the building was the performance of a public duty imposed upon it by the state. *Kinnare v. Chicago*, 171 Ill. 332; aff'g s. c., 70 Ill. App. 106.

So, as to county's maintenance of a public institution. *Jasper County v. Allman*, 142 Ind. 572; s. c., 39 L. R. A. 58.

New Orleans v. Kerr, 50 La. Ann. 413.

So, as to defects in an ordinary highway. *Shrum v. Washington County*, 13 Ind. App. 585.

That is, in the absence of statute. *Schnurr v. Huntington County*, 22 Ind. App. 188.

Crause v. Harris County, 18 Tex. Civ. App. 375.

Nor a town, for the misconduct of a trustee in removing a marshal. *Arnold v. Walton*, (Ky.) 56 S. W. Rep. 17.

City not liable when acting as agent of the state. *New Orleans v. Kerr*, 50 La. Ann. 413.

Neil v. Barron, 7 Oh. N. P. 84; *Austin v. Hall*, (Tex. Civ. App.) 58 S. W. Rep. 479.

So, as to town officers. *Bartlett v. Clarksburg*, 45 W. Va. 393; s. c., 43 L. R. A. 295.

Injuries from blasting while constructing a school house are not chargeable to the municipality. *Howard v. Worcester*, 153 Mass. 426.

Road commissioners in Massachusetts, act as public officers and not as servants of the town. *McManus v. Weston*, 164 Mass. 263; s. c., 31 L. R. A. 174.

Taggart v. Fall River, 170 Mass. 325.

So, of the Boston Transit Commission, though some of the members were appointed by the city officers. *Mahoney v. Boston*, 171 Mass. 427.

Schwarzwaelder v. Detroit, 77 Fed. Rep. 886.

So, of an excise board. *McGinnis v. Medway*, 176 Mass. 67.

So, of an independent board in sole charge of laying of water pipe, though the city authorized the work to be done. *Gross v. Portsmouth*, 68 N. H. 266.

So, as to acts of village trustees in destroying property to avert impending danger to the public. *Atken v. Wells River*, 70 Vt. 309.

Randles v. Waukesha County, 96 Wis. 629.

So, as to act of a city council in abating nuisances. *Wood v. Hinton*, 47 W. Va. 645.

So, as to the acts of its commissioners of public works in disposing of garbage. *Kuehn v. Milwaukee*, 92 Wis. 263.

A statute giving remedy for act or omission of a municipality resulting in injury, construed to apply to corporate and not public acts or omissions. *Wagner v. Portland*, 40 Ore. 389.

No liability attaches to a city for the wrongful act of its mayor and police in closing an exhibition given by plaintiff, with the intent to injure him. The exhibition was held on ground claimed to have been dedicated as a public graveyard. *Respondeat superior* does not apply to an act done for the city in its governmental capacity. *Kansas City v. Lemon*, 57 Fed. Rep. 905.

From opinion.—"A city has no more right to license a show of that nature in a graveyard than it has to license it to locate on the public streets and thorough-

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fares; and we entertain no doubt that when a municipality undertakes to prevent or to abate a nuisance of that kind by means of its police force, it is acting for the state as a governing agency, and not merely in the discharge of a purely corporate power or duty.

In the case of *Haskell v. City of New Bedford*, 108 Mass. 208, 211, Mr. Justice Gray used the following language:

'Acts done by the mayor and aldermen, or the mayor alone, to keep the streets clear of obstructions, are acts done by them as public officers, and not as agents of the city; and for such acts the city was not liable to be sued.' Citing *Walcot v. Swampscott*, 1 Allen 101; *Griggs v. Foote*, 4 id. 195; *Barney v. Lowell*, 98 Mass. 570; and *Fisher v. Boston*, 104 id. 87.

In a comparatively recent case (*Culver v. City of Streator*, 130 Ill. 238; 22 N. E. Rep. 810), it was held that the city was not liable for the negligent act of one of its police officers while endeavoring to enforce an ordinance forbidding dogs to run at large without being muzzled, for the reason that in the making and enforcement of the ordinance the city was acting merely as agent of the state in the discharge of duties imposed by law for the promotion of the general welfare. The court said that the ordinance was passed in pursuance of the police power vested in the municipality, and that acts performed in the exercise of that power were done in a public capacity as a governing agency, and not for the special advantage of the municipality.

It is also very generally held that a city is not liable for wrongful acts committed by its police officers in enforcing city ordinances, or in making arrests for alleged violations of law or local ordinances, or while endeavoring to suppress an unlawful assemblage, because while acting in such matters police officers are not mere servants of the municipality, and the rule of *respondeat superior* does not apply. *Buttrick v. City of Lowell*, 1 Allen 172; *Fox v. Northern Liberties*, 3 Watts. & S. 103; *Calwell v. City of Boone*, 51 Iowa, 687; *Odell v. Schroeder*, 58 Ill. 353; *Elliott v. Philadelphia*, 75 Penn. St. 347; *Dargan v. Mobile*, 31 Ala. 469; *Little v. City of Madison*, 49 Wis. 605; 6 N. W. Rep. 249; *Tramwell v. Russellville*, 34 Ark. 105; *Worley v. Inhabitants*, 88 Mo. 106; *Dill. Mun. Corp.*, sec. 975."

1. POLICE.

Brooklyn bridge policeman acts under a state statute and not as a policeman of either New York or Brooklyn. *Woodhull v. New York*, 150 N. Y. 450.

A bar counter was placed on the sidewalk near a building and had been there for several days and policemen had seen it. A boy five or six years old meddled with it and tipped it over and he was hurt. City was not liable. City was not so negligent as to excuse the negligence of the child. City was not liable for negligence of policemen. *Kunz v. Troy*, 36 Hun, 615, rev'g judg't for pl'ff; reversed, 104 N. Y. 344.

From opinion.—"It is the duty of the policemen to observe and execute the laws of the United States, of the state, the rules and regulations of the board of police commissioners and the ordinances of the city. Following the case of

McKay v. City of Buffalo, 9 Hun, 401; affirmed, 74 N. Y. 619, we think it must be held that the police department of Troy is a creation under the laws of the state for the purpose of securing public order, and is not the creation of the city and is not its agent. The case of Rehberg v. Mayor, 91 N. Y. 137, seems to have been decided with reference to the laws peculiar to New York City."

The police officers of a municipal corporation are not its servants or agents so as to render it responsible for the damages occasioned to third persons by a failure on their part to duly and properly discharge the duties imposed upon them.

The rule of *respondeat superior* is based upon the rights which an employer has to select his servants and discharge them if not competent or skillful or well behaved, and to direct and control them while in his employ.

Where, by legislative enactment, a municipal corporation is required to elect or appoint an officer to perform a public duty laid, not upon it, but upon the officer, in which it has no private interest and from which it derives no special benefit or advantage, such officer is not a servant or agent of the municipality, and for his negligence or want of skill in the performance of his duty, or for that of a servant whom he employs, it is not liable.

Pursuant to section 8 of chapter 300 of the Laws of 1875, the trustees of the Brooklyn bridge, acting on behalf of the municipalities of New York and Brooklyn, have an undoubted right to select persons as peace officers, upon whom is conferred the same authority as is enjoyed by policemen in either city; such persons, however, as they also act as guards or trainmen, and as their pay and employment are regulated by the bridge trustees, and as the municipalities receive remuneration from persons using the bridge, are in no sense agents or servants of the state, and are the agents and servants of such municipalities, for whose negligence and wrongful acts such municipalities are liable upon the doctrine of *respondeat superior*. *Woodhull v. Mayor, Aldermen and Commonalty of the City of New York and the City of Brooklyn*, 76 Hun, 390.

Keeping jail is a governmental function. *Eddy v. Ellicottville*, 35 App. Div. 256.

Gray v. Griffin, 11 Ga. 361; *Lahner v. Williams*, 112 Iowa, 428; *Hughes v. Lawrenceburg*, (Ky.) 37 S. W. Rep. 257; *Gullikson v. McDonald*, 62 Minn. 278; *Dolittle v. Walpole*, 67 N. H. 554.

Recovery is given in North Carolina, however. *Shields v. Durham*, 118 N. C. 450; s. c., 36 L. R. A. 293; *Coley v. Statesville*, 121 id. 301; *Howell v. Yancey*, id. 362.

Including duties incident to its keeping. *McAuliffe v. Victor*, 15 Colo. App. 337.

Nisbet v. Atlanta, 97 Ga. 650; *Bailey v. Fulton County*, 111 Ga. 313.

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So, as to policing a village, and the enforcements of the regulations. *Dovey v. Port Jervis*, 23 Misc. 313.

Gray v. Griffin, 111 Ga. 361; *Craig v. Charleston*, 180 Ill. 154; aff'g s. c., 78 Ill. App. 312; *Caldwell v. Prunelle*, 57 Kan. 511; *Taylor v. Owensboro*, 98 Ky. 271; *Gullikson v. McDonald*, 62 Minn. 278; *Coley v. Statesville*, 126 N. C. 301; *McIlhenney v. Wilmington*, 127 N. C. 146; s. c., 50 L. R. A. 470; *Alvord v. Richmond*, 3 Oh. N. P. 136; *Grein v. Muskingum County Commissioners*, 23 Oh. C. C. 43; *Betham v. Philadelphia*, 196 Pa. St. 302; *Kelly v. Cook*, 21 R. I. 29; *Steinnett v. Sherman*, (Tex. Civ. App.) 43 S. W. Rep. 847; *McFadden v. San Antonio*, 22 Tex. Civ. App. 140; *Royce v. Salt Lake City*, 15 Utah, 401.

And committing, for breach of ordinance. *Bartlett v. Columbus*, 101 Ga. 300.

Easterly v. Irwin, 99 Iowa, 694; *Vaughtman v. Waterloo*, 14 Ind. App. 649; *Crosdale v. Cinthiana*, (Ky.) 50 S. W. Rep. 977; *New Orleans v. Kerr*, 50 La. Ann. 413; *Moran v. Pullman & Co.*, 134 Mo. 641; s. c., 33 L. R. A. 755; *Crause v. Harris County*, 18 Tex. Civ. App. 375.

So, as to the acts of a police jury of a parish in Louisiana. *Sherman v. Parish of Vermilion*, 51 La. Ann. 880.

But the extra-jurisdictional act of a police justice is a personal one and does not implicate the city. *Fox v. Richmond*, (Ky.) 40 S. W. Rep. 251.

Corporation is not liable for negligence of a constable. *Hurlburt v. Litchfield*, 1 Root. (Conn.) 520.

A municipal corporation is not responsible to one who is injured by carelessness of one of its police officers in shooting a dog. *Culver v. Streator*, 130 Ill. 238.

A city is not responsible to a person injured by the bursting of a cannon upon one of its streets, by reason of the fact that its peace officers negligently failed in their duty of preventing the use of the cannon. *Arms v. Knoxville*, 32 Ill. App. 604.

Injuries from negligent killing of a dog by one of defendant's officers are not chargeable to the defendant. *Culver v. Streator*, 34 Ill. App. 77.

Whitfield v. Paris, 84 Tex. 431.

Unlawful arrest by police officer does not give right of action against the municipality. *Blake v. Pontiac*, 49 Ill. App. 543; *McKay v. Buffalo*, 74 N. Y. 619; *Dillon's Munic. Corp.* § 975, note 1.

False imprisonment by a city marshal is not chargeable to the city. *Peters v. Lindsborg*, 40 Kas. 654.

Injuries sustained by a person confined in a prison, by reason of the negligent care of the same, are not chargeable to the municipality. *La Clef v. Concordia*, 41 Kas. 323.

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A city is not liable for the negligence of its city marshal in permitting a mob to gather and fire guns. *Jolly v. Hawesville*, 11 Ky. L. R. 477; nor for the illegal arrest of plaintiff by city marshal. *Laurel v. Blue*, 1 Ind. App. 128.

City's prison was negligently constructed and equipped; but plaintiff's disease together with his excesses were held the proximate cause of his death. *Coley v. Statesville*, 121 N. C. 301.

2. FIRE.

Inspection of poles on which fire alarm wires are strung is the exercise of a governmental function. *Peaty v. New York*, 33 Misc. 231.

So is the maintenance of a fire department. *Saunders v. Fort Madison*, 111 Iowa, 102.

Miller v. Minneapolis, 75 Minn. 131; *Frederick v. Columbus*, 58 Oh. St. 538; *Lilly v. Scranton*, 18 Pa. Co. Ct. 433; *Irvine v. Chattanooga*, 101 Tenn. 291; *Shanewerk v. Ft. Worth*, 11 Tex. Civ. App. 271.

Negligence of the fire department does not place liability upon a city, notwithstanding taxes are levied to provide suitable fire appliances. *Wright v. Augusta*, 78 Ga. 241.

No action lies against a city for injuries caused by the breaking of a pole used in the fire signal service. *Pettengell v. Chelsea*, 161 Mass. 368.

A city is not liable for the death of a person caused by the negligent driving of a fire wagon. *Gillespie v. Lincoln*, 35 Neb. 34; *Alexander v. Vicksburg*, 68 Miss. 564.

So, where plaintiff came in contact with a fire truck stretched across the sidewalk for the purpose of being cleaned, no recovery was had. *Dodge v. Granger*, 17 R. I. 664.

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Maintenance of penitentiary and almshouse is the exercise of a governmental function. County not liable for their sewerage into a neighboring stream. *Lafrois v. Monroe County*, 162 New York, 563; s. c., 50 L. R. A. 206; rev'g s. c., 21 App. Div. 421.

Similarly, in case of a public school. See *Folk v. Milwaukee*, 108 Wis. 359.

Duty to remove ashes from the street is such a function. *Bishop v. New York*, 21 Misc. 598.

So, as to waste paper and garbage. *Davidson v. New York*, 24 Misc. 560.

Ostrom v. San Antonio, (Tex. Civ. App.) 60 S. W. Rep. 591.

But the deposit of garbage &c. near a dwelling is the commission of a private

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nuisance for which municipality is liable the same as private individual. *New Albany v. Slider*, 21 Ind. App. 392.

Municipality not liable for actions of health officers. *Wyatt v. Rome*, 105 Ga. 312.

Gilboy v. Detroit, 115 Mich. 121; *Webb v. Detroit*, 116 id. 516; *Murray v. Grass Lake*, 125 Mich. 2; *Turner v. Toledo*, 15 Oh. C. C. 627; *Conelly v. Nashville*, 100 Tenn. 262; *Bates v. Houston*, 14 Tex. Civ. App. 287; *White v. San Antonio*, (Tex. Civ. App.) 57 S. W. Rep. 858; s. c., aff'd, 60 id. 426; *Kempster v. Milwaukee*, 103 Wis. 421.

The immunity as to ambulances of public institutions held not to extend to drivers of private ones. *Green v. Eden*, 24 Ind. App. 583.

City's officer acts as a public officer in rebuilding a retaining wall along the street. *Bowden v. Rockland*, 96 Me. 129.

So, where the general laws of the state impose on cities the duty of maintaining hospitals, they are not liable though their charters also provide therefor. *Nicholson v. Detroit*, (Mich.) 88 N. W. Rep. 695.

A city is not liable for negligent discharge of duty by a health officer. *Dillon's Mun. Corp.*, sec. 977.

4. HIGHWAYS, STREETS AND SIDEWALKS.

The recovery of a sum against a town officer for neglect of duty is not a town charge. The town, in its corporate capacity, has no control over and is not obliged to keep a highway in repair, but, if the commissioners have funds in their hands, they are liable for neglect to so keep the highway in repair. *People ex rel. Loomis v. Board of Auditors*, 75 N. Y. 316, aff'g order quashing *mandamus*.

County, being in the exercise of a governmental function, is not liable for defects in its bridges. *Markey v. Queens County*, 154 N. Y. 675; s. c., 39 L. R. A. 46; aff'g s. c., 9 App. Div. 627.

Ahearn v. Kings County, 89 Hun, 148; *Jasper County v. Allman*, 142 Ind. 572; s. c., 39 L. R. A. 58; *Cowen v. Adams County*, id. 699; *Johnson County v. Rainier*, 18 Ind. App. 119; *Florida v. Galveston County*, (Tex. Civ. App.) 55 S. W. Rep. 540.

So, as to building a culvert by a town. *Barber v. New Scotland*, 88 Hun, 522.

See, also, *Weltsch v. Stark*, 65 Minn. 5.

And as to its construction of a sewer. *Brunswick Gas Light Co. v. Brunswick*, 92 Me. 493.

So, as to care of streets by cities. *Custer v. New Philadelphia*, 20 Oh. C. C. 177.

And as to their maintenance of a bridge. *Corning v. Saginaw*, 116 Mich. 74.

MISCELLANEOUS INSTANCES.

The crushing of stone for the purpose of macadamizing roads held a governmental duty. *Colwell v. Waterbury*, 74 Conn. 568.

Highway surveyors and road commissioners are public officers, though maintained at the expense of and appointed by the town. *Goddard v. Harpswell*, 88 Me. 228.

So, as to acts of a superintendent of streets and surveyor of highways, though the city will derive an incidental advantage from the improvement. *Taggart v. Fall River*, 170 Mass. 325.

A town appropriated certain moneys for the repairing of a certain road and for no other purpose; in pursuance of their legal duty as surveyors of highways, the mayor and aldermen purchased the rights to take gravel from a bank, with a portion of this money, and while digging it out the plaintiff was hurt. The mayor and aldermen were acting as surveyors of highways as regards the gravel bank, and therefore no recovery was allowed. *Hennesey v. New Bedford*, 153 Mass. 260.

See *Walcott v. Swampscott*, 1 Allen, 101; *Barney v. Lowell*, 98 Mass. 570; *Prince v. Lynn*, 149 id. 193.

Separating stone from gravel for the use of the highway, held a public function. *Murphy v. Needham*, 176 Mass. 422.

So, where a bridge was not maintained as a source of profit but for the public good. *Corning v. Saginaw*, 116 Mich. 74.

Negligence in grading a street was not chargeable to the city where it was not done under its own ordinance. *Koeppen v. Sedalia*, 89 Mo. App. 648.

5. WATERWORKS.

Maintenance of water works is a governmental and not a corporate function. *Springfield &c. Ins. Co. v. Keeseville*, 148 N. Y. 46; s. c., 30 L. R. A. 660.

6. MARITIME.

Exemption afforded by public nature of the act held not to apply in admiralty. *Workman v. New York*, 179 U. S. 552; rev'g s. c., 67 Fed. Rep. 347.

See, also, *Thompson Nav. Co. v. Chicago*, 79 Fed. Rep. 984.

7. MISCELLANEOUS INSTANCES.

The city of New York is not liable for the negligence of the board of revision and correction of assessments, nor for failure to confirm assessments. *Tone v. Mayor*, 70 N. Y. 158, aff'g nonsuit.

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A county is not liable for the negligence of a county treasurer in omitting to serve proper notices of redemption on tax sales, as he is neither its servant nor agent in making such sale. *DeGraun v. Supervisors of Queens Co.*, 13 Hun, 381.

City not liable for unwarrantable arrest caused by its tax collector. *Dunbar v. Boston*, 112 Mass. 75.

Perley v. Georgetown, 7 Gray, 464; *Alger v. Easton*, 119 Mass. 77; see, also, *Buttrick v. Lowell*, 1 Allen, 172; *Walcott v. Swampscott*, 1 id. 101; *Fisher v. Boston*, 104 Mass. 87; *McKenna v. Kimball*, 145 id. 555; *Anthony v. Adams*, 1. Misc. 284.

Nor for torts of assessors or collectors. *Lorillard v. Monroe*, 11 N. Y. 392; *Bank v. Mayor*, 43 id. 184.

Injuries to a laborer at work upon lands given to a city for park purposes for the use of the public, are not chargeable to the city. *Russell v. Tacoma*, 8 Wash. St. 156.

A city is not liable for negligence of its city surveyor in fixing boundary of lots under ordinance. *Dill. Mun. Corp.*, secs. 978-9.

(c). BUT LIABLE FOR NEGLIGENCE IN THE EXERCISE OF CORPORATE FUNCTIONS.

Where power as to water supply is vested in a city in its corporate capacity, it is liable for the acts of its board of water commissioners. *Seeley v. New Amsterdam*, 54 App. Div. 9.

Rider v. Amsterdam, 31 Misc. 375; *Rhobidas v. Concord*, 70 N. H. 90; s. c., 51 L. R. A. 381.

So, where sewer commissioners acted under corporate authority, though appointed by the legislature. *Platt v. Waterbury*, 72 Conn. 531.

So, where the act is within the general scope of the corporate powers. *Boye v. Albert Lea*, 74 Minn. 230.

1. HIGHWAYS, STREETS AND SIDEWALKS.

A municipality was liable for injury from the falling of a pile of bricks in the street without authority, and allowed to remain by negligence of a policeman. *Rehberg v. Mayor*, 91 N. Y. 137.

See *Kunz v. City of Troy*, 104 N. Y. 344.

A municipality must use reasonable care to keep the streets free from obstruction and safe for travel, even though a third party cause the obstruction. One using a street is not bound to expect the obstruction.

The city was liable for the negligence of its water commissioners. *Pet-tengill v. Yonkers*, 116 N. Y. 558, aff'g 39 Hun, 449, and judg't for pl'ff.

From opinion.—"Its duty was to keep the streets in a safe condition for public travel, and it was bound to exercise reasonable diligence to accomplish that end, and the rule is now well established to be applicable whether the act or omission complained of and causing the injury is that of the municipal corporation or some third party. *Nelson v. Vil. of Canisteo*, 100 N. Y. 89.

When public or private improvements are being made in a street, it is the duty of the city to guard and protect them so as to protect travelers on the street from receiving injury therefrom. *Turner v. City of Newburgh*, 109 N. Y. 301. And if necessary to prevent accidents it should, by some barrier, close the street against the public so no harm may happen if the work on the street is delayed. *Russell v. Vil. of Canastota*, 98 N. Y. 496.

A person using a public street had no reason to apprehend danger, and is not required to be vigilant to discover dangerous obstructions, but he may walk or drive in the daytime or night-time, relying upon the assumption that the corporation whose duty it is to keep the streets in a safe condition for travel, have performed that duty, and that he is exposed to no danger from its neglect.

Although the street where this accident happened had been in a dangerous condition for weeks, the proof does not show the slightest effort on the part of the city to warn travelers of its condition. It appeared to have relied upon the contractor to maintain the warning lights at the excavation, which, under his contract, he was bound to do. But the city was not absolved from its liability by this provision of the contract. *Turner v. City of Newburgh*, *supra*.

We think, however, that the board of water commissioners was one of the instrumentalities of the government of the city, and that the defendant is liable for its negligent acts.

In *Ehrgott v. Mayor &c.*, 96 N. Y. 273, the court said: 'To determine whether there is municipal responsibility, the inquiry must be whether the department whose misfeasance or nonfeasance is complained of is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty or charged with a duty primarily resting upon the municipality.'

The duty of supplying the citizens of Yonkers with water is by statute made a municipal duty, and the board of water commissioners exists for that purpose.

While this board is created by special statute it is recognized as a department of the city government in the charter, and charged with the duty of 'making the necessary surveys &c., and preparing a general plan and system of sewers for the city,' also 'of preparing and approving specifications for constructing all sewers, drains, wells, fire cisterns, laying water pipes and erecting hydrants.'

The board exists solely for the benefit of the city. It can own no property and do no act that has not reference to the well being of the city. It is given the power to purchase and acquire land, but the title, when acquired, vests in the city. For its contracts the city is liable and judgments recovered against it are judgments against the city. When the water rents collected by it are more than sufficient to meet its expenses the surplus must go to the benefit of the city. It is denominated the 'board of water commissioners of the city of Yonkers.' It is not an independent body, acting for itself, but is a department of the city, and one of the instruments of the municipal government. Being such, when engaged in digging the trench for the purpose of laying water pipes in Yonkers avenue, it was engaged in the discharge of a municipal duty, and it was obligatory upon it, in so doing, to so protect and guard the work that it should not endanger persons using the street, and if that was impossible, with a due and

HIGHWAYS, STREETS AND SIDEWALKS.

diligent prosecution of the work, the street should, by suitable barrier, have been closed against the public.

For its failure so to do, and for injuries resulting from such failure, the defendant is liable. *Erghott v. Mayor &c.*, 96 N. Y. 265; *Walsh v. Mayor &c.*, 107 id. 220; *Barnes v. Dist. of Columbia*, 91 U. S. 540; *Brusso v. City of Buffalo*, 90 N. Y. 679."

See to same effect, *Dillon's Mun. Corp.*, sec. 982; *Aldrich v. Tripp*, 11 R. I. 141.

Street cleaning held a corporate function, though it incidentally benefited the public. *Missano v. New York*, 160 N. Y. 123; rev'g s. c., 17 App. Div. 536.

Defendant was liable for injuries caused by excavation in its streets made by its commissioner for repairs, because being done by its agents it had notice through them. *Deyoe v. Saratoga Springs*, 1 Hun, 341.

Intestate was killed by falling off a defective embankment in the street through the negligence of common council as street commissioners. The charter exempted the city from negligence of any officer, elected or appointed, and exempted the officers save for "willful or gross neglect or intentional violation of duty." Held, that defendant was liable, else plaintiff would have no remedy. *Fitzgerald v. City of Binghamton*, 40 Hun, 332, aff'g judg't for pl'ff; following *Fitzpatrick v. Slocum*, 89 N. Y. 358; *Hardy v. City of Brooklyn*, 90 id. 435, and *Vincent v. City of Brooklyn*, 31 Hun, 122.

Maintenance of the highway held a corporate function, where the duty reasonably came under a town's charter powers. *Doeg v. Cook*, 126 Cal. 213.

So, where the officers of a municipality had sole jurisdiction. *District of Columbia v. Sullivan*, 11 App. D. C. 533.

So, where the sidewalks are within a city's own control. *Wakley v. Boswell*, 149 Ind. 64.

Kennedy v. Williamsport, 11 Pa. Super. Ct. 91; *Hall v. Austin*, 73 Minn. 134; *Thompson v. Corpus Christi*, (Tex. Civ. App.) 38 S. W. Rep. 373; *Jacksonville v. Smith*, 78 Fed. Rep. 292.

So, as to an incorporated town. *Kentland v. Hagan*, 17 Ind. App. 1.

Williamsport v. Lisk, 21 Ind. App. 414.

City held liable, where it prescribed plan and manner of execution, and directed and supervised the work, though the work was done by a railroad company. *Laager v. San Antonio*, (Tex. Civ. App.) 57 S. W. Rep. 61.

Injuries to a scow from a tug belonging to the street cleaning department of New York city, are chargeable to the city. *Barney Dumping Boat Co. v. New York*, 40 Fed. Rep. 50.

2. WATERWORKS.

Cases arising in connection with transactions within the general powers of the corporation, as trespasses upon or the unlawful taking of private property, in the course of authorized improvements of streets, sewers, etc., create liability. *Dillon on Mun. Corp.*, sec. 971; *Ætna Mills v. Lowell*, 11 Gray, 345; *Conniff v. San Francisco*, 67 Cal. 45; *Crasset v. Janesville*, 28 Wis. 420; *Buffalo T. Co. v. Buffalo*, 58 N. Y. 639; *Baltimore v. St. Agnes Hospital*, 48 Md. 419; *Leeds v. Richmond*, 102 Ind. 372.

Ratification of wrongs as to matters not wholly *ultra vires* creates liability. *Dillon on Mun. Corp.*, 971; *McGary v. Lafayette*, 12 Rob. (La.) 668; 4 La. Ann. 440; *Wilde v. New Orleans*, 12 id. 15 (city defended the unlawful act as its own).

Municipal corporations possess two kinds of power—one governmental and public, and the other corporate or private; the first is given and used for public purposes, and in the exercise of those powers it acts as a municipal corporation; the other is given for the corporate purposes, and where a municipal corporation assumes or accepts powers and duties that are not public in their nature it is to be treated in relation to those powers and duties as a business corporation or a natural person would be.

Where a service is being rendered for the public good and in obedience to law, and is one in which a municipal corporation has no particular interest, and from which it derives no particular benefit in its corporate capacity, the municipality is not liable for the improper or negligent performance of that service, nor is it responsible for the acts of its officers or agents performing such public service, although the officers and agents are designated by the municipality.

As to those powers and duties of a municipal corporation, which are private corporate powers and duties, and are not for the benefit of the general public, the corporation is regarded as a legal entity, and is responsible for its omission to perform its corporate duties, to the same extent that a natural person would be under the same circumstances.

The supplying of water by a municipal corporation is not a public function; it is purely a matter of private business in which the general public has no interest, and if a municipal corporation elects to construct and maintain water works under the authority granted to it by statute, it becomes responsible for the proper exercise of such powers.

Municipal corporations are bound to use the same degree of care and diligence in respect to the maintenance of their water works as they are required to exercise in regard to their streets and sewers, and where a person who has been obliged to contribute towards the expenses of the water supply proves that by the willful misconduct or culpable neglect

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of a municipal corporation he was deprived of the use of water for the purpose of extinguishing a fire, whereby he has been damaged, he establishes a cause of action.

When a municipal corporation exercises the power of erecting and maintaining water works it assumes a two-fold obligation—one not to create any new source or condition of danger by the negligent exercise of such power, and the other to remove or at least diminish existing conditions or sources of danger, such as danger from fire. The first duty it owes to all the world; the second it does not, perhaps, owe to the general public, but only to those who contribute to pay the expenses of exercising such powers.

A public corporation having agreed to erect and take charge of a public work or enterprise for the people within its boundaries, those who contribute of their means to the erection and maintenance of such public work, have a right to demand from the corporation reasonable care and diligence in maintaining it, so that it will discharge the functions for which it was created, and for which the contributors pay, and to hold the corporation liable for a lack of such care and diligence. Such is the nature of the implied contract between a water rent payer and a municipal corporation. *Springfield Fire and Marine Ins. Co. v. Village of Keeseville*, 80 Hun, 162, rev'd, 148 N. Y. 46.

From opinion.—"Municipal corporations possess two kinds of power, one governmental and public, and the other corporate or private; the first is given and used for public purposes, and in the exercise of these powers it acts as a municipal corporation; the last is given for corporate purposes, and in the exercise of such powers it acts as a private corporation or individual. *Lloyd v. Mayor*, 5 N. Y. 369; *Maxmilian v. Mayor*, 62 id. 160; *Ham v. Mayor*, 70 id. 459.

Where the service is being performed for the public good, in obedience to law, and is one in which the municipality has no particular interest, and from which it derives no particular benefit in its corporate capacity, the municipality is not liable for the improper or negligent performance of that service. *Maxmilian v. Mayor*, 62 N. Y. 160; *Smith v. City of Rochester*, 76 id. 506; *Ham v. Mayor*, 70 id. 459; *Bieling v. City of Brooklyn*, 120 id. 98-106.

The municipality is not responsible for the acts of the officers or agents performing such public services, although such officers and agents are designated by the municipality; the maxim *respondeat superior* does not apply. *Maxmilian v. Mayor*, *supra*.

As to those powers and duties which are private corporate powers and duties, and are not for the benefit of the general public, a municipal corporation is regarded as a legal entity, and is responsible for its omission to perform its corporate duties to the same extent that a natural person would be under the same circumstances. *Conrad v. Ithaca*, 16 N. Y. 158-172; *N. Y. & B. S. M. & L. Co. v. City of Brooklyn*, 71 id. 580; *Platz v. City of Cohoes*, 89 id. 219.

It is sometimes exceedingly difficult to draw the distinction between what are public and what are private corporate powers and duties.

The administration of justice, the preservation of public peace and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gas works and water works, the construction of sewers and the like, are matters which pertain to the municipality as distinguished from the state at large. Dillon on Mun. Corp. (3 ed.) sec. 58.

The supplying of water by municipal corporations is not a public function; it is purely a matter of private business. Matter of Long Island Water Supply Co., 30 Abb. N. C. 36.

The general public have no interest in it; it is purely a local matter, exclusively for the benefit of the village.

When the water works are constructed they belong to the village, the people of the village pay for them, and ordinarily receive rentals for supplying water. Fleming v. Village of Suspension Bridge, 92 N. Y. 368; Pettingill v. City of Yonkers, 116 id. 558.

And in Bailey v. Mayor, 3 Hill 531, it was held that the powers granted by the act providing a supply to the city of New York with pure and wholesome water were intended for the private advantage and emolument of that city, the state in its sovereign capacity having no interest in it, and that, therefore, the city was liable to the negligent construction of the dam by the employes of the water commissioners.

While this case has been criticised in some respects, in several cases, such as in Darlington v. Mayor, 31 N. Y. 164, the principle decided has never been overruled or departed from, but has been approved in Walsh v. Bridge Trustees, 96 N. Y. 427; Ehr Gott v. Mayor, 96 id. 264, and the same principle has been maintained by the elementary writers.

In regard to all those powers which are conferred upon the corporation, not for the benefit of the general public, but of the corporators, such as the power to construct works to supply a city with water or gas works, or sewers, and the like, the corporation is held to a still more strict liability, and is made to respond in damages to the parties injured by the negligent manner in which the work is constructed or guarded, even though, under its charter, the agents for the construction are not chosen or controlled by the corporation, and even where the work is required by law to be let to the lowest responsible bidder.' Cooley's Const. Lim. (3d ed.) 249; Beach's Pub. Corp., sec. 1140.

The complaint must be read in connection with the statutes governing the defendant; they are as much a part of the complaint as if written in it.

The defendant was authorized by Chapter 181 of the Laws of 1875, and various acts amendatory thereof, to construct and maintain water works to supply its inhabitants with water.

The president and trustees constitute the board of water commissioners. Chap. 74, Laws of 1891.

The defendant receives rents for supplying water; it has control over all the employes connected with the water works; it can employ and discharge them at pleasure; they are its servants. The construction and maintenance of the water works is something that was not forced upon it by the power of the state; it could act under the law authorizing it to construct and maintain water works, or refuse to act, at its pleasure; but having accepted the power and authority granted, it became responsible for the proper exercise of such powers. Cain v. Syracuse, 95 N. Y. 83.

BUSINESS, QUASI-PRIVATE.

The decision of the court below was as follows:

A failure to maintain water works system of a village in proper condition so that a court or jury might deem it possible or probable that fire could have been put out with proper vigilance by the parties who first discovered it if the water supply had been sufficient, does not afford a cause of action against village to either the insurer or insured. *Springfield Fire & Marine Ins. Co. v. Village of Keeseville*, 6 Misc. 233, sustaining demurrer to complaint."

From opinion.—"I do not, therefore, think that the failure to maintain the water works system of the village in proper condition, so that a court or jury might deem it possible or probable that fire could have been put out with proper vigilance by the parties who first discovered it, if the water supply had been sufficient, affords a cause of action to either the insurer or insured. *Van Horn v. City of Des Moines*, 63 Iowa, 447; 50 Am. Rep. 750; *Black v. City of Columbia*, 19 S. C. 412; 45 Am. Rep. 785; *Wheeler v. City of Cincinnati*, 1 Ohio St. 19; 2 Am. Rep. 368; *Tainter v. City of Worcester*, 123 Mass. 311; 25 Am. Rep. 90; *Mendel v. City of Wheeling*, 28 W. Va. 233; 57 Am. Rep. 664; *Edgerly v. City of Concord*, 62 N. H. 8; 13 Am. Rep. 533; *Fisher v. City of Boston*, 104 Mass. 94.

In this state it has been held that the actual wrong doing of various agents of the different departments, such as the police, fire and water departments, did not give a right of action against the municipality. *Woolbridge v. Mayor*, 49 Howe. 67; *Smith v. City of Rochester*, 76 N. Y. 506; *O'Meara v. Mayor*, 1 Daly, 425; *Maxmilian v. New York*, 62 N. Y. 160."

Waterworks maintained for the benefit of inhabitants was held a corporate function. *Lynch v. Springfield*, 174 Mass. 430.

So were acts of water commissioners done pursuant to corporate power to maintain such work. *St. Germaine v. Fall River*, 177 Mass. 550.

Though such maintenance is a public duty, a city is liable for the acts of its own officers and agents in violation of private rights. *Rhobidas v. Concord*, 70 N. H. 90; s. c., 51 L. R. A. 381.

Though the appointment of the water commissioners was by the legislature. *Esberg-Gunst Cigar Co. v. Portland*, 34 Or. 282; s. c., 43 L. R. A. 435.

3. BUSINESS, QUASI-PRIVATE.

When a city derives a benefit from the existence of a board of city government, created by the legislature, although not subject to its control, it is liable for its negligence and malfeasance, otherwise not. A person with the measles, against her will, was removed from her home by the New York health board and placed with small-pox patients, and she had the small-pox. *Tormey v. Mayor*, 12 Hun, 542, overruling demurrer to compl't.

City liable for acts done in pursuance of private enterprise. *Augusta v. Owens*, 111 Ga. 464.

As a quarry, *Augusta v. Owens*, 111 Ga. 464; *Augusta v. Lombard*, 99 Ga.

282; a steam roller, *McMahon v. Dubuque*, 107 Iowa, 62; a gravel bank, *Winfield v. Peeden*, 8 Kan. App. 671; a hall for rent, *Little v. Holyoke*, 177 Mass. 114; a private sewer, *Ostrander v. Lansing*, 111 Mich. 693; ice boat on private venture, *Guthrie v. Philadelphia*, 73 Fed. Rep. 688; see, also, *Carroll v. New York*, 29 App. Div. 420; s. c., aff'd, 159 N. Y. 559.

The liability in such case being the same as that of an individual. *New Orleans v. Kerr*, 50 La. Ann. 413.

Tomlin v. Hildreth, N. J. L., 47 Atl. Rep. 649.

Removal of dirt, ashes and garbage held a quasi-private function. *Quill v. New York*, 36 App. Div. 476.

Municipality was liable for negligence in the maintenance of a market house owned by it. *Savannah v. Cullens*, 38 Ga. 334.

Town commissioners made a contract with the plaintiff, agreeing to supply him with water to make steam for his greenhouse, reserving the right to shut off the same under stated circumstances. Action for breach of contract would lie for lack of diligence in failing to discover a leak in the pipes, by reason of which failure the pipes were emptied and plaintiff's vegetables destroyed. *Watson v. Needham*, 161 Mass. 404, citing *Merrimack, &c., Bank v. Lowell*, 152 Mass. 556, and on the liability of the town for the neglect of its water commissioners. *Hand v. Brookline*, 126 Mass. 324; *Neff v. Wellesley*, 148 Mass. 487.

The erection of a stand-pipe upon a lot contiguous to the plaintiff's, for the purpose of supplying water to the public, gives the plaintiff no right of action as for a nuisance, where no negligence in its construction or maintenance is alleged. *Whitfield v. Carrolton*, 50 Mo. App. 98.

Maintenance of an electric plant to light its buildings, streets and parks. *Bullmaster v. St. Joseph*, 70 Mo. App. 60.

No liability rested on municipality for the death of a child from drowning in an old reservoir which was being filled up; if an express or implied invitation could have been shown, liability might have attached because the city having abandoned the public use of the reservoir was filling it up for business purposes. *Clark v. Manchester*, 62 N. H. 577.

Quaere as to whether a municipal corporation is liable in tort for malfeasance or misfeasance in the performance of a private duty. *Chapman v. Charleston*, 28 S. C. 373.

A municipality controlling a dump yard is liable for the injuries caused by the negligent mode of keeping it. *Fort Worth v. Crawford*, 74 Tex. 404.

A municipal corporation, like a private person, is liable for negligence of its officers and agents in the conduct of water works or gas works. *Dillon on Mun. Corp.*, sec. 954.

Municipal corporations are liable for the improper management and

CONSTRUCTION OF STATUTES IMPOSING DUTIES.

use of their property, to the same extent and in the same manner as private corporations and natural persons. *Dillon on Mun. Corp.*, sec. 985.

4. MISCELLANEOUS INSTANCES.

Statutory exemption of defendant, on account of nonfeasance or misfeasance of common council, or officer appointed, does not relieve from liability for the death of a person lawfully in municipal building, through the negligence of the keeper thereof, resulting in explosion of illuminating gas. *Vincent v. Brooklyn*, 31 Hun, 122, aff'g judg't for pl'ff.

Town was liable for acts of its treasurer. *Tucker v. Rochester*, 7 Wend. 254.

(d). CONSTRUCTION OF STATUTES IMPOSING DUTIES AND LIABILITIES.

The statute giving to the commissioners of the department of public parks exclusive power to lay out, and exclusive control of, the streets of the annexed territory does not mean exclusive of the city; but exclusive of any other officers of the city; and said commissioners in the exercise of such powers act as agents for the municipality, their duties being regulated by statute. *Ehrgott v. Mayor*, 96 N. Y. 264, rev'g order granting a new trial.

From opinion.—"But the park commissioners are not independent public officers; their duties are regulated by the acts constituting the charter of the city. Chaps. 335 and 757 of the Laws of 1873 and chap. 300 of the Laws of 1874. The department of public parks is one of the city departments, and the commissioners are appointed by the mayor, and by him may be removed. They have from time to time, by various acts of the legislature, been clothed with power to open, lay out and control streets in the city, south of the Harlem river. Chap. 363 of 1859; chap. 275 of 1864; chaps. 564 and 565 of 1865; chaps. 367 and 757 of 1866; chaps. 580 and 697 of 1867, and sec. 83 of the charter act of 1873. And in the discharge of the duties thus conferred upon them, it cannot be doubted that they acted for and represented the city, just as the department of public works would have represented the city if the duties had been devolved upon it."

Duty of cleaning streets and removing garbage imposed by statute was construed to be a corporate, and not a governmental function. *Missano v. New York*, 160 N. Y. 123.

Howard v. Brooklyn, 30 App. Div. 217.

The statute of 1889, chap. 453, did not withdraw from the jurisdiction of the highway commissioners any highway upon which commissioners of improvement had entered in the exercise of their statutory powers, nor relieve such commissioners from the care of such highway. Section 1,

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chap. 700, Laws 1881, was repealed by chap. 568, Laws of 1890; section 16 of which last law provided that "every town shall be liable for all damages to person or property sustained by reason of any defect in its highways or bridges, existing because of the neglect of any commissioner of highways of such town." *McGuinness v. Westchester*, 66 Hun, 356, aff'g judg't for pl'ff.

"Injury to person or property" does not embrace the loss of wife's services. *Lounsbury v. Bridgeport*, 66 Conn. 360.

Statute made officers liable. It was no defense to city. *Henderson v. Clayton*, (Ky.) 57 S. W. Rep. 1.

See, also, *Clayton v. Henderson*, (Ky.) 44 S. W. Rep. 667; s. c., 44 L. R. A. 474.

All the powers of a city council "as public officers or otherwise" were conferred on the board of public works. They were not vested thereby with a public function. *Norton v. New Bedford*, 166 Mass. 48.

Park commissioners in Massachusetts are created as an independent board and subject to a statutory liability for negligence committed within the scope of their authority. *Holleran v. Boston*, 176 Mass. 75.

Defects in a stairway of a public building were not included in the statutory liability for defects in "highways," "townways," or "ways entering on and uniting with existing public highways." *McNeil v. Boston*, 178 Mass. 326.

Statutory duty of towns as to condition of streets construed to be mandatory and not discretionary. *Parmenter v. Marion*, 113 Iowa, 297.

Liability for a "defect of culvert" construed to extend to the defective drain leading to it. *Boyd v. Derry*, 68 N. H. 272.

Statutory liability enforced, though the statute provided no way of raising a fund to pay the claim. *Hardin County v. Coffman*, 60 Oh. St. 527.

That act complained of, was a nuisance, did not alter municipal liability. *Billings v. Dressler*, 5 Oh. N. P. 114.

Liability "by reason of defects or mismanagement of anything under control of the corporation" construed to cover operation of steam boiler. *Barksdale v. Laurens*, 58 S. C. 413.

(e). NOT LIABLE FOR ACTS ULTRA VIRES THE CORPORATION.*

If the act causing damage was beyond the scope of corporate powers, the municipality is not liable, although its officers directed it done. The committee of common council ordered a hose cart to take part in an anniversary celebration and it negligently ran over a person in the street.

*NOTE—As to what acts of officers are unauthorized, see, *post*, p. 2007.

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In an action to recover damages, held, that the calling out of the hose cart for such purpose was not authorized and defendant was not liable; that the fact that the city owned the horses and hose cart did not make it responsible for the negligent acts of its servants having charge and control of them, when using them in a service not of a public nature, and not authorized by law. Assuming that the defendant had authority to call out the fire department for the purpose stated, it was not liable. *Smith v. Rochester*, 76 N. Y. 506, aff'g 13 Hun, 214, and nonsuit.

From opinion.—"In *Eastman v. Meredith*, 36 N. H. 285, the action was for an injury caused by the giving away of the flooring of a town house erected by the town, which was imperfectly constructed; and it was held that no action would lie against the town. The *dictum* of Perley, C. J., in the opinion, as to the liability of corporations for private injuries caused by improper management, does not go to the extent of holding that they are liable for acts done by its officers or managers beyond the scope of the powers conferred by law; nor was it intended, we think, to hold that, in the latter case, the corporation was liable when the property was not employed for the purposes and objects for which it was designed. So also the remarks in *Bailey v. Mayor*, 3 Hill, 531, of Nelson, Ch. J., which are cited to the effect that municipal corporations, in their private character as owners and occupants of lands, must be regarded the same as individual owners, and dealt with accordingly, must be restricted, I think, to apply only to cases where the officers do not exceed their powers. In the case of *Neuert v. City of Boston*, 120 Mass. 338, where the corporation was held liable for damages occasioned by the negligent suspension of a telegraph wire for the use of the fire department, the wire was for the benefit of and used by the corporation, attached to a building belonging to the city, and was owned and maintained for the use of the fire department. It has also caused or authorized its removal, and hence, the injury occurred while the city had control over it, and its agents were acting by its authority. In *Lee v. Village of Sandy Hill*, 40 N. Y. 442, the town officers were acting under a resolution of the board of trustees to remove obstructions from the street. They made a mistake and committed a trespass, but acted in entire good faith in the performance of a public duty. As they exceeded their powers while engaged in an act lawful in itself, it was held that the corporation was liable, whether the trustees were regarded as mere agents of the corporation, or the trespass was deemed the act of the corporation itself. The case differs from one where there is an absence of authority from the beginning and the agents were acting entirely beyond their powers. The rule laid down in *Dillon on Corporations*, sec. 780, that municipal corporations are liable for the improper management and use of property, in the same manner as private corporations and natural persons, must be regarded as relating to acts done which are lawful in themselves, where a liability is created by reason of the result which flows from the manner in which such acts are performed, or for a neglect of duty in the lawful care and management of the public property, and not to cases where there is no authority whatever to bind the corporation, and the injury done is caused by an act which is not sanctioned by law. The remarks cited from *Jewett v. City of New Haven*, 38 Conn. 386, that where the question is whether the principle of *respondet superior* applies to a municipal corporation, it should distinctly

appear, in order to hold them liable, that the service in which the party doing the mischief was engaged at the time was private and not public, were not required for the decision of the case; and if they can be considered as sustaining the doctrine contended for, cannot be regarded as sound law. No reported cases sustain the principle, that when the common council of a municipal corporation exceed the powers conferred by the charter of the city, they represent, by using the property of the city, as was done in this case, for purposes not recognized by law, that the corporation is answerable for negligence in the management of such property.* Such a rule would place in the hands of the members of the common council of a municipal corporation a power to create liabilities of the tax payers, which is without any precedent or authority of law, and which might be liable to great abuse. The decisions of the courts are, we think, in a contrary direction, and the cases establish, beyond question, that to authorize the conclusion that the order to the driver of the hose cart was justified by the common council, it should appear that there was express authority in the charter, or that it was done in pursuance of some general authority to act for the corporation in reference to the matter. The rule on the subject is well stated in the opinion of Shaw, Ch. J., in *Thayer v. City of Boston*, 19 Pick. 516, as follows: 'As a general rule, the corporation is not responsible for the unauthorized and unlawful acts of its officers, though done *colore officii*; it must further appear, that they were expressly authorized to do the acts, by the city government, or that they were done *bona fide* in pursuance of a general authority to act for the city, on the subject to which they relate; or that, in either case, the act was adopted and ratified by the corporation.' This rule is upheld in *Lee v. Village of Sandy Hill*, *supra*, in the opinion of the court, as well as in other decisions. See *Mayor v. Bailey*, 2 Den. 433; *Buffalo & Hamburg Turnpike Co. v. City of Buffalo*, 58 N. Y. 639; *Anthony v. Inhabitants of Adams*, 1 Metc. 284; *Mayor v. Cunliff*, 2 Comst. 165; *Ham v. Mayor*, 70 N. Y. 459; *Morrison v. Lawrence*, 98 Mass. 219. * * * Assuming, however, that the common council, in making an order for a midnight parade of the fire department to celebrate the centennial anniversary of the nation, had authority under the provisions last cited, the difficulty in maintaining the plaintiff's action is the well-settled rule, that a municipal corporation is not liable for the negligence of firemen while engaged in the line of their duty. *Dillon on Mun. Corp.*, sec. 774; *Hofford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87; *Jewett v. City of New Haven*, 38 Conn. 368; *O'Meara v. Mayor*, 1 Daly, 425.

The exemption from liability, in most of the cases last cited, is placed upon the ground that the service is performed by the corporation for the public good, in obedience to law, in which it has no particular interest, and from which it derives no particular benefit in its corporate capacity; that the members of the fire department are not the agents and servants of the city, for whose conduct it is liable, but act as officers charged with a public service, for whose negligence

*NOTE—*Ultra Vires*.—Judge Dillon's statement of the rule is: "If the act complained of necessarily lies wholly outside of the general or special powers of the corporation as conferred in its charter or by statute, the corporation can in no event be liable to an action for damages, whether it directly commanded the performance of the act or whether it be done by its officers without its express command: for a corporation cannot, of course, be impliedly liable to a greater extent than it could make itself by express corporate vote or action." *Dillon's Mun. Corp.*, sec. 969; *Albany v. Cunliff*, 2 N. Y. 165; *rev'g* 2 Barb. 190; *Smith v. Rochester*, 78 N. Y. 506; *Shelby Co. Com'rs v. Deprez*, 87 Ind. 509; *Cuyler v. Rochester*, 12 Wend. 165; *Swift v. Williamsburg*, 24 Barb. 427; *Starr v. Rochester*, 6 Wend. 654; *Boylard v. New York*, 1 Sandf. (N. Y.) 97; *Horn v. Baltimore*, 30 Md. 218; *N. Y. Lumber Co. v. Brooklyn*, 71 N. Y. 580; *Mitchell v. Rockland*, 53 Me. 118; *Field v. Des Moines*, 39 Iowa, 575.

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in the discharge of official duty, no action lies against the city, and the maxim of *respondeat superior* has no application."

Power to require inspection of work as a condition of issuance of permit to excavate in street was not *ultra vires*. *Schumacher v. New York*, 166 N. Y. 103.

A permit to permanently obstruct the street was. *Denver v. Girard*, 21 Colo. 447.

So, as to permit to project storm houses onto the street. *Rothschild v. Chicago*, 28 Chic. L. News, 216.

So, as to permit to railroad to run upon the streets. *Thompson v. Ocean City R. Co.*, 60 N. J. L. 74.

Tallon v. Hoboken, 60 N. J. L. 212; *Philadelphia v. River &c. R. Co.*, 173 Pa. St. 334.

Town was not liable for false imprisonment of a person arrested on warrant of mayor by marshal, under an illegal ordinance. *Tramwell v. Russellville*, 34 Ark. 155.

Acts of city officers in constructing a ditch to the injury of plaintiff's land, which acts are *ultra vires*, do not charge the city with liability. *Loyd v. Columbus*, 90 Ga. 20.

City not liable for acts of officers *ultra vires* the corporation. *Boye v. Albert Lea*, 74 Minn. 230.

Royce v. Salt Lake City, 15 Utah, 401; *Betham v. Philadelphia*, 196 Pa. St. 302. *Allebrand v. Duquesne*, 11 Pa. Super. Ct. 218.

So, where the ordinance sought to be enforced was invalid. *Caldwell v. Prunelle*, 57 Kan. 511.

Contra, *McGraw v. Marion*, 98 Ky. 673.

Strictly construed. *Morton v. Carlin*, 51 Neb. 202.

Buffalo v. Delaware &c. R. Co., 39 N. Y. Supp. 4.

A suit brought by a city tax collector, maliciously, and not authorized nor ratified by the city, is not a ground upon which an action will lie against the city. *Horton v. Newell*, 17 R. I. 571.

Lack of authority may be cured by ratification. *Commercial Electric Light Co. v. Tacoma*, 20 Wash. 288.

City not held for injury from display of fireworks assented to by its officers. *Bartlett v. Clarkesburg*, 45 W. Va. 393; s. c., 43 L. R. A. 295.

(f). BUT LIABLE FOR AUTHORIZED CORPORATE ACTS WITHIN POWERS OF THE CORPORATION.

A municipal corporation is liable for the tortious acts of its servants and officers, if it appear that they were expressly authorized by such corporation to do the act, or did it *bona fide* in pursuance of the general

authority to act for the corporation, on the subject, in reference to which, the act was performed. Under a written resolution or order of the trustees the commissioners of highways wrongfully entered the plaintiff's premises and moved back a fence, erected by him upon the erroneous supposition that the fence was an encroachment upon the street. Held that the plaintiff could maintain trespass against the village for such removal. *Lee v. Village of Sandy Hill*, 40 N. Y. 442, ordering judg't for pl'ff.

From opinion.—"The doctrine is too well settled in this court to admit of discussion, that municipal corporations, like the defendant, are liable in trespass for the illegal acts of its officers. *Conrad v. Trustees of the Village of Ithaca*, 16 N. Y. R. 162; *Howell and others v. City of Buffalo*, 15 id. 512; *Hickox v. Trustees of the Village of Plattsburgh*, 16 id. 161, note; *Weet v. Trustees of the Village of Brockport*, 16 id. 161; *Storrs v. City of Utica*, 17 id. 104. The rule is laid down in *Angel and Ames*, generally, that as natural persons are liable for the wrongful acts and neglects of their servants and agents done in the course and within the scope of their employment, so are corporations upon the same grounds, in the same manner, and to the same extent. Page 303, sec. 10, 3d ed. It is not very important in this case to determine whether the trustees in this case acted as mere agents of this corporation, or whether their acts are to be regarded as the acts of the corporation, performed by the principal managing officers of the corporation; for in either view of the case, the defendants are liable for their acts in causing the fence in question to be torn down and removed. * * *

The principal is liable in a civil suit, to third persons, for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances and misfeasances of his agent in the course of his employment, although the principal did not authorize, justify, or participate in, or indeed know of such misconduct, or even if he forbade the acts, or disapproved of them. *Story on Agency*, sec. 452, p. 563.

This rule of liability is not based upon any presumed authority in the agent to do the acts, but upon the ground of public policy, and that it is more reasonable, where one of two innocent persons must suffer from the wrongful act of a third person, that the principal, who placed the agent in the position of trust and confidence should suffer, than a stranger. *Hern v. Nichols*, 1 Salk. R. 289. I examined this question of the extent of the liability of the principal for the wrongs of the agent, at the last term, in the case of *Davis and others v. Bemis* (in MS.), and which opinion was approved by the court. All that is necessary to render the principal liable for the malfeasance or torts of the agent is that the tort must be committed in the course of the agency (*Story on Agency*, sec. 456); not that the agency authorized it, or, as it is expressed by *Paley*, that the employment afforded the means of committing the injury. *Dunlop and Paley on Agency*, 306. The rule as to the liability of corporations, for the acts of their agents, is stated by Chief Justice Shaw, in the case of *Thayer v. City of Boston*, 19 Pick. R. 516, as follows: It must appear that they were expressly authorized to do the acts, by the city government, or that they were done *bona fide*, in pursuance of a general authority to act for the city on the subject to which they relate, &c. This is the precise language in which the rule is laid down in *Angel and Ames on Corporations*, p. 304, sec. 10, 3d ed., where the case of *Thayer v. City of Boston*, is referred to and approved. This is certainly laying

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down the rule much narrower than it is held in most of the cases in the books, as between principal and agent generally where the principal has been held liable for the intentional wrongs of the agent, committed in the course of his employment. I do not mean to assert the rule as against municipal corporations broader than it is laid down by Chief Justice Shaw, in the case referred to, as that will clearly embrace this case. * * *

It was the duty of these trustees, if they were right in their conclusion that there had been a dedication of this street to three rods in width, to cause it to be described, entered of record and opened. The most that can be claimed, is that they, while acting within the general scope of their duties, have committed a mistake and done an illegal act. In such a case, the corporation is liable. There is another view which may be taken of this case, and which is not without authority to support it, which renders the defendants' liability equally clear. The only officers who can act for, and who represent this corporation, as we have seen, are these trustees. It was said by Judge Selden, in delivering the opinion of this court, in the case of *Perkins v. N. Y. Central R. R. Co.*, 24 N. Y. 213, that a distinction is no doubt to be made between the directors or managing officers of a corporation and its subordinate agents. As the former exercise all the power of the corporation and are its only direct medium of communication with outside parties, they must, in respect to all external relations, be considered as identical with the corporation itself.

He says, in considering this very question, in the case of *Weet v. The Trustees of The Village of Brockport*, 16 N. Y. R. R. 170, and which was adopted as the opinion of the court, in the case of *Hickox v. The Trustees of the Village of Plattsburgh*, 16 N. Y. R. R. 161, that there can be no doubt that the powers conferred upon the trustees devolve upon the corporation. That on all charters creating corporations, powers conferred upon those who stand in the place of and represent the corporative body, are deemed to be conferred upon the corporation itself. And that the defendants are to be treated as invested in their corporate capacity, with all the powers of commissioners of highways, over the roads and streets of their village. These views, if sound, and it seems to me they are, leave no doubt as to the defendants' liability. It has been held in several cases in this court, that these duties in regard to these streets, which are nominally upon the trustees, rest upon the corporation, and that the corporation is liable for any misfeasances of the trustees in regard thereto. The trustees are the managing officers of the corporation, and they alone can exercise the powers of the corporation. They represent, and speak and act for it, and their acts in the case under consideration must be regarded as the act of the corporation."

To determine whether there is municipal responsibility for misfeasance or nonfeasance, the question is whether the department whose acts or omissions are complained of, is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of, or charged with, a duty primarily resting upon the municipality. *Ehrgott v. Mayor*, 96 N. Y. 261, rev'g order granting a new trial, and aff'g judg't entered on a verdict for pl'ff.

From opinion.—"To determine whether there is municipal responsibility, the inquiry must be whether the department whose *misfeasance* or *nonfeasance*

is complained of, is a part of the machinery for carrying on the municipal government, and whether it was at the time engaged in the discharge of a duty, or charged with a duty primarily resting upon the municipality. For these views the cases of *Mayor &c. v. Bailey*, 3 Hill, 538; s. c., 2 Denio, 433, and *Barnes v. District of Columbia*, 91 U. S. 540, are ample authority, and the case of *Richards v. Mayor &c.*, 16 Jones & Su. 315, is a precise authority.

The learned counsel for the city, however, calls our attention to, and mainly relies upon, the following authorities: *Maxmilian v. Mayor &c.*, 62 N. Y. 160; *Ham v. Mayor &c.* 70 id. 459; *N. Y. & B. S. M. R. Co. v. City of Brooklyn*, 71 id. 580. But none of these cases are in point. In *Maxmilian v. Mayor &c.*, it sought to make the city liable for the negligence of an employé of the commissioners of public charities; but the plaintiff was defeated on the ground that the commissioners' and their employés were not engaged in the discharge of any duty which rested upon the city. In that case *Folger, J.*, writing the opinion, said: 'The duty of keeping in repair streets, bridges and other common ways of passage, and sewers, and a liability for a neglect to perform that duty rests upon an express or implied acceptance of the power, and an agreement so to do. It is a duty with which the city is charged for its own corporate benefit, to be performed by its own agents, as its own corporate act.' In *Ham v. Mayor &c.*, it was sought to make the city liable for the negligence or unskillfulness of servants employed by the department of public instruction; and the plaintiff was defeated upon the ground that the department was not engaged in the discharge of a corporate duty. Referring to these two cases, in *Swift v. Mayor &c.*, 83 N. Y. 528, *Rapallo, J.*, said: 'These were actions for damages resulting from negligence, and it was held, that as the persons guilty of the negligence were not the servants of the corporation, not being either employed or removable by it, or engaged in the performance of any corporate duty, the city was not liable for their negligence.' In the case of *N. Y. & B. S. M. & L. Co. v. City of Brooklyn*, an act of the legislature made it the duty of the common council of the city to repair and rebuild certain docks at the expense of the city, and an action was brought to recover damages suffered by the plaintiff from a neglect of the duty. It was held that the city was not liable, because the duty was not a corporate duty, and this rule was laid down: A municipal corporation is not liable for the acts or omissions of an officer, elected or appointed by it, in respect to a duty specifically imposed upon the officer, which is not connected with his duties as agent of the corporation, and in which it has no private interest. It is only liable for the acts or omissions of officers in the performance of duties imposed upon the corporation. *Church, Ch. J.*, writing the opinion, said: 'The general rule may be stated to be, that a municipal corporation is only liable for the acts or omissions of officers in the performance of duties imposed upon the principal.'"

Municipality is liable for the acts of its agent, where the agent is expressly authorized to do the act, or they are done in good faith in the pursuance of general authority to act for the corporation on the subject to which they refer. In this case the neglect was that of the city surveyor, the defendant's immediate agent. *Buffalo & Hamburg Turnpike Co. v. City of Buffalo*, 58 N. Y. 639, aff'g 1 N. Y. S. C. (T. & C.), and judg't for pl'ff.

Town was authorized to assume control over school districts which were

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authorized to construct sewers in connection with its buildings. Town was liable for the pollution of a stream. *Watson v. New Milford*, 72 Conn. 561.

Liability attaches to a municipality for acts not *ultra vires*, as suppressing a nuisance done by its officers in the exercise of the corporate power conferred by law upon it. *Orlando v. Pragg*, 31 Fla. 111.

Employment by city marshal and payment from the city treasury raises a presumption of employment by it. *Goshen v. Alford*, 154 Ind. 58.

See, also, *Thorntown v. Fugate*, 21 Ind. App. 537; *Dallas v. Beeman*, 23 Tex. Civ. App. 315; *Millard v. Webster City*, 113 Iowa, 220.

Mere irregularities in proceedings was no defense. *Norton v. New Bedford*, 166 Mass. 48.

Collensworth v. New Whatcom, 16 Wash. 224; *Hollman v. Plattville*, 101 Wis. 94.

Municipality liable where the acts were done *colore officii* and were accepted and enjoyed. *Schussler v. Hannepin County*, 67 Minn. 412; s. c., 39 L. R. A. 75.

Oklahoma City v. Hill, 5 Okla. 114.

And were not *ultra vires*. *Noble v. Aasen*, 8 N. D. 77.

So, where city laid its streets and invited the public to use them. *Taake v. Seattle*, 16 Wash. 90.

Municipality was liable for injury to a workman in the construction of a building from the fall of negligently constructed walls. *Hannon v. St. Louis Co.*, 62 Mo. 313.

Destruction of plaintiff's building by order of the city council, where, under the circumstances, their authority extended only to prohibiting its use for a particular purpose, renders the city liable in damages. *Allison v. Richmond*, 51 Mo. App. 133.

Knowledge of the officer's incompetency is necessary to charge city. *Newdick v. Hamilton*, 18 Oh. C. C. 266.

Trespass was committed by servants while acting in pursuance of ordinances and resolutions. City was liable. *Brink v. Dunmore*, 174 Pa. St. 395.

So, where the board of supervisors had declared a road public and directed its clerk to so enter it of record. *Coburn v. San Mateo County*, 75 Fed. Rep. 520.

City might be liable for authorized excavation though not in a street it was bound to take care of. See *Thompson v. Corpus Christi*, (Tex. Civ. App.) 38 S. W. Rep. 373.

City not exempted from liability for acts of officers destroying property

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to prevent spread of small-pox without reasonable necessity. *Dallas v. Allen*, (Tex. Civ. App.) 40 S. W. Rep. 1096.

Municipality may be liable for tort of policeman done pursuant to its direction. *Johnson City v. Wolfe*, 103 Tenn. 227.

Attempt to authorize an *ultra vires* act created no liability. *Royce v. Salt Lake City*, 15 Utah, 401.

(g). AND FOR ACTS OF OFFICERS AND EMPLOYÉES WITHIN SCOPE OF THEIR AUTHORITY.

Liability of city for acts of servants executing its orders not in execution of a public duty is the same as that of any principal. *Scott v. New York*, 27 App. Div. 240.

Tomlin v. Hildreth, 65 N. J. L., 438; *Newdick v. Hamilton*, 18 Oh. C. C. 266.

Act of city's council in carrying on a ferry was without authority. *Hoggard v. Monroe*, 51 La. Ann. 683.

Municipal corporation, liable for negligence of its agents, when acts complained of were expressly authorized, or done by agents authorized to act generally upon the subject to which said acts relate. *Thayer v. Boston*, 19 Pick. 511.

Oliver v. Worcester, 102 Mass. 489; *Hill v. Boston*, 122 id. 344; *Gordon v. Taunton*, 126 id. 349; *Lawrence v. Fairhaven*, 5 Gray, 110.

Under the employers' liability act, an action will lie against a city for injuries received by a workman from the caving in of a ditch caused by failure of superintendent to provide suitable materials. *Connolly v. Waltham*, 156 Mass. 369.

Officers of a township filled up a ditch without authority. No liability. *Chase v. Middleton*, 123 Mich. 647.

Acts must be at least within the apparent scope of authority. *Wabaska E. Co. v. Wymore*, 60 Neb. 199.

The bringing of an action by proper law officers raises a presumption of authority. *Lincoln Street R. Co. v. Lincoln*, 61 Neb. 109.

A municipality is liable for the torts of its officers only when such officers are in the legitimate exercise of the business for which they are employed. *Caspary v. Portland*, 19 Oregon, 496.

Revocation of a show license was unauthorized act of the mayor and the city was not liable. *Smith v. Major*, 16 Oh. C. C. 362.

See, also, *Saxe v. Burlington*, 70 Vt. 449.

So, as to unauthorized or unratified direction of the city engineer and street committee. *Dallas v. Beeman*, 12 Tex. Civ. App. 345.

Or, of the mayor and city physician. *San Antonio v. White*, (Tex. Civ. App.) 57 S. W. Rep. 858.

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So, where the acts of chief of police were *ultra vires*. *Royce v. Salt Lake City*, 15 Utah, 401.

Belief that servant was competent was no defense to action for his acts. *Newdick v. Hamilton*, 18 Oh. C. C. 266.

City, without power to use private property for public service in emergency, was not liable for acts of its officers in an attempt to do so. *Galveston v. Brown*, (Tex. Civ. App.) 67 S. W. Rep. 156.

Cutting of a drain held within the scope of authority of city superintendent subject to whose approval work was being done. *Bragg v. Rutland*, 70 Vt. 606.

(h). INDEPENDENT CONTRACTOR.

Contractor had the right and was obliged to furnish men and materials and machinery and to direct the details of the work. City had the right to discharge men for incompetence and to see that the work was done according to the specification. He was an independent contractor. *Uppington v. New York*, 165 N. Y. 222.

Stalder v. Huntington, 153 Ind. 354; *Ginther v. Yorkville*, 3 Pa. Super. Ct. 403.

Some plumbers were employed by a property owner to connect a building by means of a lateral pipe with a water main in the street. Only the water commissioners of the city were allowed to make any connection with the water main and the plumbers applied to the city authorities to have the street opened for the purpose aforesaid. Men were accordingly sent by the water commissioners to do the work, and they were paid by the commissioners, although the plumbers ultimately paid the commissioners. A portion of the trench made by such servants of the commissioners was left so negligently that horses going along the street were injured. The defendant was liable. *Wilson v. City of Troy*, 60 Hun, 183, modifying judg't for pl'ff.

Liability for injuries caused by excavation in a street is avoided by interposing contract with others for making the excavation. *Flynn v. N. Y. Elevated R. Co.*, 49 Supr. Ct. (N. Y.) 60.

For failure to transfer certificates of stock according to agreement, an action by contractor will lie against a city. *Chapman v. Charleston*, 28 S. C. 373.

When a contractor was not to be paid for paving the street until the assessment therefor had been made and collected, and he sued the city for neglect to take necessary steps therefor, it is no defense that the board of contract of the city have determined on the proofs submitted to them by the contractor that the contract has not been performed. *Reilly v. City of Albany*, 40 Hun, 405, rev'g nonsuit.

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Employment of independent contractor does not excuse the exercise of the duty to see that excavations are guarded. *Indianapolis v. Marold*, 25 Ind. App. 428.

A city requiring the performance of a contract according to plans, of whose defectiveness it had notice cannot use the defense that the work was done by an independent contractor. *Cloud County v. Vickers*, 62 Kan. 25.

Municipality is not liable for the negligent acts of an independent contractor. *Hookey v. Oakdale*, 5 Pa. Super. Ct. 404.

Especially in work in regard to which it exercises a public function. *Jansen v. Jersey City*, 61 N. J. L. 243.

Plan was such as necessarily to cause injury. Negligence of contractor in carrying it out was no defense. *Marsh v. Philadelphia*, 8 Pa. Dist. 340.

See, also, *Goldschmid v. New York*, 14 App. Div. 135.

If a contractor in laying a sewer by order of a municipal council infringes plaintiff's patent, for making sewer pipe, the corporation is liable. *Asbestine Tiling Co. v. Hepp*, 39 Fed. Rep. 324.

(i). RESTITUTION.

Municipality is not liable for acts of misfeasance of public officers not appointed by them, though doing acts for them by law, but is bound to refund to the plaintiff such portion of an unlawfully levied and collected tax as was received by it, notwithstanding that the officers who collected such tax were not appointed or controlled by such corporation. The decision rests upon the fact of the receipt of the money and not upon the claim that the defendant was liable for the acts of the assessors, collectors, etc. *Bank of Commonwealth v. Mayor*, 43 N. Y. 184, rev'g nonsuit.

A municipal corporation is liable to refund taxes compulsorily collected on void assessments and received by it. Dill. Mun. Corp., sec. 973.

Plaintiff was confined and set to work to pay for an illegal fine. City was liable for the value of the work. *Fox v. Richmond*, (Ky.) 40 S. W. Rep. 251.

V. Presentation of Claim.

(a). NECESSITY OF NOTICE.

1. VALIDITY OF STATUTES.

On August 14, 1890, the plaintiff was injured by the failure of the defendant to maintain proper guards upon its bridge. In June, 1890, an act was passed to take effect March 1, 1891, requiring the presentation

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of such a claim to the supervisor within six months after it occurred, &c. Held, that such act was not retroactive so as to affect the plaintiff's claim and take away the vested right. *Bullock v. Town of Durham*, 64 Hun, 380, aff'g judg't for pl'ff.

Requirement to file within 24 hours after the injury held unreasonable. *Green v. Port Jervis*, 31 Misc. 59.

Born v. Spokane, 27 Wash. 719.

The service of notice of the time, place and manner of injury as a condition of bringing suit held constitutional. *Cuttingham v. Denver*, 23 Colo. 18.

See, also, *Daniels v. Racine*, 98 Wis. 649.

As to setting a different period of limitation for different classes of cities see *Louisville v. McGill*, (Ky.) 52 S. W. Rep. 1053; *Louisville v. O'Malley*, (Ky.) 53 id. 287.

Provision in city's charter that notice of claim for damages against the city be given within six months after right of action accrued is constitutional and not in contravention of statute of limitations. *Scurry v. Seattle*, 8 Wash. 278.

2. CONSTRUCTION OF CONFLICTING PROVISIONS.

An action against a municipality before section 3245 of the Code, requiring the presentation of the claim to the fiscal officer, as a condition precedent to recovery of costs, carries costs. *Taylor v. City of Cohoes*, 105 N. Y. 54, aff'g order special term, denying retaxation of costs.

Distinguishing *Baine v. City of Rochester*, 80 N. Y. 532; and overruling *Dressel v. City of Kingston*, 32 Hun, 526.

In an action against a town for negligence, highway commissioners' complaint must show service of the claim upon the superintendent within six months after the cause of the action had accrued, and that fifteen days elapsed thereafter before commencement of action. *Olmstead v. Town of Pound Ridge*, 71 Hun, 25.

Provision for six months' notice to corporation counsel, is not affected by that for forty days' notice to the city clerk. *Walsh v. Buffalo*, 92 Hun, 438.

Krall v. New York, 60 N. Y. Supp. 661.

See, also, *Lee v. Greenwich*, 43 App. Div. 39.

Where a statute required claims to be presented in manner provided by ordinance, failure to designate the manner was no excuse for not presenting a claim at all. *Adams v. Modesto*, (Cal.) 61 Pac. Rep. 957.

City ordinance as to the manner of presenting claims was subject to the statutory limitation of action. *McFarland v. Muscatine*, 98 Iowa, 199.

TO WHAT CLAIMS STATUTES APPLY.

The special provision of a city charter takes precedence to a general statutory provision on the subject. *Harris v. Fond du Lac*, 104 Wis. 44.

3. TO WHAT CLAIMS STATUTES APPLY.

The provision in the charter that "no action against the city on a contract, obligation or liability, expressed or implied, shall be commenced except within one year after the cause of action shall have accrued," does not include torts, hence, not negligence. *McGaffin v. City of Cohoes*, 74 N. Y. 387, aff'g 11 Hun, 537, and judg't for pl'ff.

Section 51, title 3, charter of the city of Albany, refers to actions on contracts and not actions for damages. *Jones v. Albany*, 151 N. Y. 223.

A claim for negligence need not be presented to common council before action under the city charter, as condition precedent to recover costs. The city charter does not apply to claims *ex delicto*. *Quinlan v. City of Utica*, 11 Hun, 217; aff'd 74 N. Y. 603, aff'g judg't for pl'ff.

Section 7, of title 3, of the charter of the city of Buffalo (chap. 519, of 1870), provides that the common council shall audit "*all claims against the city*, but no unliquidated claim shall be received for audit unless made out in detail, specifying if for labor or services, the time when, the place where, by whom and under whose direction and by what authority performed; if for merchandise, materials or other articles furnished, the items thereof, by whom ordered, and when and to whom delivered, *and if for damages for wrong or injury, when, where and how occasioned*; nor unless accompanied by an affidavit that the claim and the terms, and specifications thereof, are in all respects just and correct, and that no payments have been made and that no set-off exists except those stated. No action or proceeding to recover or enforce any such claim against the city shall be brought until the expiration of forty days after the claim shall have been presented to the common council in the manner and form aforesaid."

Held, that the statute included claims against the city for injuries sustained by reason of its neglect to keep streets and sidewalks in proper repair, and that an action to recover damages for such an injury could not be brought until a claim therefor, verified as required by the act, had been made out and presented for audit.

That the failure of the plaintiff to allege in his complaint that he had so presented his claim for audit did not furnish a ground for demurrer to the defendant, but that the failure to present the claim should be set up as a matter of defense in the answer. *Nagel v. City of Buffalo*, 34 Hun, 1, overruling demurrer to complaint.

TO WHAT CLAIMS STATUTES APPLY.

Loss of services is a "personal injury," within L. 1886, ch. 572. *Kellogg v. New York*, 15 App. Div. 326.

So as to injury to health. *White v. New York*, 15 App. Div. 440.

Personal injuries is not a "claim" within consol. Act. sec. 1104. *McDonald v. New York*, 15 Misc. 593.

Action for the fall of a decayed tree comes under L. 1886, ch. 572. *Kelley v. New York*, 19 Misc. 257.

Claim for injury for the falling in of a bridge must be presented to the court of the county under Ala. Code 1886, sec. 902. *Roberts v. Cleburne County*, 116 Ala. 378.

Requirement that claims be audited shows that torts are to be excluded. *Adams v. Modesto*, 131 Cal. 501.

"All demands and accounts" construed to exclude torts. *Giffen v. Lewiston* (Id.) 55 Pac. Rep. 545.

"Claim," held not to include claim for personal injuries. *Snyder v. Albion*, 113 Mich. 275.

Defects in "streets" included bridges. *Sachs v. Sioux City*, 109 Iowa, 224.

Statutory notice of injury from defect in "highway" construed not to include temporary road. *D'Amico v. Boston*, 176 Mass. 599.

Positive requirement for presentment of claims for torts was not affected by inconsistent provisions as to manner of presentment of all claims presented. *Davidson v. Muskegon*, 111 Mich. 454.

Claims ante-dating a charter are not embraced within its provisions. *Angell v. West Bay City*, 117 Mich. 685.

Guthrie v. Harvey Lumber Co., 9 Okl. 464; *Atherton v. Bancroft*, 114 Mich. 241.

Requirement in city's charter that notice be served, &c., for injuries received, from "a defect in the condition of any bridge, street, sidewalk, or thoroughfare" refers to defects in such structures as such and with regard to their safety for purposes of travel; hence, no need of averment of notice in an action for damage to property from a leak in a watermain. *Noran v. St. Paul*, 54 Minn. 279.

Claims "with full account of the items" does not refer to torts. *Crocker v. Mexico*, 62 Mo. App. 385.

"Any unliquidated claim which has not been presented to the counsel to be audited" includes a tort. *Hill v. Sedalia*, 64 Mo. App. 494.

Requirement that claims be presented in writing and verified does not refer to tort. *Evans v. Joplin*, 84 Mo. App. 296.

Requirement that "claims" be filed and presented excludes claims for an injury to property by a public improvement. *Douglas County v. Taylor*, 50 Neb. 535.

Dovey v. Plattsmouth, 52 Neb. 642.

WHEN STATUTORY NOTICE, A CONDITION PRECEDENT TO RECOVERY.

Requirement of the presentment of claims for audit does not include those for unliquidated damages. *Shields v. Durham*, 118 N. C. 450; s. c., 36 L. R. A. 293.

Frisbie v. Marshall, 119 N. C. 570; *Neal v. Marion*, 126 id. 412.

Claim arising through the improvement of a street is not one arising in tort. *Sheafe v. Seattle*, 18 Wash. 298.

"Any claim or demand of any kind or character whatsoever" includes a tort. *McCue v. Waupun*, 96 Wis. 625.

"All claims" includes a claim for illegal grading of a street. *Telford v. Ashland*, 100 Wis. 238.

Requirement as to insufficiency or want of repair embraces defects of original construction. *Ziegler v. West Bend*, 102 Wis. 17.

4. WHEN STATUTORY NOTICE, A CONDITION PRECEDENT TO RECOVERY.

Limitation of period for bringing action was a condition of recovery. *Salisbury v. Washington County*, 22 Misc. 41.

Bancroft v. San Diego, 120 Cal. 432; *Adams v. Modesto*, (Cal.) 61 Pac. Rep. 957; so as to notice of injury, *Bausher v. St. Paul*, 72 Minn. 539; *Engstrom v. Minneapolis*, 78 Minn. 200; *Elias v. Rochester*, 44 App. Div. 597; s. c., aff'd, 169 N. Y. 614; *Marion County v. Woulard*, 77 Miss. 343; *Wabash R. Co. v. Defiance*, 167 U. S. 88; *Trost v. Casselton*, 8 N. D. 534; *contra*, *Short v. White Lake*, 8 S. D. 148.

Second notice was not necessary after the discontinuance of the first action properly brought. *Ward v. Troy*, 55 App. Div. 192.

The statutory bar was not affected by the fact that the injury was not discovered at the time, when no action was taken years after it had been. *Crocker v. Hartford*, 66 Conn. 387.

Ziegler v. West Bend, 102 Wis. 17.

So, incapacity to procure an extension of time must be such as to prevent securing another to act for him. *Sanders v. Boston*, 167 Mass. 595. *Hildman v. Phillips*, 106 Wis. 611.

Nor was plaintiff relieved because he misconceived his rights and gave notice for the wrong cause of action. *Tiesler v. Norwich*, 73 Conn. 199.

A written notice, pursuant to Laws of 1883, page 283, is a condition precedent to recovery for injury from defect in highway caused by defendant's track. *Fields v. Hartford R. Co.*, 54 Conn. 9.

Statutory bar of action for injuries operates upon the right of action for "death." *Sachs v. Sioux City*, 109 Iowa, 224.

Where delay in bringing suit is caused by city's own failure to pass on claim, it cannot set up the statute of limitation. *Springer v. Detroit*, 118 Mich. 69.

WAIVER.

Where a city authorizes a work it need not be appraised of its consequences. *Jarboe v. Carrollton*, 73 Mo. App. 347.

Allegation and proof of application and refusal of redress, as required by statute, held prerequisite to recovery. *Luke v. El Paso*, (Tex. Civ. App.) 60 S. W. Rep. 363.

The notice of claim specified by Wis. R. S. sec. 824 held valid without that required by sec. 1339. *Groundwater v. Washington*, 92 Wis. 56.

The condition may be waived by failure to object to its not being complied with. *O'Connor v. Fond du Lac*, 109 Wis. 253.

See *Schaefer v. Fond du Lac*, 99 Wis. 333; s. c., 41 L. R. A. 287, (when suit against party primarily liable is made a condition).

5. BURDEN OF PROOF.

Chapter 291, Laws of 1870, as amended by chapter 440, Laws of 1889, provides that an action for injuries from negligence shall not be maintained against a village incorporated under that act unless it is begun within two years after the claim accrued, and unless it has been presented and notice of the time and place at which the injuries were received, has been filed with the village clerk or presented to the board of trustees within one year after the cause of action has accrued. The action was begun November 9, 1889; the accident occurred August 8, 1889, but there was no allegation of presentation of claim. Nonsuit was properly granted for failure to allege presentation of the claim. *Arthur v. Village of Glens Falls*, 66 Hun, 136, aff'g nonsuit.

Plaintiff need not establish performance of requirements as to notice of injury. It is for defendant to take advantage of non-performance. *Hawley v. Johnstown*, 40 App. Div. 568.

Otherwise as to the notice of intention to sue, prescribed by L. 1886, ch. 572. *Krall v. New York*, 60 N. Y. Supp. 661.

6. WAIVER.

City failed to reject claim for lack of verification within the time authorized. It was not allowed to object to lack of verification thereafter. *Sweet v. Buffalo*, 92 Hun, 404.

Sufficiency of notice cannot be questioned, where defendant goes ahead under it and examines plaintiff. *Grothier v. New York &c. Bridge*, 19 App. Div. 586.

See, also, *Wright v. Portland*, 118 Mich. 23.

But it may, where a city takes merely informal action. *Griswold v. Ludington*, 116 Mich. 401.

CURING DEFECTS AND OMISSIONS.

So, where the village council pass a resolution to settle a claim and agree to arbitrate but plaintiff refuses. *Clark v. Davison*, 118 Mich. 420.

So, action by the city's committee on claims upon plaintiff's appearance before it did not constitute a waiver of proper notice. *Currier v. Concord*, 68 N. H. 294.

Requirement as to statement of injuries cannot be waived by a town supervisor. *Borst v. Sharron*, 24 App. Div. 599.

But an assistant city counsel has power to do so. *Hamilton v. Buffalo*, 55 App. Div. 423.

Otherwise, where the acts claimed as a waiver were done after the right to sue had been cut off. *Kennedy v. New York*, 34 App. Div. 311.

By investigating the claim, the city council waived the statutory requirement of prior notice thereof to the city attorney. *Lindley v. Detroit*, (Mich.) 90 N. W. Rep. 665.

But reference for investigation on oral notification did not operate as a waiver. *Blumrich v. Highland Park*, (Mich.) 91 N. W. 129.

Presentment of claim waived by county intervening in suit against road overseer. *Luckie v. Schneider*, (Tex. Civ. App.) 57 S. W. Rep. 690.

Charter did not permit suit on unverified claims, and claim was rejected on another ground. Failure to verify did not preclude recovery. *Pearson v. Seattle*, 14 Wash. 438.

7. DISABILITY OF PARTY INJURED.

Incapacity due to the injuries in question excused delay of five days in presentment. *Green v. Port Jervis*, 55 App. Div. 58.

Disability of infancy, no defense. *Norton v. New York*, 16 Misc. 303.

Nor is inability to determine extent of injury. *Ft. Worth v. Shero*, 16 Tex. Civ. App. 487.

Failure does not defeat recovery, where the injuries themselves are the cause. *Webster v. Beaver Dam*, 84 Fed. Rep. 280.

Confinement to bed on account of the injuries was not *per se* an excuse for failing to remember the date of injury. *Hildman v. Phillips*, 106 Wis. 611.

Crocker v. Hartford, 66 Conn. 387.

8. CURING DEFECTS AND OMISSIONS.

Rejection of claim for form does not preclude a second presentment. *People v. Champlain*, 33 App. Div. 277.

Delay, shown to be due to ignorance of the law and not to neglect, was excused. *Boyd v. Derry*, 68 N. H. 272.

APPEAL.

Where the notice was a condition precedent, defects after time for presentment were fatal. *Maloney v. Cook*, 21 R. I. 471.

9. ACTION OF MUNICIPALITY.

Plaintiff need not wait before commencing suit after presenting his claim, because the city's law department neglects to act on it and report. *Jones v. Albany*, 151 N. Y. 223.

Gutkind v. Elroy, 97 Wis. 649; *Moriarty v. Albany*, 8 App. Div. 118.

But see *Morgan v. Rhineland*, 105 Wis. 138; *Mason v. Ashland*, 98 Wis. 540; *Seegar v. Ashland*, 101 Wis. 515; *State v. Bardon*, 103 id. 297.

Interest on amount of depreciation of property injured did not begin to run until sixty days after the presentation to city comptroller of the claim against the city, as it had time within which to pay the claim after presentation. *Wilson v. City of Troy*, 60 Hun, 183, modifying judg't for pl'ff.

See *Dickinson v. Mayor*, 28 Hun, 254.

A claim was presented the common council on the twenty-fourth day of February; was referred to the law department on the third day of February, and before any report had been made upon it by the latter, was put in suit on March 18th. In the absence of proof that the law department had been negligent in delaying action upon the claim, the "reasonable" time given by the defendant's charter for investigation must be taken to mean three months from the time the claim was referred. *Jones v. City of Albany*, 62 Hun, 353, rev'g judg't for pl'ff.

City withheld action until the time for filing notice had passed and then rejected it on a technicality. The informality was no defense. *Brown v. Owosso*, 126 Mich. 91.

City cannot defer action against it by refraining from taking action on a claim for an unreasonable length of time. *Craft v. Madison*, 98 Wis. 252.

Gill v. Oakland, 124 Cal. 335.

10. APPEAL THEREFROM.

Failure to appeal from the disallowance of the claim within the time allotted constituted a bar. *Mason v. Ashland*, 98 Wis. 540.

Telford v. Ashland, 100 Wis. 238.

And a suit already barred by such failure was not revived by L. 1893, ch. 312. *Morgan v. Rhineland*, 105 Wis. 138.

Presentment for the purpose of appeal, held that to the clerk by the plaintiff and not that by the clerk to the council. *Oshkosh Water Works Co. v. Oshkosh*, 106 Wis. 83.

(b). SUFFICIENCY OF NOTICE.

1. DESCRIPTION OF PLACE OF INJURY.

It is not necessary in a claim filed with the city, as condition precedent to action, to state the precise spot where the accident happened. The claim stated that plaintiff fell near a designated corner; proof showed that it was about sixty-five feet away. *Masters v. City of Troy*, 50 Hun, aff'g judg't for pl'ff.

Ignorance of number of residence does not excuse failure to insert name of street. *Johnson v. Troy*, 24 App. Div. 602.

Occurrence on or about a date and in front of or near a certain residence on the west side of a certain street was sufficient. *Murphy v. Seneca Falls*, 57 App. Div. 438.

Collins v. Janesville, 107 Wis. 436.

Occurrence as in front of Nos. 164 and 166 of a certain street instead of Nos. 264 and 266 was fatal. *Learned v. New York*, 21 Misc. 601.

Otherwise, where the actual place was pointed out to the street committee. *Newman v. Birmingham*, 109 Ala. 630.

Excavation causing fright was the place of injury rather than the post run against. *Carstesen v. Stratford*, 67 Conn. 428.

Miller v. Springfield, 177 Mass. 373.

Wrong corner was not material where the place otherwise sufficiently appeared. *Owen v. Ft. Dodge*, 98 Iowa, 281.

Occurrence as at the end of a planking nearly abreast of a mill was sufficient, though such end was in fact 210 feet beyond it. *Kaberl v. Rockport*, 87 Me. 527.

The following is a sufficient notice to the town to satisfy statutory requirements: Person injured on day named, driving down U. street, by the wheel of his carriage striking a "barrel placed in a hole in the highway, a little below the house occupied by 'E. R.' as a boarding house, and nearly opposite a maple tree standing on the northerly side of said street." *Pendergast v. Clinton*, 147 Mass. 402.

Notice of defect as prescribed by statute should be of the particular defect, so no liability attaches for damages caused by the non-repair of the crosswalk at B. street by merely showing that sidewalks in that vicinity were out of repair. *Dundas v. Lansing*, 75 Mich. 499.

Notwithstanding the mistake of Sixteenth avenue for Fifteenth avenue, the following notice was held sufficient. Plaintiff, while passing over a sidewalk upon the south side of Twenty-first street, between Fifteenth and Sixteenth avenues south, at a point near the intersection of

DESCRIPTION OF CAUSE OF INJURY.

said Twenty-first street and said *Sixteenth avenue south, &c.* *Harder v. Minneapolis*, 40 Minn. 446.

As to instances of descriptions insufficient for the purpose, see *Lyons v. Red Wing*, 76 Minn. 20; *Lincoln v. Pirner*, 59 Neb. 634; *Davis v. Rumney*, 67 N. H. 591; *Currier v. Concord*, 68 id. 294; *Maloney v. Cook*, 21 R. I. 471; *Piper v. Spokane*, 22 Wash. 147.

Where the description was 100 feet out of the way, the question of sufficiency was for the court. *Trost v. Casselton*, 8 N. D. 534.

Notice contained "crosswalk," "complaint," "sidewalk." Variance immaterial. *Piper v. Spokane*, 22 Wash. 147.

See, also, *Ottawa v. Black*, 10 Kan. App. 439.

2. DESCRIPTION OF TIME OF INJURY.

The complaint alleged that such injuries were sustained on August fifth and the notice given to the mayor of such city asserted that the accident was on the same day.

The counsel for the defendant asked and the court refused to charge the jury that "unless the jury find that the accident occurred on the fifth day of August, 1891, the plaintiff cannot recover under the notice served in this case." The court charged that it was not fatal to the plaintiff's case if the accident occurred on the evening of the fourth, but that the question for the jury was whether substantially in the place and at the time in the complaint and notice specified the plaintiff had sustained the accident and the injury for which she claimed damages. No error. *Sullivan v. City of Syracuse*, 77 Hun, 440.

On or about March 6th held not insufficient in an action for a slippery sidewalk. *Lea v. Greenwich*, 48 App. Div. 391.

3. DESCRIPTION OF CAUSE OF INJURY.

Assignment of defect in highway as cause of injury embraced negligent piling of poles beside it. *Quinn v. Sempronius*, 33 App. Div. 70.

The breaking of a defective bridge was sufficient assignment. *Spencer v. Sardinia*, 42 App. Div. 472.

The defectiveness of a railing on an embankment was sufficient without additional element of the defectiveness of the highway which caused plaintiff to stumble against it. *Ashborn v. Waterbury*, 70 Conn. 551.

So, that stones deposited in the road so as to form a gully caused plaintiff's sleigh to upset. *Dean v. Sharron*, 72 Conn. 667.

That the condition of the road is the cause of the accident and that bushes and grass hide holes and rocks so that a driver cannot see danger

DESCRIPTION OF AMOUNT AND NATURE OF INJURY.

until he meets it was a sufficient assignment of cause. *Green v. Cornwall*, 73 Conn. 309.

Notification gave time and place but none of the circumstances. Insufficient. *Giles v. Shenandoah*, 111 Iowa, 83.

That injury was "caused by defect in road" was sufficient. *Carrberry v. Sharron*, 166 Mass. 32.

But where the notice is otherwise insufficient, proof must be made that the defendant was not misled. *Miller v. Springfield*, 177 Mass. 373.

That plaintiff was tripped by a loose plank sufficiently stated the manner of injury. *Brown v. Owosso*, 126 Mich. 91.

Injury by defects and obstructions did not sufficiently specify the cause. *Mears v. Spokane*, 22 Wash. 323.

As to when variance was misleading, see *Benson v. Madison*, 101 Wis. 312; *Gagen v. Janesville*, 106 Wis. 662; *Homan v. Franklin County*, 98 Iowa, 692.

4. DESCRIPTION OF AMOUNT AND NATURE OF INJURY.

When claim must be made to a municipality before suit for damages, it is immaterial that the plaintiff does not demand *as much* in his complaint as he did in his claim. *Minick v. City of Troy*, 83 N. Y. 514, aff'g 19 Hun, 253, and judg't for pl'ff.

A person suffering damage need not present his estimate of the amount thereof under section 105, chapter 335, Laws 1873, and is not limited in the action to the amount specified. *Reed v. Mayor*, 97 N. Y. 620, rev'g 31 Hun, 311, which reversed order allowing amendment to complaint as to amount of damages.

Such particulars as will enable city to investigate claim is a sufficient description of extent. *Place v. Yonkers*, 43 App. Div. 380.

Statement that plaintiff was damaged to the amount of \$5,000, but that he would compromise on \$2,500 was a sufficient demand of payment. *Homan v. Franklin County*, 98 Iowa, 692.

Account of the items constituting the claim did not require the elements of personal damage. *Salina v. Kerr*, 7 Kan. App. 223.

Claim for damages refers to the amount thereof. *Lord v. Saco*, 87 Me. 231.

The nature of the defect is required. Greatly injured, does not satisfactorily set forth the nature of the injury. *Lord v. Saco*, 87 Me. 231.

Presentment of a claim for damages is as essential as notice of injury. *Seldon v. St. Johns*, 114 Mich. 698.

Belief that claimant is entitled to \$5,000, held sufficient. *Brown v. Owosso*, 126 Mich. 91.

Requirement of a "statement of the amount of compensation or the

NOTICE OF INTENTION.

nature of the relief demanded" demanded both. *Bausher v. St. Paul*, 72 Minn. 539.

5. VERIFICATION OF NOTICE.

That comptroller has power to examine claimant did not relieve claimant of the necessity of verifying his claim. *Patterson v. Brooklyn*, 6 App. Div. 127.

Lack of verification is fatal though the statement sent was retained. *Vorst v. Sharron*, 24 App. Div. 599.

Infant may verify. *Donovan v. Oswego*, 42 App. Div. 539.

Statement sworn to but unsubscribed was insufficient. *Place v. Yonkers*, 43 App. Div. 380.

Husband's verification as agent was sufficient. *Ottawa v. Black*, 10 Kan. App. 439.

Claim against a city of a fourth class must be verified. *Griswold v. Ludington*, 116 Mich. 401.

6. SIGNATURE OF NOTICE.

The addition of the signature of husband was immaterial. *Dean v. Sharron*, 72 Conn. 667.

So, statement "for which we will be obliged to make a claim" showed signature on wife's behalf and as her agent. *Carberry v. Sharron*, 166 Mass. 32.

So, where the husband gives notice that he holds the town for injuries to his wife. *Higgins v. North Andover*, 168 Mass. 251.

The initials of the husband are *prima facie* sufficient. *Terryll v. Fari-bault*, 81 Minn. 519.

Notice signed by attorneys for a wife was not available to husband for his own loss. *McKeague v. Green Bay*, 106 Wis. 577.

Signature of widow is sufficient without signature of administrator. *Carpenter v. Rolling*, 107 Wis. 559.

7. NOTICE OF INTENTION TO SUE.

Chapter 572 of the Laws of 1866, requiring actions against "the mayor, aldermen and commonalty of any city" having fifty thousand inhabitants or over applies to the city having such a population although it has not, in its corporate name, the words "mayor," &c. The commencement of the action is not such notice. *Curry v. City of Buffalo*, 135 N. Y. 366, aff'g 57 Hun, 25, and judgment for defendant.

Citing *Merz v. City of Brooklyn*, 33 N. Y. St. Rep. 577, aff'd in 128 N. Y. 617.

From opinion.—"The section is imperative. The action cannot be main-

tained unless notice of the intention to commence it, and of the time and place of the injury 'shall have been filed with the counsel to the corporation,' and a failure to file the notice furnishes a defense to the action. The filing of the notice is a condition precedent to the maintenance of the action. *Reining v. City of Buffalo*, 102 N. Y. 308; *Mertz v. City of Brooklyn*, 33 N. Y. St. Rep. 577; *Dawson v. City of Troy*, 49 Hun, 322."

Statement that the notice of intention to sue was given under a different act requiring presentment of claim was immaterial. *Massano v. New York*, 160 N. Y. 123.

City not allowed to defend on ground that the notice did not express an intent to sue, where entries in its own books showed that it understood it to mean such. *Sheehy v. New York*, 160 N. Y. 139.

Kennedy v. New York, 18 Misc. 303; *Walsh v. Buffalo*, 92 Hun, 438.

Where a person presented a claim against the city of Rochester which stated that the injury was received on a certain evening; that the night was very dark, and that there were no guards or lights of any kind around the obstruction which overturned his buggy and occasioned his injuries; that he was rendered unconscious by the fall and remained in the street in that condition for over an hour; that the dirt was in the middle of the street at a point about one-third of a mile east of the Charlotte branch of the New York Central and Hudson River Railroad, as near as the claimant could estimate the distance, his statement was sufficiently definite as to the time and place, and a compliance with charter of the city.

Under the provisions of such charter, if the common council fails to audit and allow a claim for injuries within forty days thereafter, the claimant has the right to commence an action thereon, but before commencing such action, and within six months from that time and within a year from the time of the accident, notice of the intention to commence such action must be filed with the counsel of the corporation or other proper law officer thereof. *Werner v. City of Rochester*, 77 Hun, 33.

Service of a notice of a claim upon the comptroller of the city of New York, stating that it was served pursuant to sec. 123, chap. 410 of the act of 1882, which notice was transmitted by the comptroller to the corporation counsel for the purpose of examination, is not sufficient compliance with chapter 572, Laws of 1886, which requires that notice of *intention to commence action* for injury sustained by negligence shall be served within six months after cause of action, shall have accrued, upon the corporation counsel. *Babcock v. Mayor*, 56 Hun, 196, aff'g nonsuit.

The time within which such notice must be filed does not begin to run in case of an action for death until the appointment of an administrator. *Barnes v. Brooklyn*, 22 App. Div. 520.

UPON WHOM.

(c). SERVICE OF NOTICE.

1. BY WHOM.

The plaintiff, in the night, ran into a lumber pile occupying half of the street and was hurt. What was sufficient presentation of claim to the city considered? *Magee v. City of Troy*, 48 Hun, 383, aff'g judg't for pl'ff.

Notice by administratrix was sufficient within 10 days after the accident, where intestate became totally incapacitated. *Barclay v. Boston*, 173 Mass. 310.

2. UPON WHOM.

Notice was served upon comptroller but was forwarded by him to the corporation counsel who acted upon it. Held sufficient service on the latter. *Missano v. New York*, 160 N. Y. 123.

But see *Burford v. New York*, 26 App. Div. 225.

So, where the notice is delivered to an attorney assisting the corporation counsel in the examination of the very claim. *McMahon v. New York*, 1 App. Div. 321.

Notice must be given to the governing body of the city as required by statute, though notice to the mayor is sufficient under its charter. *Doyle v. Duluth*, 74 Minn. 157.

To the recorder or other custodian of the records, directed to the council. *Roberts v. St. James*, 76 Minn. 456.

The clerk of the council. *Lyons v. Red Wing*, 76 Minn. 20.

Or the assistant city clerk. *Kelley v. Minneapolis*, 77 Minn. 76.

But delivery to such clerk without directing to such council held insufficient. *Daly v. St. Paul*, 1 Minn. Dist. Rep. 6.

Claim was properly "presented" to the mayor and common council by filing it in the office of the city auditor, who read it at one of their regular sessions. *Coleman v. Fargo*, 8 N. D. 69.

Assistant solicitor is authorized to act for the solicitor as to notice and consent to sue. *Raffert v. Pittsburg*, 15 Pa. Super. Ct. 77.

Notice is not given to the city council by delivery to the board of aldermen. *McKenna v. Bates*, 19 R. I. 610.

Notice to a town council is made by delivery to a town clerk addressed to it, but not by delivery to the town treasurer, nor by delivery to separate members of such council out of session. *Seamons v. Fitts*, 21 R. I. 236.

City council is not served by delivery to the city's secretary. *Ft. Worth v. Shero*, 16 Tex. Civ. App. 487.

TIME AND MANNER OF SERVICE.

Presentment to city clerk held a sufficient compliance with a charter provision providing for filing with the council. *Durham v. Spokane*, 27 Wash. 615.

Presentation to the city council is made under the charter of the city of Antigo by filing the notice with the city clerk for presentation. *Bacon v. Antigo*, 103 Wis. 10.

Harris v. Fond du Lac, 104 Wis. 44.

3. TIME AND MANNER OF SERVICE.

Requirement that it be "filed" demands a writing. *Foley v. New York*, 1 App. Div. 586; *Norton v. New York*, 16 Misc. 303.

See, also, *Spalding v. Waverly*, 12 App. Div. 594.

And excludes service by mail. *Burford v. New York*, 26 App. Div. 225.

Mailing was held sufficient where actually received. *Soper v. Greenwich*, 48 App. Div. 354.

A copy showing verification was valid. *Soper v. Greenwich*, 48 App. Div. 354.

Kelly v. Minneapolis, 77 Minn. 76; *Carpenter v. Rolling*, 107 Wis. 559.

Cause of action "accrues," at the time of injury. *Dement v. De Kalb County*, 97 Ga. 733.

Notice which referred for particularity to a petition in an action pending at the time was sufficient. *Pardey v. Mechanicsville*, 112 Iowa, 68.

Service by mail must reach the party within the time limited. *Chase v. Surry*, 88 Me. 468.

PARENT AND CHILD.*

A parent is not liable for the torts of his infant child, not done by his authority; but the child, if sui juris, is liable for his own torts.

The child is liable for his torts. Reeve's Domestic Relations, p. 386 and note 2 by P. & B. *Conklin v. Thompson*, 29 Barb. 218.

See *Harvey v. Dunlap*, Hill & Denio, 193; Schouler on Domestic Relations (3d ed.) sec. 253; *Conway v. Reed*, 66 Mo. 346; *Campbell v. Stakes*, 2 Wend. 137; *Bulloe v. Babcock*, 3 id. 391.

A father was not liable for giving his eleven-year-old boy a loaded pistol to play with, and for an accident happening to another from the boy's careless use of it. *Hagerty v. Powers*, 66 Cal. 368.

Citing *Tift v. Tift*, 4 Denio, 177.

From opinion.—"We have been cited to no case controlled by the principles of the common law that holds that the action, under such circumstances, can be maintained. It seems that under the civil law it may be; and such an action was lately sustained by the supreme court of Louisiana, in the case entitled *Marionneaux v. Brugier* (16 Rep. 208). * * Pothier, in his work on Obligations, says: 'The doctrine that fathers and others shall be responsible for the acts of the children under their care, which it was in their power to prevent, appears highly reasonable; but I am not aware of any case in which it is adopted in the English law.' (Vol. 2d, p. 34.)"

Father left an axe on the sidewalk temporarily. His four-year-old boy picked it up and injured a small girl with it. Father was not liable however for the unauthorized trespass. *Malmberg v. Bartos*, 83 Ill. App. 481.

A storekeeper sold a revolver to a boy of fifteen years, who accidentally injured himself. Storekeeper was not liable to the father. *Poland v. Earhart*, 70 Iowa, 285.

An air-gun is not so obviously intrinsically dangerous as to charge a father with negligence in placing it in the hands of his nine-year-old son, and make him liable for injuries by another boy, not of his family, to whom, without his knowledge or consent and in his absence, his wife loaned it. *Chaddock v. Plummer*, 88 Mich. 225.

A father is not responsible for an assault committed by his son without his sanction, even though the child was known to be of a vicious temper. *Baker v. Haldeman*, 24 Mo. 219; *Paul v. Hummel*, 43 Miss. 119.

Father gave his boy a gun knowing he used it negligently. He was liable for the consequences. *Johnson v. Glidden*, 11 S. D. 237.

*NOTE.—As to duty of parent to furnish medical aid to sick child, see *People v. Pierson*, (N. Y. L. J. Oct. 25, 1903) rev'g 89 App. Div. 415.

The purchase by a father for his son, eleven years old, of a toy air-gun, was not culpable negligence, nor could he have reasonably anticipated the improper and dangerous use of it by a boy, to whom his son lent it, resulting in injury to another boy. *Harris v. Cameron*, 81 Wis. 239.

That the object which a father desired should be attained was accomplished, was not sufficient to charge him with its negligent performance by his son without authority, and on the contrary against his wishes and beyond his control. *Kumba v. Gilham*, 103 Wis. 312.

Boy was 20 years old. He was brought up by his father, who had done his best to prevent his causing any injury. Father not liable. *Thiebault v. Blohm*, 16 Rap. Jud. Que. C. S. 98.

Especially where the son is about his own business. *File v. Unger*, 27 Ont. App. 648.

A father was not liable for trespass and false imprisonment charged against the son. *Moon v. Towers*, 8 C. B. N. S. 611.

PARTIES.

For personal injuries from concurring negligence of several persons, there is a joint and separate liability and all are proper but not necessary parties. *Creed v. Hartman*, 29 N. Y. 591.

See *Cooper v. Eastern Trans. Co.*, 75 N. Y. 116; *Bryant v. Bigelow Carpet Co.*, 131 Mass. 503; *Werner v. Edmiston*, 24 Kan. 153; *Bloss v. Plymale*, 3 W. Va. 393; *Jack v. Hudnall*, 25 Ohio St. 255; *Chamberlain v. Murphy*, 41 Vt. 118; *Blann v. Crocheron*, 19 Ala. 647.

Either the general owner of property or the bailee, with special interest therein, can maintain an action for injury to, or concerning it. There can be but one action, and judgment against the owner is a bar against the bailee. *Green v. Clark*, 12 N. Y. 343.

A joint action will lie against the principal and agent for an injury caused by the latter. *Phelps v. Waite*, 30 N. Y. 78.

The owner of a vessel, who has pledged it for a debt, may recover for injury to it by the negligence of a third person. *Wilson v. Knapp*, 70 N. Y. 596.

The plaintiff, in possession and under contract to purchase a boat which was destroyed by fire, received from the owner an assignment of all claims growing out of the fire and was held entitled to recover for the negligent destruction of the boat. *Ridell v. N. Y. C. & H. R. R. Co.*, 73 N. Y. 618.

The defendant, making connection with another company, agreed to put in a switch and the latter company agreed to maintain it, as required to do by the city. The switch was put in properly, but the pavement wore away and the rail caused the accident. The second company, not the defendant, was liable. *Lowery v. Brooklyn City & Newton R. Co.*, 76 N. Y. 28.

When a person is injured by the negligence of two or more parties operating a railway, he has a cause of action against all or any of them. *Kane v. Smith*, 80 N. Y. 458.

When there is a contract of carriage by two companies and both are liable for negligence, they need not be joined. *Holsapple v. R., W. & O. R. Co.*, 86 N. Y. 275.

The defendant furnished the team and "M." gathered the passengers and collected the fares. The plaintiff was hurt while "M." was in charge. The defendant and "M." were liable. *Stroher v. Elting*, 97 N. Y. 102.

"A." contracting to build a bridge, employed "B.," a skillful builder, and gave him the sole management of the work and the manner of doing

it. By the latter's alleged negligence a servant was hurt. "A." and "B." were jointly and severally liable. *Fort v. Whipple*, 11 Hun, 586.

Action for failure to keep in proper repair a highway and bridge will lie against one commissioner individually, although all be guilty. *Babcock v. Gifford*, 29 Hun, 186.

The consolidation of the defendant and another corporation into a third corporation was attempted, and while such consolidated company was operating defendant's road the plaintiff was hurt. Consolidation was held to be illegal and defendant was held liable. *Latham v. B., H. T. & W. R. Co.*, 38 Hun, 265.

Durfee v. Johnstown, Gloversville & Kingston Horse Ry. Co., 71 Hun, 279.

As to liability of lessor railway company, see "Landlord and Tenant," p. 1316.

"A.," suddenly threw borax and iron filings on iron, which the plaintiff, his servant, was welding and the same sputtered in plaintiff's face. Whether "A.'s" action was negligent was for jury. "A.'s" copartners were liable for his negligence. *McCarragher v. Gaskell*, 42 Hun, 451.

An engineer of one company was injured in the collision with a train of another company, using the tracks of the former. He recovered judgment against his own employer and also against the second company; the first judgment was paid and assignment taken of the second, whereby the second company moved to discharge the second judgment. Held, that such motion should be granted, and that satisfaction by one joint feisor was satisfaction as to both, and that the question of which of one of the companies was primarily liable must be tried in a separate action. *Gross v. Penn., Poughkeepsie & Boston R. Co.*, 65 Hun, 191.

A village must bring an action to abate a nuisance, under N. Y. Pub. Health L. 1893, ch. 661, amended L. 1895, ch. 20, and not its board of health. *Green Island Bd. of Health v. Magill*, 17 App. Div. 249.

See, also, *Buckstaff v. Oshkosh*, 92 Wis. 520.

All parties who turned their horses in the pasture where plaintiff's was, were joint wrongdoers, jointly and severally liable for injury to the latter's horse. *Martin v. Farrel*, 66 App. Div. 177.

Where several are sued as joint wrongdoers, recovery may be had against the one shown to be liable. *Usher v. Van Yranker*, 48 App. Div. 413.

See, also, *Ross v. Shanley*, 86 Ill. App. 144; s. c. aff'd, 56 N. E. Rep. 105.

An insurance company which has paid a loss has an "interest" under the New York Code, in an action against the railroad company for negligence and should be made a party to obtain a complete determination of the question involved. *Munson v. New York City R. Co.*, 32 Misc. 282.

Where the negligence would not have resulted from the negligence of

one, both parties are chargeable. *City Electric Street R. Co. v. Conery*, 61 Ark. 381; s. c., 31 L. R. A. 570.

The plaintiff in the proceedings, the sheriff and the obligors on the indemnity bond are jointly and severally liable for a wrongful attachment suit. *Rice v. Wood*, 61 Ark. 442; s. c., 31 L. R. A. 609.

All parties diverting water from the same ditches and claiming the right to do so from the same source are parties. *Senior v. Anderson*, 115 Cal. 496.

Statute declaring that all persons aiding and assisting trustees of any character, with a knowledge of their misconduct in misapplying assets are directly accountable, permits suit against them jointly or severally. *Anderson v. Foster*, 112 Ga. 270.

Plaintiff loaded on a defective platform, which was used in common by the defendant and another company, and was injured. Both were liable. *Wabash &c. R. Co. v. Wolff*, 13 Ill. App. 437.

Same principle, *Hannibal &c. R. Co. v. Martin*, 11 Ill. App. 386.

In an action to recover damages to a vehicle, caused by the defendant's negligence in remaining within sound of a band of music with a restless horse, after knowledge that the horse was frightened thereby, in consequence of which the horse ran into the plaintiff's buggy, a verdict for the plaintiff was sustained.

In such a case the owner of the vehicle injured, and not the hirer thereof, was the proper person to bring suit. *Smith v. Kurrus*, 31 Ill. 276.

A passenger injured in a collision by the negligence of his carrier and another has an action against both. *Wabash &c. R. Co. v. Shacklet*, 105 Ill. 364.

Bennett v. N. J. R. Co., 36 N. J. 225; *Danville Turnpike Co. v. Stewart*, 2 Metc. (Ky.) 119; *Louisville &c. R. Co. v. Case*, 9 Bush. (Ky.) 728; Principle of identification enunciated in *Thorgood v. Bryan*, 8 C. B. 131, an English case, obtains in few of the states, and is now practically abandoned in England.

In an action against a sheriff to recover property levied on as that of another, the latter who procured it from plaintiff by fraud need not be a party. *Ide v. Gilbert*, 62 Ill. App. 524.

Where negligence of two concur in injuring a third, their liability to the latter is joint and several. *Boyle v. Illinois C. R. Co.*, 88 Ill. App. 255.

Where some or all are liable the case must go to the jury. *Murray v. Arthur*, 98 Ill. App. 331.

Each of two companies using a platform in common is responsible for its repair. *Lucas v. Penn. R. Co.*, 120 Ind. 205.

Where the damages are alleged as to each plaintiff severally the causes of action was several and not joint. *Browell v. Irwin*, 25 Ind. App. 395.

All persons injured from cattle communicating Texas splenic or Spanish fever may join in a suit against the owner of such cattle. *Mis-souri &c. R. Co. v. Haber*, 56 Kan. 694.

The state by the attorney-general or county attorney is the party to restrain the violation of the rights of the public by the mayor, &c. of a city of the third class. *State v. Neodesha*, 3 Kan. App. 319.

Insurer may join insured in action for negligent loss of the property. *Atchison &c. R. Co. v. Neet*, 7 Kan. App. 495.

That a city recovered against for an obstruction on the sidewalk failed to give the party responsible therefor the prescribed notice before suing him, did not prevent recovery where he also was joined in the former suit. *Waltemeyer v. Kansas City*, 71 Mo. App. 354.

A company owning a bridge and one having an interest therein may be joined in an action to recover for misconstruction thereof or negligent operation of cars thereon. *Chesapeake &c. R. Co. v. Hyde*, (Ky.) 56 S. W. Rep. 423.

Where a train was jointly operated by two railroads both were liable though one owned the engine and the other the right of way. *Chesapeake &c. R. Co. v. Davis*, (Ky.) 58 S. W. Rep. 698.

One company allowed its pole to stand till it was a source of danger and another company in removing it made an excavation alongside of it which together caused its fall. They were held liable for the whole damage. *Joseph v. Edison Electric Light Co.*, 104 La. 634.

That the act of another contributed to the injury is no defense to an action against defendant for its own negligence. *Cumberland County v. Central Wharf &c. Co.*, 90 Me. 95.

See, also, *McNamara Tobacco Co. v. Warm*, (Ky.) 66 S. W. Rep. 609; *Meade v. Chicago &c. R. Co.*, 68 Mo. App. 92; *Ohio &c. R. Co. v. Fishburn*, (Oh.) 56 N. E. Rep. 457; *McGary v. West Chicago Street R. Co.*, 85 Ill. App. 610; *Brown v. Webster City*, 115 Iowa, 511.

The act of each wrongdoer sufficient to have caused the damage constitutes him a joint wrongdoer, though acting independently. *Allison v. Hobbs*, 96 Me. 26.

Parties negligent may be sued jointly or severally. *Richard v. Detroit &c. R. Co.*, (Mich.) 98 N. W. Rep. 52.

Although in an action for negligence, the insurance company obtained some interest in the damages, the owner of the building could properly prosecute an action to its termination. *Nichols v. Chicago &c. R. Co.*, 36 Minn. 452.

Town brought suit against defendant for injury to sheep by his dogs under a statute permitting it to pay the damage to the party injured and recover over against the wrongdoer. It was held that recovery was con-

fined to such sheep as were owned by the party to whom damages were paid by the town and not such as were in his possession as bailee unless the owners of the latter had filed releases or authorized the payment on their behalf. *Unity v. Pike*, 68 N. H. 71.

One or more property owners on a street may sue to restrain the erection of a railway on behalf of others. *Gledden v. Cincinnati*, 4 Oh. Dec. 423.

A surgeon and his assistant are jointly and severally liable. *Tish v. Welker*, 7 Oh. N. P. 472; s. c., 5 Oh. S. & C. P. Dec. 725.

Where the interests of the public at large are at stake the proper officers to bring the action are those who are by law intrusted with such duties. *State v. Lord*, 28 Or. 498; s. c., 31 L. R. A. 473.

See, also, *State v. Neodesha*, 3 Kan. App. 319.

Defendants are not liable for negligence of each other unless their negligence be joint. *Boyd v. Phila. Ins. Patrol*, 113 Pa. St. 269.

An owner of goods did not sustain an action against a third party by whose negligence, and that of a carrier, the goods in possession of the latter were injured. *Carlisle v. Brisbane*, 113 Pa. St. 544.

The negligent placing of a block of wood across a trench along a car track by a gas company, and the negligent direction by a carrier to alight at such a place, held not joint but separate and independent acts. *Howard v. Union Traction Co.*, 195 Pa. St. 391.

Where a business is jointly managed, the absence of an owner at the time does not relieve him. *Balker v. Hagey*, 177 Pa. St. 128.

Difficulty of apportioning the injury due to combined acts was held no warrant for joining independent wrongdoers. *Magee v. Pennsylvania &c. Co.*, 13 Pa. Super. Ct. 187.

Switch was allowed to remain open by the concurring negligence of both companies. They were jointly liable. *Rahentramp v. United States T. Co.*, 14 Pa. Super. Ct. 635.

Town unable to act except through its council cannot be joined because the trespasses complained of are within the lines of the highway. *Matteson v. Whaley*, 19 R. I. 648.

Owner, architect and contractor may be joined upon a proper count. *Cole v. Lippitt*, 22 R. I. 31.

See, also, *McBride v. Scott*, 125 Mich. 517.

In action for mandamus to enforce a private right, name of state was struck out as mere surplusage. *State v. Bates*, 48 S. C. 95.

Plaintiff sought to amend his complaint where he found that his defendant had consolidated with another's company, by substituting the name of the new company. Held that he could not do so. *Stewart v. Watterboro &c. R. Co.*, 64 S. C. 92.

"S." agreed with "Y." & "S." that his boiler should, on certain days, operate their grist mill and on others his saw mill, in which last use one was injured by explosion. "Y." & "S." were not liable. *Young v. Brandsford*, 12 Lea, (Tenn.) 232.

Where the only relief demanded against an attorney in an action for relief from a judgment procured through his fraud, is that he be disbarred, he should not be joined as a party. *Smith v. Quarles*, (Tenn.) 46 S. W. Rep. 1035.

Plaintiff took possession of a calf struck by defendant's train, apparently abandoned and cared for it for two years without anyone's claiming it. Was entitled to sue for its death caused by defendant's act. *Southern R. Co. v. Hall*, 107 Tenn. 512.

A gas company cannot complain of a verdict releasing the city where the failure to light and guard an excavation was its own negligence. Verdict against the city would have enabled it to recover over. *San Antonio Gas Co. v. Singleton*, (Tex. Civ. App.) 59 S. W. Rep. 920.

In an action to enforce a void judgment neither the justice of the peace making it or the constable holding an execution issued thereon can be made parties. *Gulf & C. R. Co. v. Blankenbecker*, 13 Tex. Civ. App. 249.

Parties who communicate a libel on one date cannot be joined with those who do so on another. *Hays v. Perkins*, 22 Tex. Civ. App. 199.

That one acted as agent for another is no defense where a joint trespass is charged. *Diamond v. Smith*, (Tex. Civ. App.) 66 S. W. Rep. 141.

Such defense held untenable on the ground that joint wrongdoers are severally liable as well as jointly. *Ellis v. Stime*, (Tex. Civ. App.) 55 S. W. Rep. 758.

Where a fire was set by a landlord and tenant, liability was held to depend not so much upon the form of the rental agreement as upon the question whether in setting such fire, they were acting together in the prosecution of a joint enterprise. *Meadows v. Truesdell*, (Tex. Civ. App.) 56 S. W. Rep. 932.

Where contractors who placed the obstruction in the way were made co-defendants, plaintiff could not recover of them upon failing to recover of defendants—not having herself sought relief against them. *Luke v. El Paso*, (Tex. Civ. App.) 60 S. W. Rep. 363.

Joint operation of a connecting line of a road gives joint liability for negligence on the line in either state. *Smith v. New York R. Co.*, 96 Fed. Rep. 504.

To maintain a joint action it is not necessary that the breaches should be of a joint duty. *Charman v. Lake Erie & C. R. Co.*, 105 Fed. Rep. 449.

On the question as to whether those owning the cars or track were liable, see *Fawcett v. Pittsburg & C. R. Co.*, 24 W. Va. 755.

PHYSICAL EXAMINATION OF PLAINTIFF.

The court has no inherent power, and, in the absence of a statute conferring the right may not, in advance of a trial of an action for personal injuries, compel the plaintiff on application of the defendant to submit to an examination of his person by surgeons appointed by the court with the view of enabling them to testify on the trial as to the existence or extent of the alleged injury. *McQuigan v. D., L. & W. R. Co.*, 129 N. Y. 50.

Previous to this decision the power of the court to order such examination was affirmed by the superior court of the city of New York in *Walsh v. Sayre*, 52 How. Pr. 334, and by the special term of the common pleas in *Shaw v. Van Rensselaer*, 60 id. 143. But the power was denied in *Roberts v. Ogdensburg, &c. R. Co.*, 29 Hun, 154, and in *Winner v. Lothrop*, 67 id. 511, it was held that a person exhibiting the injured part to jury should be required to submit it to an examination in the presence of the jury.

By chapter 721 of the Laws of 1893 of the state of New York, section 873 of the Code was amended so as to authorize such examination upon application to the court.

The power had been exercised in this state in actions for divorce for impotence. See 2 Bishop on Marriage, &c., sec. 590; *Devenbagh v. Devenbagh*, 5 Paige, 554.

Newell v. Newell, 9 Paige, 25; *Le Barron v. Le Barron*, 35 Vt. 365; *Anon v. Anon*, 89 Ala. 291.

The power of circuit court of the United States to order a physical examination, was denied by the supreme court in *Union Pacific Co. v. Bottsford*, 141 U. S. 250; this was based upon the ground that the jurisdiction of the court was limited by powers conferred by congress and the constitution.

In *Schroeder v. C. R. I. &c. R. Co.*, 47 Iowa, 375, (1877) the leading case on this subject, the plaintiff sued to recover damages for personal injuries caused by defendant's negligence. After the jury was empanelled, the defendant filed a written application requesting the court to make a proper order requiring the plaintiff to submit to a physical examination to determine the character and extent of the injuries. This application was denied. On the cross-examination the plaintiff was asked if he would allow physical examination to be made. Objection was taken to the question and sustained, the court holding that it had no power to order such an examination. The supreme court reversed the judgment.

From opinion.—"He (the plaintiff) claims in his pleadings, and so testified in the former trial, that the injuries produced permanent disability. * * * To our minds the proposition is plain that a proper examination by learned and skillful physicians would have opened the road by which the cause could have been conducted nearer to exact justice than any other way. The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of law demand that he should have produced it."

White v. Milwaukee &c. R. Co., 61 Wis. 536, was also an action for personal injuries. The plaintiff was a woman, as in the case at bar. During the trial the defendant moved for a physical examination of the plaintiff by two physicians in a private room at the court house, in the presence of her own physician and such woman friends as she might choose. The court refused to order the examination, and the plaintiff declined it, alleging her own physician had departed from the city after leaving the witness stand. Judgment was reversed.

From opinion.—"It will be seen that the court denied this request on the sole ground that he had no authority to compel the plaintiff to an examination against her will. On principle and authority we are satisfied this was error. The then condition of the injured limb had a most important bearing upon the question as to whether the plaintiff's injuries were permanent, and an examination at that time, the results of which would have been put in evidence before the jury, would in all probability have greatly aided them in determining the extent and consequences of the injury. It would be or might have been more satisfactory and conclusive evidence on that subject than the statements of the plaintiff or the opinions of medical witnesses. The application for her examination contained in it every reasonable safeguard against offending the modesty or delicacy of the plaintiff, and although she might shrink from the examination, yet the ends of justice imperatively demanded that she submit to it. Such examinations are frequently ordered by courts in cases of divorce for impotency and in cases of alleged pregnancy, and the authority of the court to order them has never been questioned, so far as we are advised."

Alabama G. S. R. R. Co. v. Hill, 90 Ala. 71, (31 Cent. Law Journal, 376, which contains a valuable note by the reporter) the plaintiff, "a young woman of delicacy and refinement," sued to recover damages for personal injuries caused by a train in which she was a passenger being overturned and derailed. Her injuries were alleged to be internal and of a permanent and dangerous character. "Neither the fact of their infliction, nor their extent, character or probable consequences, were determinable except by expert examination of the plaintiff's person in a manner most objectionable to a young woman of delicacy and refinement as she is shown to be." Prior to the trial, and on the day the trial was entered upon, and again pending the trial, after the plaintiff and her physicians had testified, the defendant moved the court for an order requiring the plaintiff to submit to an examination by a reputable and

disinterested physician or physicians to be appointed by, and to conduct the investigation under the direction and control of the court at the cost of the defendant. The motion was denied for lack of power, and the judgment was reversed on this ground.

From opinion.—"We are satisfied from the evidence which was before the court when the last application was made, that such an examination would not have involved any ill consequences to the plaintiff. * * * Her delicacy and refinement of feeling, though of course entitling her to the most considerate and tender treatment consistent with the rights of others, cannot be permitted to stand between the defendant and a legitimate defense against her claim of a large sum of money. When it becomes a question of possible violence to the refined and delicate feelings of the plaintiff on the one hand and possible injustice to the defendant on the other, the law cannot hesitate; justice must be done. Was it essential to the ends of justice that plaintiff should submit to this examination? We think it was."

Prior to the present statute on the subject in New York there was no right to compel the physical examination of plaintiff in an action for personal injuries. *Cole v. Fall Brook Coal Co.*, 159 N. Y. 59; aff'g s. c., 87 Hun, 584.

From opinion.—"The question is not an open one in this court. Anterior to 1891 there had been a difference of views in the courts of this state in regard to it. The supreme court in some cases held that it had power to grant such an order, while in others it was held that it had not.

Finally, however, the case of *McQuigan v. D. L. W. R. Co.*, 129 N. Y. 50, reached this court, where it was decided that the supreme court, in the absence of a statute to that effect, had no power to compel a plaintiff to submit to an examination of his person by surgeons with a view to enable them to testify upon the trial as to the extent of his injuries.

That case must be regarded as decisive of the question. We think the trial court properly denied the defendant's motion for such an examination. We find no substantial ground upon which to distinguish this from the *McQuigan* case. It is true that in that case the application for an examination was in advance of a trial. While in this it was upon the trial. We think the same principle should apply in either case.

Nor do we think the fact that witnesses who had examined the plaintiff were permitted to testify as to his condition at the time of such examination constituted a waiver by him or in any way affected the rule established in the *McQuigan* case."

Examination will be ordered where defendant shows he is ignorant of the nature and extent of the injuries. *Moses v. Newburgh Elec. R. Co.*, 91 Hun, 278. And the affidavit need not state that he intends to use the information upon the trial, as it cannot be told whether or not it will be wanted until it is found out what it is.

See, also, *Sewell v. Butler*, 16 App. Div. 77.

Defendant has no right to a physical examination of plaintiff merely

to settle a dispute between opposing doctors. *French v. Brooklyn Heights R. Co.*, 57 App. Div. 204.

A female has a right as a matter of law to have an examination by a physician of her own sex. *Lawrence v. Samuels*, 17 Misc. 559; rev'g s. c., 16 Misc. 501.

Physical examination is not to take place in the presence of the referee or defendant's attorney, but as a private examination before the appointed physician. After making it he is to testify before the referee as to the information obtained. *Bell v. Litt*, 12 App. Div. 626.

See, also, *Lawrence v. Samuels*, 20 Misc. 278; s. c., id. 15.

It was for the jury to say whether the acts of a sub-contractor in weakening a tie beam in the flooring of a building in process of construction and of the contractor in putting an extra load of materials on the floor was such concurrent or successive negligence as, combined, caused its collapse. If their acts did so combine, the party injured may recover of either or both. *Gardner v. Frederick*, 25 App. Div. 521; s. c. aff'd, 163 N. Y. 568.

Where an order has been made for physical examination of a plaintiff who began suit here she cannot vacate it simply because she thereafter removed from the state, and defendant was not able to serve the order upon her within the state, as it is her duty to submit herself to the jurisdiction of the court. *Campbell v. Bauland Co.*, 41 App. Div. 474.

Application denied where it did not appear that relator's disability could not be established by other available evidence, especially where it is a proceeding by alternative writ of mandamus to determine relator's right to the office of chief of police, as there is no legal authority therefor. *People v. Roosa*, 43 App. Div. 611.

It was not error to require plaintiff to expose his injured limb to the jury and allow a physician to point out the injuries. *Perry v. Metropolitan Street R. Co.*, 68 App. Div. 351.

An order for the physical examination of the plaintiff in an action for personal injuries can only be granted in connection with, or as a part of, an order for an oral examination of the plaintiff before trial under section 873 of the Code. *Lyon v. Manhattan Ry. Co.*, 7 Misc. 401. (New York Common Pleas.)

This case and the constitutionality of the statute were affirmed in the court of appeals, 142 N. Y. 298.

An affidavit to procure an order for the physical examination of the plaintiff in an action for personal injuries which states the nature of the action, and that defendant is ignorant of the nature and extent of the injuries complained of, complies sufficiently with the requirements of rule 83.

It is not necessary that such affidavit should state that defendant intends to read the testimony on the trial; it is sufficient if it show that he proposes to use the testimony so obtained on the trial. *Green v. Middlesex R. Co.*, 10 Misc. 475. (Supreme Court, Monroe Circuit, December, 1894.)

Order denying further examination is discretionary and not appealable. *Lawrence v. Samuels*, 20 Misc. 278; s. c., id. 15.

See, also, *Bell &c. Distilling Co. v. Riggs*, (Ky.) 45 S. W. Rep. 99; *Will v. Sedalia*, 64 Mo. App. 494.

Power to grant the order held to be inherent. *Alabama &c. R. Co. v. Hill*, 90 Ala. 71.

McGuff v. State, 88 Ala. 147, where the right to grant the order in a proper case was affirmed. It was held in that case (a criminal prosecution for rape) that the order for a physical examination of a prosecutrix could only be exercised in cases of extreme necessity, and that the order was discretionary and not reviewable.

Held that the defendant is entitled to a physical examination of the plaintiff before trial, as a matter of right, where permanent injuries are claimed. In other cases the courts can exercise their discretion, which is subject to review in case of abuse. *Sibley v. Smith*, 46 Ark. 295.

Plaintiff exhibited his leg to the jury subject to inspection by defendant's physicians. Request that plaintiff be compelled to re-exhibit it during the testimony of defendant's physicians was denied. *Mills v. Wilmington City R. Co.*, 1 Marv. (Del.) 269.

Power to grant the order inherent where the injury is alleged to be permanent. *Richmond &c. R. Co. v. Childress*, 82 Ga. 719.

Power denied, the supreme court saying the court had no power to make or enforce the order. *Parker v. Ensloe*, 102 Ill. 272.

But in later cases this position has not been maintained, and it seems to be conceded that the power exists. *Chicago &c. R. Co. v. Holland*, 122 Ill. 461.

Joliet & Co. Ry. Co. v. Caul, 32 N. E. Rep. 388; *City of Galesburg v. Benedict*, 22 Ill. App. 114.

Power should not be exercised where plaintiff does not complain of any secret injury. *Chicago &c. R. Co. v. Reith*, 65 Ill. App. 461.

Power held not to be inherent. *Penn. Co. v. Neumeyer*, 129 Ind. 409.

Terre Haute R. Co. v. Brunker, 128 Ind. 554; *Hess v. Lowrey*, 122 Ind. 233.

The question is squarely met and the inherent power of the court to compel the examination is laid down. *Schroeder v. C. R. I. & P. R. Co.*, 47 Iowa, 375.

Court must allow measurement before the jury, of a woman's leg where

medical experts differ in regard to the effect of the injury. *Hall v. Manson*, 99 Iowa, 938.

Power to grant the order declared to be inherent. *Atchison &c. R. Co. v. Thul*, 29 Kas. 466.

Court may refuse examination in case of an unexplained delay in making no application till the close of plaintiff's case. *Southern R. Co. v. Michaels*, 57 Kan. 474.

See, also, *Marler v. Springfield*, 65 Mo. App. 301; *Paul v. Omaha &c. R. Co.*, 82 Mo. App. 500; *Smith v. Spokane*, 16 Wash. 403.

Court may, in the exercise of its discretion, order it, where the discovery of the truth will more likely result from an examination. *Belt Electric Line Co. v. Allen*, (Ky.) 44 S. W. Rep. 89.

Examination of plaintiff's foot in presence of jury refused, where it had been already exhibited to them and defendant had had an opportunity to make a private examination. *Illinois C. R. Co. v. Clark*, (Ky.) 55 S. W. Rep. 699.

Examination ordered where plaintiff testified that she was unable to close her hand. *Louisville &c. R. Co. v. Simpson*, (Ky.) 64 S. W. Rep. 733.

Where defendant's motion has been withdrawn before any examination has been made, physicians should not be allowed to testify contrary to defendant's objection. *South Covington &c. R. Co. v. Stroth*, (Ky.) 66 S. W. Rep. 177.

Examination refused, where defendant had already had two physicians examine plaintiff at the time of injury, and there was substantially no conflict of testimony of the different doctors present. *Louisville &c. R. Co. v. McClaim*, (Ky.) 66 S. W. Rep. 391.

See, also, *Stack v. New York &c. R. Co.*, 177 Mass. 155; s. c., 52 L. R. A. 328.

Power to grant the order inherent. *Graves v. City of Battle Creek*, 95 Mich. 266.

Examination refused where anæsthetics would be necessary. *Strudgeon v. Sand Beach*, 107 Mich. 496.

Held that the court had the power to compel the plaintiff to perform a physical act in the presence of the jury to show the nature and extent of his injuries. *Hatfield v. St. Paul &c. R. Co.*, 33 Minn. 130.

Plaintiff solicited medical aid of defendant and a doctor appointed by it attended, but it was six months before trial. Held no ground for refusing the city a regular examination. *Waneck v. Winona*, 78 Minn. 98; s. c., 46 L. R. A. 448.

Examination by X-ray process refused in absence of proper skill. *Wittenberg v. Onsgard*, 78 Minn. 342; s. c., 47 L. R. A. 141.

Power to grant order inherent. *Sidekum v. W. St. L. & P. R. Co.*, 93 Mo. 400, overruling *Loyd v. R. Co.*, 53 Mo. 509.

Owens v. Kansas City &c. R. Co., 95 Mo. 169; *Sheperd v. Mo. Pac. Ry. Co.*, 85 id. 629.

Power to order the examination declared to exist on the proper facts being shown. *Stuart v. Havens*, 17 Neb. 221.

Sioux City &c. R. Co. v. Finlayson, 16 Neb. 578.

Statute granting examination held constitutional. *McGovern v. Hope*, 63 N. J. L. 76.

Power to grant the order denied. *McQuigan v. Delaware &c. R. Co.*, 129 N. Y. 50.

The court has the power to grant the order. On plaintiff's refusal to comply the court may dismiss the action, or refuse to allow the plaintiff to give testimony to establish the injury. *Miami &c. Turnpike Co. v. Bailey*, 37 Oh. St. 104.

Examinations cannot be ordered in advance of the trial. *Kunsman v. Harris*, 6 Northampton Co., Rep., (Pa.) 230.

The power to order the examination where the ends of justice require it, declared to be inherent but within the discretion of the court. *I. & G. N. Ry. Co. v. Underwood*, 64 Tex. 463.

Missouri &c. R. Co. v. Johnson, 72 Tex. 95.

Defendant may select his experts for the examination. *Chicago &c. R. Co. v. Langston*, 92 Tex. 709.

Contra, see *Gulf &c. R. Co. v. Pendery*, 14 Tex. Civ. App. 60; *Smith v. Spokane* 16 Wash. 403.

Examination refused where examination had already been refused once and there was ample evidence otherwise given. *Gulf &c. R. Co. v. Pendery*, 14 Tex. Civ. App. 60.

Plaintiff cannot be compelled to submit to examination before a physician who is unfriendly. *Houston &c. R. Co. v. Berling*, 14 Tex. Civ. App. 544.

Refusal was not error where plaintiff left it to his counsel to say whether he should submit and they expressed their unwillingness. *Ft. Worth &c. R. Co. v. White*, (Tex. Civ. App.) 51 S. W. Rep. 855.

Examination cannot be allowed merely for the purpose of getting the opinion of experts. *Galveston &c. R. Co. v. Sherwood*, (Tex. Civ. App.) 67 S. W. Rep. 776.

Court may order the examination of a woman by medical experts. *Lane v. Spokane Falls &c. R. Co.*, 21 Wash. 119; s. c., 46 L. R. A. 153.

The power to grant the order held to be inherent. *White v. Milwaukee &c. R. Co.*, 61 Wis. 536.

Examination refused where the test proposed would likely result in injury to plaintiff. *O'Brien v. La Crosse*, 99 Wis. 421; s. c., 40 L. R. A. 831.

Likewise refused where a previous X-ray examination had lasted two hours, during which plaintiff had been burned. *Boelter v. Ross Lumber Co.*, 103 Wis. 324.

PLEADING.

- I. NEW YORK CASES.
- II. INSUFFICIENT ALLEGATIONS.
- III. SUFFICIENT ALLEGATIONS.
- IV. EARNINGS AND LOSS OF TIME.
- V. APPOINTMENT OF ADMINISTRATOR.
- VI. GENERAL DENIAL.
- VII. DEMURRER.
- VIII. CONTRIBUTORY NEGLIGENCE.

I. New York Cases.

In an action for the killing of a child, the complaint averred that the death was caused by the negligence and default of the defendants, etc. This authorized evidence of the defendants' negligence or misconduct, tending to produce the injury in respect to the conduct of the driver of the car, by which he was killed while on the street, or the default of the defendants themselves in providing unsuitable vehicles, or from the combination of such causes; hence, evidence as to whether there were guards in front of the car was proper. *Oldfield v. N. Y. & Harlem R. Co.*, 14 N. Y. 310.

If the complaint alleges that the plaintiff was without fault in producing the accident, a denial by the defendant raises the issue. *Wall v. Buffalo Water Works Co.*, 18 N. Y. 119.

Where the complaint contained a general averment that the injury was received from the negligence of the defendants and its employés, it was immaterial whether the proof established the particular negligence specified in the complaint, some negligence being shown. *Edgerton v. N. Y. & Harlem R. Co.*, 39 N. Y. 227.

Money paid for medicines on physician's prescriptions fairly comes under the head of damages "for necessary expenditures for medical treatment." *Metcalf v. Baker*, 57 N. Y. 662.

A receipt by a carrier containing a clause exempting the company from liability unless a claim for damages was made in writing within a certain time from the accruing of the cause of action, is not in the nature of a condition precedent to the plaintiff's right to recover, as it assumes the existence of the cause of action, but was in the nature of a limitation and could not be of avail upon the trial, unless pleaded in the answer. *Westcott v. Fargo*, 61 N. Y. 542.

Plaintiff offered to show that he had lost rents in consequence of the

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flow of water into his cellar through the fault of the defendant, and that the cellars had remained unoccupied since that time, and proof of the rental value thereof. Such damages necessarily and naturally resulted from the injury, and especial averment thereof was not necessary. *Jutte v. Hughes*, 67 N. Y. 267.

In an action for an injury from falling through a coal hole in a sidewalk, evidence of a permit from the proper authorities, authorizing the coal hole was properly excluded, and, if admissible at all, it was not only necessary to plead it, but to allege and prove compliance with its terms. *Clifford v. Dam*, 81 N. Y. 52.

Where the complaint in one of several counts alleged damages for \$10,000, and a recovery was had under such count for \$15,000, the general prayer for damages for \$20,000, at the conclusion of the complaint, was controlling. However, if there were a defect in the complaint in the particular mentioned, it was capable of amendment by the court wherein the judgment was rendered or by the appellate court. *Schultz v. Third Ave. R. Co.*, 89 N. Y. 242, 246.

In an action for negligence in leaving unguarded and unlighted an opening temporarily made in a street, the defendants, who, the complaint alleged, were officers of the city, that is, mayor, common council and street commissioner, were sued in their individual names, with the title of their respective offices added, but the word "as" did not precede their official designations. The complaint also averred that the mayor and common council directed the excavation to be made, and "the said street commissioner" left it unguarded, and there was a demand of judgment "against the defendants." The action was against the defendants individually and not in their official capacity. While the omission of the word "as" is not conclusive, when the body of the complaint plainly discloses the official or representative capacity as ground of action, where its scope and averments harmonize with the omission, the action will be considered as against the defendants individually. *Bennett v. Whitney*, 94 N. Y. 302.

Distinguishing *Beers v. Shannon*, 73 N. Y. 292, in which case the plaintiff added after his name the word "executor," but omitted the word "as," and the court held that the "frame and averments and scope of the complaint" were such as clothed him with representative character.

Allegation that the plaintiff was "sick, sore and disabled, prevented from attending to his business and greatly otherwise injured," covers spinal disease. *Ehrgott v. Mayor &c.*, 96 N. Y. 264.

The plaintiff cannot, without pleading it, recover for hiring a man in his place while he was ill from injury.

Under general allegations of damage the plaintiff may recover for

damages naturally flowing from injury. Special damages must be alleged. Not the amount paid, but the value of the service is the amount recoverable. *Gumb v. Twenty-Third St. R. Co.*, 114 N. Y. 411.

Expenses of recovery from injury for a doctor's services may be had although there be no evidence of a doctor's bill, at least for nominal damages. *Feeney v. L. I. R. Co.*, 116 N. Y. 375.

In an action based on negligence from blasting, whereby injury was done to neighboring premises, the defendant may show that the act causing the injury was done by an independent contractor, under an answer containing a general denial, with an admission of ownership of defendant's premises by defendant. *Roener v. Striker*, 142 N. Y. 134.

A complaint alleged that defendant's servant was directed by him "to go down and do certain work in the excavation," which he had caused to be made, and that while therein, following defendant's instructions, the side of the excavation, by reason of its not having been properly constructed by the defendant, fell in, causing death. Defendant denied that he directed decedent "to go down and do certain work in the excavation" which the defendant had caused to be made. This was not such a denial as is required by the Code of Civil Procedure to put in issue the averments of the complaint that defendant caused the trench to be made, and directed the deceased to work in it, and while, in the absence of a motion to correct the answer and make it more certain, it might be regarded as good upon appeal, yet, as the whole scope of the answer assumed the fact that defendant made the trench and directed the deceased to work therein, and as a nonsuit was granted on the assumption of defendant's negligence, on the grounds of contributory negligence and a release, the point of a failure of evidence to show that the defendant did make the trench or direct the deceased to work therein, could not be availed of to support the nonsuit. *Stuber v. McEntee*, 142 N. Y. 200.

Cause of action for negligence and one for malfeasance may be brought against director of bank. *Smith v. Rathbun &c.*, 22 Hun, 150.

It is not necessary to allege damage in behalf of the plaintiff, when the action is under statute of negligent killing, as at least nominal damages will be presumed. *Kenney v. N. Y. C. & H. R. R. Co.*, 49 Hun, 535.

The complaint alleged that plaintiff was injured by being hit by some object thrown from the premises of the defendant, by an explosion of gas thereon caused by the defendant's negligence. A motion for an order that the complaint be more definite and certain about stating forthwith the act of negligence causing the explosion, was properly denied. The remedy, if any, was for an order for the plaintiff to furnish a bill of particulars stating forthwith the particular cause of negligence purposed to be proven on the trial. *Jackman v. Lord*, 56 Hun, 192.

An averment that an injury to the hand is serious, permanent and painful, will support evidence as to plaintiff's general health. *Hanse v. Brooklyn Elev. R. Co.*, 66 Hun, 384.

An allegation that plaintiff was injured while traveling on a sidewalk rendered dangerous by a depression in which snow and ice accumulated; shown on the trial that the dangerous condition of the sidewalk resulted from the overflow of water and formation of ice caused by a defective ditch. Held, error. *Woolsey v. Trustees of Ellenville*, 69 Hun, 489.

In an action for damages it is not necessary to allege as a fact that the acts complained of constituted a nuisance.

Allegation that the defendant so negligently and carelessly did certain acts as to cause the damage, is sufficient. *Campbell v. U. S. Foundry Co.*, 73 Hun, 576.

In an action brought to recover for personal injuries by the alleged negligence of the defendant, the complaint contained an allegation that the plaintiff "has become disabled for life to such an extent as to seriously interfere with the active prosecution of his business."

Such allegation was sufficient to give the defendant notice that an attempt would be made to recover special damages; if the defendant had desired a more definite allegation it should have moved that the complaint be made more definite and certain. *Frobisher v. Fifth Ave. Transportation Co.*, 81 Hun, 544; s. c. rev'd on another point, 151 N. Y. 431.

A complaint in an action for personal injuries which alleges that they were caused by the sudden starting of the car without notice or warning, cannot be amended on the trial so as to allege that the driver pushed the plaintiff from the car, as such amendment would not only be a substantial change of the claim, but the substitution of another cause of action. *Zboynski v. Brooklyn City R. Co.*, 10 Misc. 7. (City Court of Brooklyn.)

II. Insufficient Allegations.

A general allegation of negligence is not sufficient, but must set out *facts constituting negligence*.

Chicago &c. R. Co. v. Howard, 90 Ill. 425; *Hawley v. Williams*, 90 Ind. 160; *Pennsylvania &c. R. Co. v. Dian*, 92 id. 459; *Kennedy v. Morgan*, 57 Vt. 146; *Regan v. Chicago &c. R. Co.*, 51 Wis. 599; *Whatley v. Zenida Coal Co.*, 122 Ala. 118; *Laporte v. Cook*, 20 R. I. 261; *Jacobson v. Dallas*, 93 Fed. Rep. 975.

When too vague and uncertain, see *Reynolds v. Union Free School &c.*, 33 App. Div. 88; *Pierce v. Southern R. Co.*, 120 Cal. 156; *King v. Wilmington &c. R. Co.*, 1 Penn. (Del.) 452; *King v. Oregon Short Line R. Co. (Id.)* 55 Pac. Rep. 665.

Allegation of wantonness. Facts showed simple negligence. Not suffi-

cient. *Memphis &c. R. Co. v. Martin*, 117 Ala. 367; *Omaha &c. R. Co., v. Crow*, 54 Neb. 747.

Failure to allege ownership. *Mackay v. Monahan*, 13 Colo. App. 144.

Allegation of a particular act of negligence will not permit recovery upon proof of other acts. *Straight v. O'Dell*, 13 Ill. 232.

That defendant conducted an exhibition, without alleging control of the specific place in question. *Hart v. Washington Park Club*, 157 Ill. 9.

Allegation not alleging in what respect carrier was negligent. *Ward v. Chicago &c. R. Co.*, 61 Ill. App. 530.

See further examples of insufficient allegations in actions against carriers, *Louisville &c. R. Co. v. Bizzell*, 131 Ala. 429; *Armstrong v. Montgomery Street R. Co.* 123 id. 233; *Lachner v. Adams Exp. Co.*, 72 Mo. App. 13; *Reed v. Louisville &c. R. Co. (Ky.)* 47 S. W. Rep. 591; *Cave v. Carolina &c. R. Co* 53 S. C. 496.

That walk was permitted to be built in a dangerous shape. *Sloney v. Grand Rapids*, 95 Ill. App. 39; *Koepke v. City of Milwaukee*, 112 Wis. 475; *Gagan v. Janesville*, 106 Wis. 662.

For further illustration in actions against municipalities, see *Cullman v. McMinn*, 109 Ala. 614; *Homan v. Franklin Co.*, 98 Iowa 692; *Vogelgesang v. St. Louis*, 139 Mo. 127; *Waggener v. Point Pleasant*, 42 W. Va. 798.

Where the damage does not necessarily result from the act complained of, plaintiff must state it specially. *O'Connor v. Prendergast*, 99 Ill. App. 531.

See, also, *Clark v. Metropolitan &c. Street R. Co.*, 68 App. Div. 49; *Chesapeake &c. R. Co. v. Hanmer*, (Ky.) 66 S. W. Rep. 375; *Muth v. St. Louis &c. R. Co.*, 87 Mo. App. 422.

An averment that a fire was negligently set on the company's land, will not permit proof that the same was spread by the company's negligence. *Indianapolis &c. R. Co. v. Adamson*, 90 Ind. 60.

Allegation that the injury was caused in a "willful, reckless, careless and unlawful manner," requires proof of willful injury in order to recover. *Indianapolis &c. R. Co. v. Burdge*, 94 Ind. 46.

A charge of negligence alone will not permit proof of willful injury. *Penn. &c. R. Co. v. Smith*, 98 Ind. 42.

Servant only alleged lack of notice of loosening of an embankment, without allegation of lack of knowledge of any danger involved. *Peerless Stone Co. v. Wray*, 143 Md. 574.

For further examples of insufficient allegation on the subject of master and servant, see *Paolo v. Hunter*, 3 App. Div. 528; *Louisville &c. R. Co. v. Bouldin*, 110 Ala. 185; *Postal Tel. C. Co. v. Hulsey*, 132 id. 444; *Savannah v. Charney*, 101 Ga. 420; *Standard Cement Co. v. Minor*, 27 Ind. App. 479; *Salem Bedford Stone Co. v. Hobbs*, 144 Md. 146; *Missouri &c. R. Co. v. Kirkland*, 11 Tex. Civ. App. 528; *Eckles v. Norfolk &c. R. Co.*, 96 Va. 69.

Plaintiff alleged negligence in allowing combustible material to collect

and to catch fire, without alleging negligence in allowing it to escape. *Louisville &c. R. Co. v. Roberts*, 13 Ind. App. 692.

Allegations in the alternative are bad. They must be definite, on one theory or another. *Kalen v. Terre Haute &c. R. Co.*, 18 Ind. App. 202; *Highland Ave. R. Co. v. Swope*, 115 Ala. 287; *Huntsville &c. R. Co. v. Ewing*, 116 id. 576; *East Chicago Foundry Co. v. Ankey*, 19 Ind. App. 150.

When sufficiently particular. *Croft v. North Western S. S. Co.*, 20 Wash. 175.

Allegation of duty without the facts to sustain it is insufficient. *Clyde v. Helmes*, 61 N. J. L. 358.

But see *Jensen v. Wetherill*, 79 Ill. App. 33.

See, also, *International &c. R. Co. v. Downing*, 16 Tex. Civ. App. 643.

Evidence that the accident happened from the employment of incompetent servants, unless pleaded. *Troughear v. Lower Vein Coal Co.*, 62 Iowa, 576.

Under what averment such evidence may be given, see *South &c. R. Co. v. Thompson*, 62 Ala. 494.

Allegation of failure of officers of a company to select competent foreman, without allegation that it was their duty to do so. *Henry v. Brackinridge, L. Co.*, 48 La. Ann. 950.

When freedom from contributory negligence is insufficiently alleged.

Kilberg v. Berry, 166 Mass. 488; *Peoria v. Adams*, 72 Ill. App. 662; *Wahl v. Shoulder*, 14 Ind. App. 665; *Lake Erie &c. R. Co. v. Hancock*, 15 id. 104; *Chicago &c. R. Co. v. Rhomas*, 147 Ind. 35.

Allegation that step was insufficient in height, does not permit proof of insufficient station platform. *Price v. St. Louis &c. R. Co.*, 72 Mo. 414.

Plaintiff alleged careless, improper and negligent operation of a car. None of the particulars stated were alleged to be unusual. *McCerrren v. Alabama &c. R. Co.*, 72 Miss. 1013.

Allegation as to willfulness and negligence is contradictory. *Ranning v. Metropolitan Street R. Co.*, 157 Mo. 477.

In an action for death, the complainant must allege that the deceased left a widow or next of kin. *Burlington &c. R. Co. v. Crockill*, 17 Neb. 570.

Holton v. Dalley, 106 Ill. 131; *Nohrden v. North Eastern R. Co.*, 54 S. C. 492; *Commercial Club v. Hilliker*, 20 Ind. App. 239; s. c., 85 Fed. Rep. 493; *Chicago &c. R. Co. v. Bond*, 58 Neb. 385; *Assumption v. Campbell*, 95 Ill. App. 521; *St. Luke's Hospital v. Foster*, 86 id. 282; *Pizzi v. Reed*, 36 Misc. 123; *Boyle v. Southern R. Co.* id. 289.

See "Death from Negligence," p. 945.

But an amendment to that effect is proper, as it does not set up a new cause of action. *Haynie v. Chicago &c. R. Co.*, 9 Ill. App. 105.

Plaintiff failed to state pecuniary loss from another's death. *Orgall v. Chicago &c. R. Co.*, 46 Neb. 4.

In an action for injury from a defective highway, notice or knowledge thereof on the part of the town must be alleged. *Heilner v. Union County*, 7 Ore. 83.

So, failure to put in a crossing. *O'Connor v. St. Louis &c. R. Co.*, 56 Iowa, 735.

Allegation of negligent death unparticularized; as negligence of fellow servant will be presumed. *Miller v. Coffin*, 19 R. I. 164.

See further in respect to death. *Gusman v. Caffery &c. R. Co.*, 49 La. Ann. 1264; *Chicago &c. R. Co. v. Van Buskirk*, 58 Neb. 218; *Chicago &c. R. Co. v. Young* id. 678; *Eau v. Chicago &c. R. Co.*, 95 Wis. 69.

State of facts authorizing exemplary damages must be pleaded. *Galveston &c. R. Co. v. Legiese*, 51 Tex. 189.

Negligence must be connected with the injuries. *Richmond &c. Works v. Ford*, 94 Va. 627; *Eckles v. Norfolk &c. R. Co.*, 96 Va. 69; *Allenger v. McKeown*, 30 Misc. 275; s. c. aff'd. 50 App. Div. 628; *Lafayette Carpet Co. v. Stafford*, 25 Ind. App. 187; *Martello v. Fusco*, 21 R. I. 572; *Wheatley v. Zenida Coal Co.*, 122 Ala. 118.

III. Sufficient Allegations.

A general charge of negligence was sufficient on demurrer in the following instances. *Cleveland &c. R. Co. v. Wynant*, 100 Ind. 160.

Wilson v. Denver &c. R. Co., 7 Col. 101; See *Clark v. Chicago &c. R. Co.*, 28 Minn. 69; *Chicago &c. R. Co. v. Miller*, 46 Mich. 532.

Highland Ave. &c. R. Co. v. South, 112 Ala. 642; *Louisville &c. R. Co. v. Anchors*, 114 id. 492; *Cunningham v. Los Angeles R. Co.*, 115 Cal. 561; *Rogers v. Balt. &c. R. Co.*, 150 Ind. 397; *Pa. Co. v. Witte*, 15 Ind. App. 583; *Chicago &c. R. Co. v. Cummings*, (Ind.) 53 N. E. Rep. 1026; *Omaha &c. R. Co.*, 54 Neb. 747.

General allegation of freedom therefrom is sufficient. *Alton &c. R. Co. v. Foulds*, 81 Ill. App. 322.

Citizens Street R. Co. v. Albright, 14 Ind. App. 433; *Pennsylvania Co. v. Witte*, 15 id. 583.

General allegation is sufficient unless the facts warrant a contrary inference. *Pittsburg &c. R. Co. v. Martin*, 157 Ind. 216.

Davis Coal Co. v. Polland, 158 Ind. 607; see *Indianapolis Street R. Co. v. Robinson*, 157 Ind. 414; *Citizens Street R. Co. v. Heath*, (Ind. App.) 62 N. E. Rep. 107; *Southern Indiana R. Co. v. Peyton*, 157 Ind. 690.

Especially where injury itself raises a presumption. *Alton R. &c. Co. v. Foulds*, 81 Ill. App. 322.

Unless pleading is attacked by motion. *Union P. R. Co. v. Vincent*, 58 Neb. 171.

Pleading need not go into detail. *Chicago &c. R. Co. v. Kreig*, 22 Ind. App. 393.

As long as facts are charged with reasonable definiteness. *Schmidt v. Parker*, 1 N. Y. L. Reg. 16; *Race v. Railroad Co.*, 62 N. J. L. 526; *Green v. Eden*, 24 Ind. App. 583.

For example, that work was performed in a "careless and negligent manner." It need not specify particular acts. *Bunnell v. Berlin*, 66 Conn. 24.

So general allegation of injury is sufficient, though followed by allegations of specific injuries which could not include the one in question. *St. Louis &c. R. Co. v. Kelton*, (Tex. Civ. App.) 66 S. W. Rep. 887.

That a vicious dog was allowed to be at large need not be alleged; it being presumed to have been. *Woodbridge v. Marks*, 5 App. Div. 604, 605; *Show v. McCracken*, 107 Mich. 49; *Byington v. Merrill*, 112 Wis. 211; *Goshen v. Alford*, 154 Ind. 58; *Whitty v. Oshkosh*, 106 Wis. 87.

Allegation in action against municipality that it negligently allowed a dangerous hole to remain in one of its public sidewalks held a sufficient charge of notice and opportunity to repair. *Lord v. Mobile*, 113 Ala. 360.

For further examples on this subject, see *Coon v. Fremont*, 25 App. Div. 250; *Frankfort v. Coleman*, 19 Ind. App. 368; *Whorden v. Argentine Twp.*, 112 Mich. 20; *Storrs v. Grand Rapids*, 110 id. 483.

So, as to allegation as to great physical injuries causing plaintiff to suffer great mental and physical pain. *Hoehman v. New York Dry Goods Co.*, (Id.) 67 Pac. Rep. 798.

Allegation, that a cable car was so managed as to collide with a wagon with great force and violence states negligence with sufficient particularity. *Chicago &c. R. Co. v. Jennings*, 157 Ill. 274.

See, also, on the subject of Private Premises, *Citizens Street R. Co. v. Albright*, 14 Ind. App. 433. Flooding lands, *Fremont &c. R. Co. v. Harlin*, 50 Neb. 698; *Alabama &c. R. Co. v. Shahan*, 116 Ala. 302.

Servant did not allege that he was not a fellow servant. It was sufficient. *Hess v. Rosenthal*, 160 Ill. 621.

See, also, *Braun v. Conrad Seip Brew. Co.*, 72 Ill. App. 232.

Where facts showed he was not. *Chicago &c. R. Co. v. Leach*, 80 Ill. App. 354.

Otherwise when they do, *Laporte v. Cook*, 20 R. I. 261.

Not necessary to allege specific injuries where general damages are claimed. *Chicago &c. R. Co. v. McDonnell*, 194 Ill. 82; aff'g s. c., 91 Ill. App. 488.

Characterization of conduct as being a duty, was unnecessary. *Thamm v. Lahey*, 59 Ill. App. 73.

Servant need not allege employment. *Chicago Econ. Gas &c. Co. v. Myers*, 64 Ill. App. 270.

See further examples of sufficient allegation by servant in actions against master, *Conrad v. Gray*, 109 Ala. 130; *Bessemer Land &c. Co. v. Campbell*, 121 id. 50; *Southern R. Co. v. Arnold*, 114 id. 183; *Alabama &c. R. Co. v. Marcus*, 128 id. 355; *Galveston &c. R. Co. v. Hitzfelder*, (Tex. Civ. App.) 66 S.W. 707; *Denver &c. R. Co. v. Smock*, 23 Colo. 456; *Consolidated Stone Co. v. Summit*, 152 Ind. 297; *Woodson v. Johnson Co.*, 109 Ga. 454; *McFarlan Carriage Co. v. Potter*, 153 Ind. 107; *East Chicago &c. R. Co. v. Ankeny*, 19 Ind. App. 150; *Potter v. Knox Lumber Co.*, 146 Ind. 14; *Chicago &c. R. Co. v. Swan*, 176 Ill. 424; *Lee v. Reliance Mills*, 21 R. I. 322; *Dingee v. Unrue*, 98 Va. 247; *Miller v. Itaska &c. Co.*, (Tex. Civ. App.) 41 S.W. Rep. 366; *Hillsboro Oil Co. v. White*, (Tex. Civ. App.) 54 S.W. Rep. 432; *Taylor v. Telsing*, 63 Ill. App. 624; s. c., aff'd 164 Ill. 331; *Talkenan v. Abrahamson*, 66 Ill. App. 352; *Chicago &c. R. Co. v. Trach*, 80 id. 354; *Alabama &c. R. Co. v. Marcus*, 128 Ala. 355.

Allegation that a bridge was defective permits evidence of the rate of speed of train thereon. *Louisville &c. R. Co. v. Pedigo*, 108 Ind. 481.

Allegations that person was a cripple and was prevented from pursuing his business for life permits evidence of injury to nervous system. *Wabash &c. R. Co. v. Savage*, 110 Ind. 156.

Facts showing negligence are sufficient without allegation charging them to be so. *Schreiber v. United Tel. Co.*, 153 Ind. 609.

Complaint need not in words aver loss of services of wife where it shows that that has necessarily been the result. *Indianapolis &c. R. Co. v. Robinson*, 157 Ind. 414.

It need not be specified that any horse would have been frightened, in addition to allegation of freedom from contributory negligence. *Keeley Brew. Co. v. Parbin*, 13 Ind. App. 588.

So, where complaint alleged that horse entered where there was no fence. Allegation of duty to fence was unnecessary. *Lake Erie &c. R. Co. v. Rooker*, 13 Ind. App. 600.

So, as to allegation by servant "that pulley was insufficient in both size and strength and that its defects were so located as to elude detection." *Indiana Bituminous Coal Co. v. Buffey*, 28 Ind. App. 108.

"That all the facts occurred and were done without the fault of plaintiff" is a sufficient allegation of freedom from contributory negligence. *Wabash R. Co. v. Schultz*, (Ind. App.) 64 N. E. Rep. 481.

As to when freedom from contributory negligence is sufficiently alleged, see further, *Mt. Vernon v. Hoehn*, 22 Ind. App. 282; *Anderson v. Hopkins*, 91 Fed. Rep. 77; *Alexandria v. Young*, 20 Ind. App. 672; *Baltimore &c. R. Co. v. Young*, 146 Ind. 374; *Rupprecht v. Brighton Mills*, 27 App. Div. 77; *McKormick v. West Bay City*, 110 Mich. 265.

Negligent construction of an incline next to a track is sufficient without allegation of violation of ordinance. *Rouse v. Ledbetter*, 56 Kan. 348.

Damages which are the natural and proximate results need not be specially pleaded. *Ft. Scott &c. R. Co. v. Lightburn*, 9 Kan. App. 642.

See, also, *West Chicago &c. R. Co. v. Levy*, 182 Ill. 525; *Franklin Printing &c. Co. v. Behrent*, 80 Ill. App. 313; *Mauch v. Hartford*, 112 Wis. 40; *Coleman v. Kentucky C. R. Co.*, (Ky.) 33 S. W. Rep. 945.

For further illustrations of sufficient allegations on this subject, see *Jones v. Alabama &c. R. Co.*, 107 Ala. 400; *Budd v. Meriden E. R. Co.*, 69 Conn. 272; *Clarke Co. v. Wright*, 16 Ind. App. 630; *Buckalew v. Tennessee Coal &c. Co.*, 112 Ala. 146; *Board of Commissioners v. Coffman*, 18 Oh. C. C. 254; *Brothers v. Rutland R. Co.*, 71 Vt. 48.

Unless a flagman by authority be required at a crossing the failure to keep one there need not be pleaded. *Lesan v. Maine &c. R. Co.*, 77 Me. 85.

General allegation of injury permits evidence of damage to special calling. *Joslin v. Gris Co.*, 50 Mich. 516.

Ordinances regulating the speed of trains need not be pleaded. *Faber v. St. Paul &c. R. Co.*, 29 Minn. 465.

Where next of kin and other relationship to the deceased was stated with an allegation of damages, it was sufficient on the subject of damages. *Barnum v. Chicago &c. R. Co.*, 30 Minn. 451.

Allegation that car couplers are "loose and defective" is sufficient. *Tierney v. Minneapolis &c. R. Co.*, 31 Minn. 234.

That defendant "willfully and negligently" ran its cars without a brakeman at the forward end. *Johnson v. St. Paul &c. R. Co.*, 31 Minn. 283.

Allegation of negligence in the management and condition of cars permits evidence of defective stove. *Dunn v. Cedar Rapids R. Co.*, 35 Minn. 73.

Injury sustained from fright or from lack of care is general and not special. *Smith v. St. Paul &c. R. Co.*, 60 Minn. 169.

A complaint is not demurrable, as not stating a cause of action unless the particular acts alleged are such that they could not be negligent under any evidence admissible under the allegation of the complaint. *Stendal v. Boyd*, 67 Minn. 279.

Following *Rolseth v. Smith*, 38 Minn. 14.

So, that the defendant so negligently ran its cars as to run over the plaintiff's horse. *Schneider v. Missouri &c. R. Co.*, 75 Mo. 295.

A general allegation of negligence resulting in the killing of a horse was sufficient. *Mack v. St. Louis &c. R. Co.*, 77 Mo. 233.

Same principle, *Otto v. St. Louis &c. R. Co.*, 12 Mo. App. 168; *Jones v. White*, 90 Ind. 215.

Not necessary to allege how the defects caused the injury. *Lee v. Publishers*, 155 Mo. 610.

The specific charge of negligence, did not show it, but it could be deducted from the other allegations connected therewith. It was held to be sufficient. *Hamilton v. Great Falls Street R. Co.*, 17 Mont. 334, rehearing denied in id. 351.

See *Evansville S. R. Co. v. Meadows*, 13 Ind. App. 155.

"That death of intestate was caused by the negligence and fault of intestate himself" is a sufficient allegation of contributory negligence. *Cogdell v. Wilmington &c. R. Co.*, 130 N. C. 313.

So, is an allegation that plaintiff was rightfully on an elevator with lessee's goods. It need not specify what goods. *Ellis v. Waldron*, 19 R. I. 369.

Notice to town was sufficiently stated by an allegation that it negligently suffered its highway to be out of repair. *Carroll v. Allen*, 20 R. I. 144.

Statement as to wanton, careless, reckless and negligent non-compliance with ordinance as to speed, was sufficient to support a verdict giving punitive damages against a carrier. *Brasington v. South Bound R. Co.*, 62 S. C. 325.

See further as to sufficient allegations in actions by passenger against carrier, *Fort Worth &c. R. Co. v. Ferguson*, 9 Tex. Civ. App. 610; *Chicago &c. R. Co. v. Redmond*, 70 Ill. App. 119; *Jefferson v. Birmingham &c. R. Co.*, 116 Ala. 294; *Birkhead v. Chesapeake &c. R. Co.*, 95 Va. 648; *Croft v. Northwestern S. S. Co.*, 20 Wash. 175.

Special allegations control general. *Missouri &c. R. Co. v. Vance*, (Tex. Civ. App.) 41 S. W. Rep. 156; *Bedford v. Woody*, (Ind.) 53 N. E. Rep. 838.

Damages for permanent injuries need not be specially alleged. *San Antonio &c. R. Co. v. Weigers*, 22 Tex. Civ. App. 344.

As to what general allegations in regard to injuries lets in proof as to special injury, see further, *Mullady v. Brooklyn Heights R. Co.*, 65 App. Div. 549; *Bodie v. Charleston &c. R. Co.*, 61 S. C. 468; *St. Louis &c. R. Co. v. Kelton*, (Tex. Civ. App.) 66 S. W. Rep. 887.

In case of derailment of train the particulars of such negligence need not be stated. *Clark v. Chicago &c. R. Co.*, 15 Fed. Rep. 588.

See *Lucas v. Wattls*, 49 Miss. 380; *Keating v. Brown*, 30 Minn. 9.

Allegation that the defendant furnished a defective brake was sufficient in an action based on the negligence of its servant. *Mentor v. Union Pacific R. Co.*, 3 Utah, 500.

Shipper is not required to set up a special contract exacted by carrier. It is a matter of defense. *Southern Pac. R. Co. v. Arnett*. 111 Fed. Rep. 849.

That fence was out of repair "so that" an animal escaped, sufficiently connects the non-repair with the escape. *Lucia v. Meech*, 68 Vt. 175.

Allegation of legal duty is not necessary when facts show its existence. *Brothers v. Rutland R. Co.*, 71 Vt. 48.

That carrier failed to properly secure, adjust, and fasten the trap door which caused the injury is sufficient. *Washington v. Spokane Street R. Co.*, 13 Wash. 9.

So is an allegation that the deceased was a workman of the defendant and was killed by defendant's negligence and left a child, &c., constitutes a cause of action, also, that child suffered pecuniary damage. *Kelley v. Chicago &c. R. Co.*, 50 Wis. 381.

As to what special bodily injury may be proved on general allegation of injury, see *Delhi v. Chicago &c. R. Co.*, 51 Wis. 400.

A charge as to specific injuries includes such injuries as are so closely connected as to be considered a part thereof. *Mauch v. City of Hartford*, 112 Wis. 40.

As to examples of allegations sufficiently specific in this respect, see *Echolz v. Niagara Falls &c. Co.*, 68 App. Div. 441; *Illinois C. R. Co. v. Cheek*, 152 Ind. 663; *Salina v. Kerr*, 7 Kan. App. 223; *Marshall v. McAllister*, 18 Tex. Civ. App. 159; *Clukey v. Seattle Electric Co.*, 27 Wash. 70.

IV. Earnings and Loss of Time.

(See "Damages," p. 834.)

The nature of plaintiff's employment and the value of his earnings need not be specially pleaded, but are admissible under averment that he was prevented for one month from attending to his business. *Doherty v. Lord*, 8 Misc. (N. Y.) 227.

Complaint need not allege in words that plaintiff will be deprived of his wife's society where the facts alleged show it. *Indianapolis Street R. Co. v. Robinson*, 157 Ind. 414.

Evidence of loss of time and earnings is not admissible under an averment that "the injury is permanent and will render the plaintiff a cripple for life." *Slaughter v. Met. Street R. Co.*, (Mo.) 23 S. W. Rep. 760.

Mellor v. Railroad Co., 105 Mo. 455; *Coontz v. Railroad Co.*, (Mo.) 22 S. W. Rep. 572; *Duke v. Railroad Co.*, 99 Mo. 347; *Smith v. Railroad Co.*, 108 id. 243; *Norton v. Railroad Co.*, 40 Mo. App. 642; *Rhodes v. Nevada*, 47 id. 499; *Winter v. Railroad Co.*, 74 Iowa, 448; *Railroad Co. v. Simcock* (Tex.) 17 S. W. Rep. 47; *Britton v. Railroad Co.*, (Mich.) 51 N. W. Rep. 276.

Under an allegation, in an action for injuries received, that the plaintiff is unfitted for carrying on his vocation and has lost and will lose the earnings of his labor, evidence of damage from loss of earnings is admissible. *Gerdes v. Christofer &c. Co.*, (Mo.) 25 S. W. Rep. 557.

Houston &c. R. Co. v. Boehm, 9 Am. & Eng. R. Cas. (Tex.) 366.

Evidence of inability to earn such wages after an injury as plaintiff had obtained before, was admissible evidence under the allegation, "that by reason of said injuries plaintiff has suffered great bodily and mental anguish, and has been unable to follow his business or perform any kind of labor." *Gurley v. Missouri Pac. R. Co.*, (Mo.) 26 S. W. Rep. 953.

Smith v. Railroad Co., (Mo.) 23 S. W. Rep. 784; *Britton v. St. Louis*, 25 id. 366; *Luck v. Ripon*, 52 Wis. 196; *Wade v. Le Roy*, 20 How. 34; *Railroad Co. v. Savage*, 110 Ind. 157; *Bloomington v. Chamberlain*, 104 Ill. 208.

Proof of specific trade at which plaintiff had been earning money was inadmissible in the absence of averment of special damages. *Krueger v. Chicago &c. R. Co.*, 94 Mo. App. 458.

In action for loss of time and earnings, the value thereof need not be alleged. *Mabrey v. Cape Girardeau &c. R. Co.*, (Mo. App.) 69 S. W. Rep. 394.

Allegation of the time plaintiff was confined to his bed and a statement of the amount he was earning at the time of the injury, warrants the consideration of plaintiff's loss of time as an element of damage. *Galveston &c. R. Co. v. Templeton*, (Tex.) 25 S. W. Rep. 135.

Hanover &c. R. Co. v. Coyle, 55 Pa. St. 396; *Campbell v. Wing*, (Tex.) 24 S. W. Rep. 360.

V. Appointment of Administrator.

Where allegation states the granting of unrestricted letters, appointment under limited letters cannot be shown. *Kirwin v. Malone*, 45 App. Div. 93.

That plaintiff was "duly" appointed administratrix, is sufficient. *Boyle v. Southern R. Co.*, 36 Misc. 289.

So, that plaintiff is the "duly qualified and acting administrator." *Collins v. O'Lavery*, 136 Cal. 31.

Complaint made no allegation as to appointment or profert of letters. It was demurrable. *Foster v. Adler*, 84 Ill. App. 654.

Administrator need not show his appointment or profert of letters. *McDowell v. North*, 24 Ind. App. 435.

An appointment of an administrator must be alleged. *City of Atchison v. Twine*, 9 Kas. 350.

Haggerty v. Hughes, 4 Baxter, 422.

But where the plaintiff sue as administratrix and refers to the deceased as "plaintiff's intestate" it was sufficient. *Louisville &c. R. Co. v. Trammell*, 9 South Rep. 870.

Allegation of appointment is insufficient where it fails to allege the state, county or court making it. *Hamilton v. McIndoo*, 81 Minn. 324.

Allegation that executors were duly appointed and duly qualified, will be allowed. *Jerkowski v. Marco*, 56 S. C. 241.

Allegation failed to state whether qualification was as a regular or independent executrix. As it was not excepted to, proof that it was in fact the latter was allowed. *Ellis v. Mabry*, (Tex. Civ. App.) 60 S. W. Rep. 751.

Allegation that letters have been issued, need not be added to allegation that petitioners have duly qualified. *Boyer v. Robinson*, 26 Wash. 117.

The appointment of an administrator is not brought in issue by a general denial. *Ewen v. Chicago &c. R. Co.*, 38 Wis. 613.

Union R. Co. v. Hacklet, 119 Ill. 232.

VI. General Denial.

Denial of "all the allegations" contained in a certain paragraph of a complaint, is a good general denial. *Donovan v. Main*, 77 N. Y. Supp. 229.

See, also, *Althouse v. Town of Jamestown*, 91 Wis. 46.

General denial does not put in issue the question of whether defendant is a corporation. *Riley v. Metropolitan Street R. Co.*, 36 Misc. 789.

Under general denial the defendant may show that he was not negligent. *Kendig v. Overhulser*, 58 Iowa, 195.

General denial of negligence, although not of the particular facts alleged, is sufficient. *Louisville &c. R. Co. v. Wolff*, 80 Ky. 82.

Allegations of a special plea following a general denial are not admissions. *Gillett v. Missouri &c. R. Co.*, (Tex. Civ. App.) 68 S. W. Rep. 61.

General traverse raises the question of contributory negligence. *Clark v. Canadian &c. R. Co.*, 73 Fed. Rep. 76.

VII. Demurrer.

A demurrer to a complaint for injury admits only nominal damages, and the plaintiff must prove anything beyond that. *Nolan v. N. Y. R. Co.*, 53 Conn. 461.

For pleading in action by wife, see "Damages," p. 842.

VIII. Contributory Negligence.

See "Contributory Negligence," p. 856.

Freedom from negligence need not be pleaded. *Southern I. R. Co. v. Peyton*, 157 Ind. 690; *Indianapolis &c. R. Co. v. Robinson*, id. 414; *Davis Coal Co. v. Polland*, 158 Ind. 607; *Citizens' Street R. Co. v. Heath*, (Ind. App.) 62 N. E. Rep. 107; *Evansville v. Christy*, (Ind. App.) 63 N. E. Rep. 867; *Winchester v. Carroll*, 99 Va. 727; *Berry v. Lake Erie &c. R. Co.*, 70 Fed. Rep. 193; *Buchner v. Richmond &c. R. Co.*, 72 Miss. 873; *Johnson v. Bellingham Bay*, 13 Wash. 455; *Reading Twp. v. Telfer*, 57 Kan. 798; *Matthews v. Bull*, (Cal.) 47 Pac. Rep. 733; *Valley v. Concord &c. R. Co.*, 68 N. H. 546; *Pueschell v. Sutherland*, 79 Mo. App. 459.

Plaintiff need not allege freedom from contributory negligence except where contributory negligence itself, is an inference to be drawn from the facts stated. *Cummings v. Helena &c. Co.*, 26 Mont. 434.

In which case the complaint must raise such a presumption against plaintiff as to justify the direction of a verdict. *Union v. Hester*, 8 Kan. App. 725.

See, also, *Warshawski v. Raritan Tract. Co.*, (N. J. L.) 52 Atl. Rep. 296; *Street R. Co. v. Nolthenius*, 40 Ohio St. 376; *Lopez v. Central R. Co.*, 1 Ala. 464; *Dallas &c. R. Co. v. Specker*, 61 Tex. 427.

Complaint need not allege that the plaintiff's negligence did not contribute where the fact stated therein shows that it did not. *Brockett v. Fair Haven &c. P. Co.*, 73 Conn. 428.

Alexander &c. Min. Co. v. Irish, 16 Ind. App. 534; *Summit Coal Co. v. Shaw*, 16 id. 9; *Galveston &c. R. Co. v. Bohan*, (Tex.) 47 S. W. 1050, 1052; *Hillsboro v. Jackson*, 18 Tex. Civ. App. 325.

For example, when the complaint shows plaintiff is a child of the age of four years. *Elwood Electric R. Co. v. Ross*, 26 Ind. App. 258.

Or a child is seven; the question whether he is chargeable with negligence being for the jury. *Ellwood v. Addison*, 26 Ind. App. 28.

Question of contributory negligence cannot be raised upon a non-suit. *Winkler v. Carolina &c. R. Co.*, 126 N. C. 370.

Contributory negligence being a matter of defense.

Kansas City v. Smith, 8 Kan. App. 82; *Lee v. Reliance Mills*, 21 R. I. 322; *Illinois C. R. Co. v. Davis*, 104 Tenn. 442; *Conroy v. Oregon &c. R. Co.*, 23 Fed. Rep. 71; *McDugal v. Central &c. R. Co.*, 63 Cal. 431.

It must be set up by defendant.

Smith v. Southern R. Co., 129 N. C. 374; *City of Winchester v. Carroll*, 99 Va. 727; *Dupre v. Alexander*, (Tex. Civ. App.) 68 S. W. Rep. 739.

Defendant must set it up in an action for malpractice. *Decauter v. Simpson*, 115 Iowa, 348.

See, also, *Cogdell v. Wilmington &c. R. Co.*, 130 N. C. 313.

An averment that the plaintiff was free from negligence contributing to the injury was not required in the following instances:

The allegation that the injury was caused by the defendant's negligent act involves the statement that contributory negligence was absent. *Lee v. Troy City G. L. Co.*, 98 N. Y. 115.

In an action by administrator his negligence need not be negatived. *Indianapolis Man. Co. v. Millican*, 87 Ind. 87.

Statement that the plaintiff was without fault negatived contributory negligence. *Rogers v. Overton*, 87 Ind. 410.

Gheens v. Golden, 90 Ind. 427.

Where there was an allegation that the fire was caused wholly by defendant's negligence while the same escaped from his premises. *Brinkman v. Bender*, 92 Ind. 234.

Where the act was alleged to have resulted from the defendant's negligence. *Benford &c. R. Co. v. Rainbolt*, 99 Ind. 551.

Allegation of willfulness relieves plaintiff of alleging want of care on his own part. *Baltimore &c. R. Co. v. Keck*, 84 Ill. App. 159.

Plaintiff need not allege freedom from imputed negligence. *Elenz v. Conrad*, 115 Iowa, 183.

Freedom from contributory negligence must be affirmatively alleged. *Chicago &c. R. Co. v. Eselin*, 86 Ill. App. 94; *Stephens v. Lafayette R. Co.*, 9 Ind. 392; *Baltimore &c. R. Co. v. Young*, 146 Ind. 374; *Lake Shore &c. R. Co. v. Boyts*, 16 Ind. App. 640; *Guthrie v. Nix*, 3 Okla. 136.

See further. *West Chicago S. R. Co. v. Boeker*, 70 Ill. App. 67; *Wabash R. Co. v. Miller*, 18 Mo. App. 549; *Miller v. Miller*, 19 Ind. App. 605; *Sale v. Amora*, 147 Ind. 324.

So, no recovery is allowed where facts stated, failed to show no such freedom and there is no allegation of a lack thereof. *Gartey v. Meredith*, 153 Ind. 16.

Not only no fault, but no knowledge of danger, must be alleged. *Daugherty v. Midland Steel Co.*, (Ind.) 53 N. E. Rep. 844.

But failure to do so will not invalidate judgment. *Baltimore &c. R. Co. v. Then*, 159 Ill. 535; aff'g s. c., 59 Ill. App. 561.

But the facts constituting freedom need not be alleged. *Chesapeake &c. R. Co. v. Smith*, 101 Ky. 104.

Brothers v. Rutland R. Co., 71 Vt. 48.

Though freedom from negligence need not be pleaded ordinarily, it must be where the complaint shows plaintiff's own act was the proximate

cause of injury. *Cummings v. Helena &c. R. Co.*, (Mont.) 68 Pac. 852.

See, also *Kennon v. Gelner*, 4 Mont. 433; *Abrams v. City of Waycross*, 114 Ga. 712.

Though the answer does not set up contributory negligence. *Clark v. Oregon &c. R. Co.*, 20 Utah, 401.

98 N. Y. 115.

An averment that the plaintiff was free from negligence contributing to the injury was required in the following instances:

Contributory negligence not negated by allegations of defendant's negligence notwithstanding. *Louisville &c. R. Co. v. Brown*, 121 Ala. 221.

Where complaint charges negligence only, and not willfulness plaintiff must allege freedom from contributory negligence. *Garten v. Meredith*, 153 Ind. 16.

PRIVATE PREMISES.

I. INJURY FROM THE USE THEREOF.

- (a) Explosions.
- (b) Blasting.
- (c) Gunpowder.
- (d) Falling buildings and walls.
- (e) Discharging water upon or diverting water from premises of another.
 - 1. Flooding land by railroad.
- (f) Unwholesome and offensive occupations.
- (g) Lateral support.
- (h) Premises adjoining one another.
- (i) Miscellaneous cases.

II. INJURIES THEREON.

- (a) Trespassers.
 - 1. Children.
- (b) Mere licensees, invitees, &c.
 - 1. Customary and frequented places.
 - 2. Premises adjoining the street.
- (c) Visitors on business and places of amusement.
- (d) Premises creating an attraction.
 - 1. To people in general.
 - 2. To children.

III. RAILROAD PREMISES.

- (a) General principles.
- (b) Who is a trespasser.
 - 1. In general.
 - 2. At crossings.
 - 3. Along highways.
- (c) Duty and degree of care to trespassers.
 - 1. In general.
 - 2. No duty arises till actually discovered.
 - 3. Right to presume that train will be avoided.
 - 4. When duty arises after he is seen.
 - 5. When company does not have to keep a lookout.
 - 6. When it must keep a lookout.
 - 7. And signal.
 - 8. Especially where it is a customary way.
 - 9. Unnecessary force must not be used in expelling.

10. Duty and degree of care as to children.
11. When company is liable.
12. Speed of trains.
- (d) Duty and degree of care by trespassers.
 1. Degree of care in general.
 2. When company is not liable.
 3. Children and defective people.
 4. When company is not liable.
- (e) Customary places.
- (f) Places adjoining the railroad.
- (g) Who is a licensee.
- (h) Duty and degree of care to licensees.
- (i) When company is liable.
- (j) Duty and degree of care by licensees.
- (k) When company is not liable.

NATURE OF OWNER'S LIABILITY. —The extent to which a person may use his own premises without incurring liability for injury to the person or property of another, resulting from such use, cannot, in view of the decisions, be stated in an acceptable general rule. In *Booth v. Railway Co.*, 140 N. Y. 267, *post*, p. 2069, it is said that the test of the permissible use of one's own land, is not whether the use or act causes injury to his neighbor's property, or whether the injury was the natural consequence, or the act was in the nature of a nuisance, but whether the act or use was a reasonable exercise of the dominion which the owner of property has by virtue of his ownership, having regard to all interests affected, his own and those of his neighbors, and having also in view public policy. The essential inquiry here is whether the liability for injury arising in the use of private premises is determinable by the law of negligence, or by the law of trespass or nuisance. In considering this question it should always be remembered that willful injury is not adjudged by the rules governing the laws of negligence and also that such reckless and wanton disregard of another's rights, or such gross negligence as indicates entire indifference to the safety of person or property, is often equivalent to willful injury. With this in mind it may be stated that generally in an action at law for an injury resulting from doing an act in itself lawful, if done with proper care, the liability depends upon the negligence of the person charged. *Booth v. Railroad Co.*, 140 N. Y. 267; *Radcliff's Executors v. May*, 4 Comst. 201. For aside from the keeping of domestic animals (*ante*, p. 998), the occupations of innkeepers and common carriers, a person is not, in doing a lawful act, bound to insure the safety of others. And here a distinction must be maintained between an injury that the wrongdoer knows will necessarily result, or *is resulting* from this act, such as continuing an occupation or conditions injurious to the exercise of the rights of others, and an unintended injury arising at once and unexpectedly in the attempted doing of a lawful act. Of the former class are those cases where slaughter houses, fat and offal boiling establishments, hog styes, or tallow manu-

factories, in or near a city,* which are offensive to the senses and render the enjoyment of life and property uncomfortable; so the permanent use of premises in a manner which causes a noise so continuous and excessive as to produce serious annoyance. *Heeg v. Licht*, 80 N. Y. 579.

In such cases the injurious act is not one arising from negligence, but is the deliberate and continuing doing an act which the wrongdoer *knows, does and inevitably must*, infringe the rights of others. But when a person attempts to do an act which is useful, usual or necessary, and lawful if done under proper conditions, and injury unexpectedly results, it is not harmonious with usual legal principles to declare that he does it at the peril of being adjudged guilty of absolute and inexcusable wrong, if he errs in judgment as to the proper time, place or occasion for performing it.

GUN POWDER-KEEPING.—A person may be adjudged guilty of negligence *per se* for keeping gun powder in a particular place, or in unduly large quantities, or in a state of improper exposure, but if he has a right to keep it, whether he keeps it in reasonable amounts, and in reasonable security, should be determined under the laws of negligence, for reasonableness in this regard cannot be determined by the law of trespass, when there is no latitude for discrimination or distinction. It was held in *Heeg v. Licht*, *supra* (see case and opinion, p. 2074), that the keeping of gun powder was not necessarily a nuisance *per se*, but that the question whether it was a nuisance depended upon the locality, the quantity and the surrounding circumstances. "By virtue of such holding a right to keep gun powder becomes a pure tort, if the keeper err in judgment as to the proper number of pounds that should be kept, in the choice of a suitable locality, or any other condition that a court or jury might not approve. But if it is a question of fact whether the keeper of gun powder has *reasonably* exercised his right, the question would seem necessarily to turn upon his negligence, that is, whether he had kept it in such a place or in such a manner as a man of ordinary prudence would exercise under the circumstances.

BLASTING.—The same principles apply to the use of blasting materials. It is not unlawful to blast upon private premises, if it be done in the exercise of reasonable care. *Booth v. Railway Co.*, 145 N. Y. 267. Nevertheless it has been held that a defendant lawfully excavating by blasting on his own land was, at his peril, absolutely bound to prevent material from being cast beyond his premises to the injury of others. *Hay v. Cohoes*, 2 N. Y. 159. In *Losee v. Buchanan*, 51 N. Y. 446, it is said that "this decision was well supported by the clearest principles," but it is added that "the damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means; and thrown directly upon plaintiff's land." The last statement may be correct in connection with the asserted fact that the injury was the *necessary* consequence of the act; but otherwise it is in seeming conflict with *Booth v. Railway Co.*, *supra*. From the apparent holding in *Colton v. Onderdonk*, 69 Cal. 155 (*post*, p. 2072), it might be con-

*NOTE.—In the case cited these wrongs are termed *private* nuisances; but if they be *private* nuisances, how is it material that the person injured dwells "in or near a city." Is not the law as solicitous to protect the rights of an individual, if he alone reside near to the objectionable conditions, as if he and many others reside near to it.

cluded that the question of negligence would not be involved in the case of a similar injury from blasting, but the holding in effect is that if a person is guilty of a wrong in blasting in a particular locality, no degree of care in the actual conduct of the blast will excuse the primary tort. This case illustrates that the negligence may consist as much in blasting at all, as in failure to use due care in operating the blast. For the person must use due care in determining whether the locality is a proper place for blasting, as well as in the actual blasting itself.

. **EXPLOSIONS.**—The rule is generally adopted that a person is not liable for the explosion of boilers, or explosive substances, on his own premises, unless the same resulted from his negligence (*post* p. 2062). *Losee v. Buchanan*, 51 N. Y. 476 (*post*, p. 2062); *Cosulich v. Standard Oil Co.*, 122 N. Y. 118, and cases there cited; *Bohan v. Port Jervis Gas Co.*, 122 N. Y. 18 (*post*, p. 2091). See, also, cases collected under "Evidence," p. 1095.

WATER, INTERFERENCE WITH.—There is a distinction between the use of water, to which a party is entitled, whereby the water itself does direct injury to the person or property of another, as where it is confined on his own premises by a dam, and escapes, doing injury, and the diversion or retention of water so as to deprive another of a rightful use thereof. The latter case does not involve the law of negligence. It is simply the taking of that which belongs to another. The maxim *aqua currit et debet currere*, "absolutely prohibits an individual from interfering with the natural flow of water to the prejudice of another riparian owner, upon any pretense, and subjects him to damages at the suit of any party injured, without regard to any question of negligence or want of care." *Bellinger v. Railway Co.*, 23 N. Y. 47; *Losee v. Buchanan*, 51 *id.* 476. This maxim would apply even if water, unlawfully detained or diverted, should thereafter so flow or escape as to directly injure another. The primary wrong is an unlawful interference with the natural flow of the stream. *Pixley v. Clark*, 35 N. Y. 520. In *Losee v. Buchanan*, 51 N. Y. 476 (*post*, p. 2062), it is said of this authority that, "it was a case of flooding lands by damming up the water of a stream, and the liability of a wrongdoer in such case has never been disputed."

If, however, the water is the property of the alleged wrongdoer, he is only liable in case of his negligence for injury resulting from an attempted retention and collection of the same on his own premises, unless the injury was necessarily and directly injurious, as where the wrongdoer knew that the necessary consequence of keeping water would be to flood the land of another. *Losee v. Buchanan*, 51 N. Y. 476 (*post*, p. 2062). But the general rule is that if one build a dam upon his own premises, and thus hold back and accumulate the water for his benefit, or if he bring water upon his premises into a reservoir, and the dam or banks of the reservoir give way, and the lands of a neighbor are thus flooded, he is not liable without proof of some fault or negligence. See authorities, *post*, p. 2063.)

Collecting and turning water upon another.—But a different rule prevails when the wrong complained of consists in doing damage to neighboring property by collecting surface water on a public street, or diverting it from its accustomed channel thereon, and throwing it upon the land of another. In such case the wrongdoer is liable irrespective of the question of negligence, and it seems that a license from the municipality will not protect

him, and that a municipality cannot delegate power to a private individual for his own benefit, to do injury to the property of his neighbors, although the municipality might itself be relieved to an extent from making compensation for injuries resulting from the exercise of powers *legally* granted to it for public purposes. *Mairs v. Manhattan &c. Ass'n*, 89 N. Y. 498. (See cases and opinions, *post*, p. 2079.)

Statutory sanction, which will justify a similar injury to private property, must be express or clearly implied from the powers conferred, and must legally authorize the very act occasioning the injury; when the terms of the statute are only permissive, they do not confer a license to commit an act which would otherwise be a nuisance, as powers conferred by statute are construed as privileges, and are to be exercised in strict conformity to private rights. (*post*, pp. 2080-2082, 2091.)

So, a person cannot so adjust *his premises* as to collect and conduct therefrom water upon the premises of his neighbors, irrespective of the question of negligence. *Jutte v. Hughes*, 67 N. Y. 204; (see same rule as to a municipality, *Byrnes v. City of Cohoes*, 67 N. Y. 204; see, also, *ante*, p. 1901); *Mairs v. Manhattan Ass'n*, 89 N. Y. 498; *Brown v. Railway Co.*, 12 *id.* 486.

Nor may a landowner, by artificial structure of any kind upon his own land, cause the water which collects thereon in rain or snow, to be discharged upon his neighbor's land or the public street, either in a current or stream or in drops. *Shipley v. Fifty Associates*, 106 Mass. 194. (See case and opinion, *post*, p. 2081.)

UNWHOLESOME AND OFFENSIVE OCCUPATIONS.—Any use of private premises which carries destructive vapors and noxious smells, smoke or injurious substances, or disturbance by way of noise, except for temporary and necessary purposes, to those in proximity to it, is unlawful, and the wrongdoer is liable irrespective of the question of negligence. This is upon the theory that the damage is the *necessary consequence* of such use, and statutory authority to so use premises will not justify it, unless it be given by express terms or by clear and unquestionable implication. *Bohan v. Port Jervis &c. Co.*, 122 N. Y. 18. (See case and opinion, *post*, p. 2091.)

Cogswell v. Railway Co., 103 N. Y. 10 (*post*, p. 2091); *Albee v. Chappaqua &c. Co.*, 62 Hun. 223 (*post*, p. 2095); *Campbell v. United States Foundry Co.*, 73 Hun. 576.

LATERAL SUPPORT.—It has been stated as a general rule, that a man may not dig so near the land of his neighbor as to cause the land of the latter to fall into his pit, thus transferring a portion of another man's land to his own, for every man, it is said, has the natural right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the adjacent soil, and for the purposes of such support he has an easement in his neighbor's soil. *Farrand v. Marshall*, 21 Barb. 409, quoted in *Losee v. Buchanan*, 51 N. Y. 476.

The foregoing doctrine was taken from a *dictum* in 2 Rolles' Abridgment, Trespass I, pt. 1 and the *dictum* was approved in *Thourston v. Hancock*, 12 Mass. 220, and *Lassala v. Holbrook*, 4 Paige, 169; to the same effect was *Transportation Co. v. Chicago*, 99 U. S. 635; but declared unsound, especially in reference to property in cities and large towns, in *Radcliff's Executors v. Mayor*, 4 Comst. 203. However the rule may be, there is a concurrence of authorities that a landowner will not be liable for the fall of a building on

adjoining premises by reason of such owner excavating his own land to the line thereof. Rolles' Abridgment, *supra*; Radcliff's Executors v. Mayor *supra*, and it is held that lateral support does not protect whatever has been placed upon the soil increasing the downward and lateral pressure, and that it must appear irrespective thereof, that the removal of the lateral support was the cause of the injury (cases *post*, pp. 2062, 2098).

But although one may remove the lateral support, he must use due care and skill in so doing or he will be liable for injury resulting from his negligence (cases *post*, p. 2098).

The matter is regulated by statute in the cities of New York and Brooklyn (see *post*, p. 2098.).

I. Injury from the Use Thereof.

(a). EXPLOSIONS.

Where one places a steam boiler upon his premises and operates the same with care and skill, so that it is no nuisance, in the absence of proof of fault or negligence upon his part, he is not liable for damages to his neighbor occasioned by the explosion of the boiler.

If the explosion was caused by a defect in the manufacture of the boiler, he is not liable in the absence of proof that such defect was known to him or was discoverable upon examination, or by the application of known tests.

Upon a trial of an action for damages occasioned by such an explosion, the fact that the boiler was purchased of reputable manufacturers is proper to be considered as tending to justify its use. *Losee v. Buchanan*, 51 N. Y. 476.

Distinguishing *Hay v. Cohoes Co.*, 2 N. Y. 159; affirming *Fletcher v. Ryland*, 11 Exch. (Law R.) 265; questioning 3 H. L. (Law R.) 330.

From opinion.—"The claim on the part of the plaintiff is, that the casting of the boiler upon his premises by the explosion was a direct trespass upon his right to the undisturbed possession and occupation of his premises, and that the defendants are liable just as they would have been for any other wrongful entry and trespass upon his premises.

I do not believe this claim to be well founded, and I will briefly examine the authorities upon which mainly an attempt is made to sustain it.

Lateral support.—In *Farrand v. Marshall*, 21 Barb. 409, it was held that a man may dig on his own land, but not so near that of his neighbor as to cause the land of the latter to fall into his pit, thus transferring a portion of another man's land to his own. This is upon the principle that every man has the natural right to the use of his land in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. He has a right to the support of the adjoining soil, and to that extent has an easement in his neighbor's soil and when the soil is removed his easement is directly interfered with. When one adjoining owner thus removes the soil, he is not doing simply what he may with his own, but he is interfering with the right which his neighbor has in the same soil. This rule, however, as stated by Judge Bronson, in *Rad-*

cliff's Executors v. Mayor &c. of Brooklyn, 4 Comst. 203, must undoubtedly be somewhat modified in its application to cities and villages.

Blasting.—In *Hay v. The Cohoes Co.*, 2 Comst. 159, the defendant, a corporation, dug a canal upon its own land for the purposes authorized by its charter. In so doing it was necessary to blast rocks with gunpowder, and the fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining. It was held that the defendant was liable for the injury, although no negligence or want of skill in executing the work was alleged or proved. This decision was well supported by the clearest principles. The acts of the defendant in casting the rocks upon plaintiff's premises were direct and immediate. The damage was the necessary consequence of just what the defendant was doing, and it was just as much liable as if it had caused the rocks to be taken by hand, or any other means, and thrown directly upon plaintiff's land. This is far from an authority for holding that the defendants, who placed a steam boiler upon their lands, and operated the same with care and skill, should be liable for the damages caused by the explosion, without their fault or any direct or immediate act of theirs. It is true that Judge Gardner, in writing the opinion of the court, lays down broadly the principle that 'every individual is entitled to the undisturbed possession and lawful enjoyment of his own property,' citing the maxim *sic utere tuo*, &c. But this example, as well as the maxim, as will be seen, has many exceptions and limitations, made necessary by the exigencies of business and society.

Interference with water.—In *Bellinger v. The New York C. R. R. Co.*, 23 N. Y. 47, it was decided that where one interferes with the current of a running stream, and causes damage to those who are entitled to have the water flow in its natural channel, but such interference is in pursuance to legislative authority granted for the purpose of constructing a work of public utility, upon making compensation, he is liable only for such injury as results from the want of due skill and care in so arranging the necessary works as to avoid any danger reasonably to be anticipated from the habits of the stream and its liability to floods. Judge Denio, in his opinion, referring to the maxim *aqua currit et debet currere*, says it 'absolutely prohibits an individual from interfering with the natural flow of water to the prejudice of another riparian owner upon any pretense, and subjects him to damages at the suit of any party injured without regard to any question of negligence or want of care.' The liability in such cases is based upon the principle that the interference is an immediate and direct violation of the right of the other riparian owners to have the water flow in its natural channel. No one has an absolute property in the water of a running stream. He may use it, but he must not, by the use of it, interfere with the equal rights which other riparian owners have also to use it, and have it flow in its natural way in its natural channel.

In *Pixley v. Clark*, 35 N. Y. 520, it was held that if one raises the water in a natural stream above its natural banks, and to prevent its overflow constructs embankments which answer the purpose perfectly, but by the pressure of the water upon the natural banks of the stream, percolation takes place so as to drain the adjoining lands of another, an action will lie for the damages occasioned thereby, and that it matters not whether the damage is occasioned by the overflow of or the percolation through the natural banks, so long as the result is occasioned by an improper interference with the natural flow of the stream. This decision was an application of the maxim *aqua currit et debet currere* to

the facts of that case. It was held that the liability was the same whether the water was dammed up and caused to overflow or percolate through the banks of the stream. It was a case of flooding lands by damming up the water of a stream, and the liability of a wrongdoer in such a case has never been disputed.

In the case of *Selden v. The Delaware and Hudson Canal Co.*, 24 Barb. 362, it was held that the defendant had the power, under its charter, to enlarge its canal, but that, though it possessed this power, and upon making compensation therefor to take private property for that purpose, it was liable to remunerate individuals in damages for any injuries they might sustain as the consequences of such improvement; and that, if by means of the enlargement, a lawful act in itself, the lands of an individual were inundated, even though the work may have been performed with all reasonable care and skill, it was a legal injury, for which the owner was entitled to redress. It may well be doubted if this decision can stand in view of the principles laid down in the case of *Bellinger v. The New York Central Railroad Co.*, *supra*. Within the principles of that case, if the Delaware and Hudson Canal Company exercised a power conferred upon it by law in a lawful and proper manner, it could not be held liable for the *consequential* damages necessarily occasioned to the owners of adjoining lands. But if we assume, as we assumed at the general term in that case, that the defendant did not have the protection of the law for the damages which it occasioned, then it was clearly liable. Its acts were necessarily and directly injurious to the plaintiff. It kept the water in its canal when it knew that the necessary consequence was to flood the plaintiff's premises. The damage to plaintiff was not accidental, but continuous, direct and necessary. In such a case the wrongdoer must be held to have intended the consequence of his acts, and must be treated like one keeping upon his premises a nuisance doing constant damage to his neighbor's property.

Shaking of buildings.—In the case of *McKeon v. Lee*, 4 Rob. Supr. Ct. R. 449, it was held that the defendant had no right to operate a steam engine and other machinery upon his premises so as to cause the vibration and shaking of plaintiff's adjoining buildings to such extent as to endanger and injure them. This case was decided upon the law of nuisances. It was held that the engine and machinery, in the mode in which they were operated, were a nuisance, and the decision has been affirmed at this term of this court. (51 N. Y. 494.) The decision in this case, and in scores of similar cases to be found in the books, is far from an authority that one should be held liable for the accidental explosion of a steam boiler which was in no sense a nuisance. * * *

Interference with water.—But our attention is called to a recent English case decided in the exchequer chamber, which seems to uphold the claim made. In the case of *Fletcher v. Rylands*, 1 Ex. 265, Law Reports, the defendants constructed a reservoir on land separated from the plaintiff's colliery by intervening land. Mines under the site of the reservoir and under part of the intervening land, had been formerly worked; and the plaintiff had, by workings lawfully made in his own colliery and in the intervening land, opened an underground communication between his colliery and the old workings under the reservoir. It was not known to the defendants nor to any person employed by them in the construction of the reservoir, that such communication existed, or that there were any old workings under the site of the reservoir, and the defendants were not personally guilty of any negligence; but in fact, the reservoir was constructed over five old shafts, leading down to the workings. On the reservoir

being filled, the water burst down these shafts and flowed, by the underground communication, into the plaintiff's mines. It was held, reversing the judgment of the court of exchequer, that the defendants were liable for the damages so caused, upon the broad doctrine that one who, for his own purposes, brings upon his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. Mr. Justice Blackburn, writing the opinion of the court, says: 'The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escapes out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the court of exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more;' and he reaches the conclusion that it is an absolute duty, and that the liability for damage from the escape attaches without any proof of negligence. This conclusion is reached by the learned judge mainly by applying to the case the same rule of liability to which owners are subjected by the escape of their live animals. As I have shown above, the rules of law applicable to live animals should not be applied to inanimate property. That case was appealed to the house of lords and affirmed (3 H. L. Law. Rep. 330), and was followed in *Smith v. Fletcher*, 20 W. R. 987.

It is sufficient, however, to say that the law, as laid down in those cases, is in direct conflict with the law as settled in this country. Here, if one builds a dam upon his own premises, and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part. *Angell on Watercourses*, sec. 336; *Taphan v. Curtis*, 5 Vt. 371; *Todd v. Cochell*, 17 Cal. 97; *Everett v. Hydraulic &c. Co.*, id. 225; *Shrewsbury v. Smith*, 12 Cush. 177; *Livingston v. Adams*, 8 Cowen, 175; *Bailey v. Mayor &c. of New York*, 3 Hill, 531; s. c., 2 Denio, 433; *Pixley v. Clark*, 35 N. Y. 520, 524; *Sheldon v. Sherman*, 42 id. 484.

The true rule is laid down in the case of *Livingston v. Adams*, as follows: 'Where one builds a mill-dam upon a proper model, and the work is well and substantially done, he is not liable to an action though it break away, in consequence of which his neighbor's dam and mill below are destroyed. Negligence should be shown in order to make him liable.'

Fires.—In conflict with the rule as laid down in the English cases is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet, 't has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage without proof of negligence. *Clark v. Foot*, 8 J. R. 442; *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 id. 424; *Lansing v. Stone*, 37 id. 15; *Barnard v. Poor*, 21 Pick. 378; *Tourtelot v. Rosebrook*, 11 Metc. 460; *Batchelder v. Heagan*, 18 Maine, 32. The rule as laid down

in *Clark v. Foot*, is as follows: 'If "A" sets fire to his own fallow ground, as he may lawfully do, which communicates to and fires the woodland of "B," his neighbor, no action lies against "A" unless there was some negligence or misconduct in him or his servant.' And this is the rule throughout this country except where it has been modified by statute. *Tourtlot v. Rosebrook* was an action to recover damages caused by a fire communicated to the plaintiff's land from a coal pit which the defendant lawfully set on fire upon his own land, and it was held that the burden was on the plaintiff to prove negligence on the part of the defendant.

In *Hinds v. Barton*, 25 N. Y. 544, and *Teall v. Barton*, 40 Barb. 137, sparks were emitted from a steam dredge used upon the Erie canal, and they set fire to neighboring buildings, and although the sparks were thrown directly upon the buildings it was held that the defendant could be made liable only by proof of negligence. In *Cook v. Champlain Transportation Co.*, 1 Denio 91, the buildings of the plaintiff were fired by sparks thrown thereon from defendant's steamboat upon Lake Champlain, and it was held that the defendant could be made liable only by proof of negligence. All these cases and the class of cases to which they belong are in conflict with the rule as claimed by the plaintiff. A man may build a fire in his house or his steam boiler, and he does not become liable without proof of negligence if sparks accidentally pass directly from his chimney or smoke-stack to the buildings of his neighbor. The maxim of *sic utere tuo, &c.*, only requires, in such a case, the exercise of adequate skill and care."

In consequence of an explosion in the defendant's works, a fire was communicated to the plaintiff's vessel. The defendant was not liable, as one need not conduct his business to save his neighbor from inevitable accident, and no negligence was shown. *Cosulich v. Standard Oil Co.*, 122 N. Y. 118.

Plaintiff's vault under the sidewalk was injured by a blast exploded by defendant while excavating a trench in the street in performing his contract with the city for such work. Nonsuit was granted for lack of evidence showing negligence in conducting the operations. *Holland House Co. v. Baird*, 169 N. Y. 136; rev'g s. c., 49 App. Div. 180.

Where there was no evidence of negligence in an explosion of gas on the part of a gas company, the plaintiff could not recover, the defendant not being an insurer but only bound to use reasonable care in view of the nature of the article dealt in. Defendant's employé went into the cellar with a candle to fix the gas pipes, but there was no evidence of his having lighted it. *Schaum v. Equitable Gas Light Co.*, 15 App. Div. 74.

Where there was no evidence that the explosion of a bottle of mineral waters which fell from a box which defendant's employé was unloading from its wagon, on the sidewalk of a street, occurred through any other cause than the negligence of such employé, plaintiff standing near by to take a car recovered. *Cole v. New York Bottling Co.*, 23 App. Div. 177.

Liability for an explosion of gas by reason of negligence in making a pipe connection is not excused under a clause in an application for gas,

exempting the company from explosions from any cause whatsoever during the "use of the gas," where the gas was not at the time turned on. *Bastian v. Keystone Gas Co.*, 27 App. Div. 584.

.. It was not error to charge the jury that if they found that the maintenance of a powder magazine in a given place was a nuisance, it was immaterial that it was exploded by lightning. *Prussak v. Huttron*, 30 App. Div. 66.

The maintenance and operation of a large fly wheel in a densely populated portion of a city is not negligence *per se* and its explosion is not prima facie evidence of negligence. *Piehl v. Albany R. Co.*, 30 App. Div. 166.

Purchaser of a heating apparatus left its valve open as far as directed by the manufacturer. No liability. *Kirby v. President, &c.*, 62 N. Y. Supp. 1110.

Negligence of a fireman in management of a boiler did not show incompetency. *Conrad v. Gray*, 109 Ala. 130.

Explosion of gunpowder was not the proximate cause of fire which would have occurred anyway. *Kinney v. Koppman*, 116 Ala. 310; s. c., 37 L. R. A. 497.

Negligence was for the jury, where the explosion of ammonia in a refrigerating machine may have been due to the inexperience of men in tightening nuts thereon. *Ryan v. Los Angeles Ice &c. Co.*, 112 Cal. 244.

Mill dust, explosive only under extraordinary conditions, does not ordinarily show the necessity of precautions. *Shufeldt v. Searing*, 59 Ill. App. 341.

Plaintiff approached a pipe, about to explode, after seeing that steam and water have begun to escape. No recovery. *Mandel v. Wheeler*, 59 Ill. App. 459.

Defendant was not allowed to set up negligence of a city in filling a trench containing gas pipes, where it had ample notice of the leak and opportunity to repair it. *Aurora Gas Light Co. v. Bishop*, 81 Ill. App. 493.

See, also, *Koplan v. Boston Gaslight Co.*, 177 Mass. 15.

Lack of opportunity to repair a boiler was no excuse. Use should have been discontinued. *Louisville &c. R. Co. v. Lynch*, 147 Ind. 165.

Vendee relied on statements that the boiler had been used, but only sufficiently to thoroughly test it. He was allowed recovery for an explosion resulting from defects, of which the vendor knew. *Fitzmaurice v. Puterbaugh*, 17 Ind. App. 318.

Defendant was held liable for an explosion caused by placing a tin sheet between a heating pot and a gasoline can. *Evans v. Hoggatt*, 9 Kan. App. 540.

Lessee's servants cannot recover for explosion due to a defect which lessor could not have discovered. *Whitmore v. Orono Pulp &c. Co.*, 91 Me. 297.

Defendant was negligent in assuming without investigation, that an escape of gas was due to a defective meter. *Consolidated Gas Co. v. Crocker*, 82 Md. 113.

Landlord's agent had a dangerous compound removed in such a way that it exploded and injured one interested with sublessee who had been invited on the premises by him. Recovery was allowed. *Baker v. Tibbets*, 164 Mass. 412.

Leakage of water and steam from an expansion joint in a steam pipe held not evidence of defectiveness. *Voight v. Michigan Peninsular Car Co.*, 112 Mich. 504.

Experts testified that conduction of nitro-glycerine in a hose pipe tended to cause an explosion. Question of whether it did or not, was for the jury. *Schoepper v. Hancock Chemical Co.*, 113 Mich. 582.

Defendant discharged his duty in notifying a partner of plaintiff that the tank of the wagon sent for repair contained oil which ought to be washed out before beginning work. *King v. National Oil Co.*, 81 Mo. App. 155.

Defendant's gas was turned on by a customer without his knowledge or consent and in spite of its warnings. No recovery. *Kohler Brick Co. v. Northwestern Ohio &c. Co.*, 11 Oh. C. C. 319.

Boiler was run by fireman instead of engineer but it was not shown that he did anything that an engineer would not have done. No recovery was allowed. *Brunner v. Blaisdell*, 170 Pa. St. 25.

Mere fact of explosion of boiler in charge of a tenant did not raise a presumption of knowledge against him in action by landlord. *Earle v. Arbogast*, 180 Pa. St. 409.

See, also, *Veith v. Hope Salt &c. Co.*, 51 W. Va. 96.

Shipper of cylinder of carbon dioxide was not liable in the absence of proof of actual negligence. *Kilbridge v. Carbon Di-Oxide &c. Co.*, 201 Pa. St. 552.

See, also, *Gibson v. Torbert*, 115 Iowa, 163.

Employé of a defendant manipulated by mistake the works of another company causing damage. Recovery was allowed. *Garner Citizens &c. Co.*, 198 Pa. St. 16.

As to a vendor's liability for failure to warn a purchaser of the explosive quality of a product, see *Waters-Pierce Oil Co. v. Davis*, (Tex. Civ. App.) 60 S. W. Rep. 453.

As to warning persons who come upon the premises unsolicited to witness the burning of a railroad wreck of the danger of an explosion of oil-tanks therein, see *Cleveland &c. R. Co. v. Ballentine*, 84 Fed. Rep. 935.

(b). BLASTING.

Operating through a contractor.—The defendant, lawfully excavating on its own land by blasting, threw rocks on the land of another and did damage, and was liable irrespective of the question of negligence. Evidence of negligence was not admissible unless exemplary damages were claimed. *Hay v. Cohoes Co.*, 2 N. Y. 159; *Tremain v. Cohoes Co.*, 2 id. 163.

See comments on these cases in *McCafferty v. Spuyten Duyvil &c. Co.*, 61 N. Y. 185, 187-195; also in *Losee v. Buchanan*, 51 N. Y. 476.

The defendant was blasting, in the course of the enlargement of the Erie canal, under a contract from the state, and earth and stone were so thrown as to fall upon and injure the plaintiff, who was upon the adjoining premises, and who had no knowledge that the blast was about to be fired. It was held that the defendant was bound to adopt such precautions as would prevent missiles from reaching the plaintiff or give him timely notice, so that he might escape, and the plaintiff was not bound, without notice, to assume that the defendant would do a wrong and be on the watch. The contractor was not the agent of the state and the latter was not liable for the manner of doing the work. The defendant was liable. *St. Peter v. Denison*, 58 N. Y. 416.

The defendant was not liable for the negligent blasting of those who were building its road under contract. The owner is not liable for negligent acts of another on his land unless the relation of master and servant exists, or the work is *per se* dangerous, or there is some omission of duty on his part. *McCafferty v. S. D. & P. M. R. Co.*, 61 N. Y. 178.

See "Contractor," p. 631.

The powers granted to railroad corporations are to be exercised in strict conformity to private rights, and under the same responsibility, save in some exceptional cases, as if the acts done in execution of such powers were done by an individual.

Where a railroad corporation in making an excavation on its land for lawful purposes is obliged to resort to blasting, it is not liable for injury to a building on adjoining land, unless it appear that it failed to exercise due care. Such care must be commensurate with the danger and the blasting must be conducted with the most cautious regard of neighbors' rights.

The test as to the permissible use of, or action upon, one's own land, is not whether the use causes injury to a neighbor's property, or that the injury was the natural consequence, or that the act was in the nature of a nuisance, but is as to whether the act or use is a reasonable exercise of the dominion which the owner, by virtue of his ownership, has over

his property; having regard to all the interests affected, his own and his neighbors, and also having in view public policy. *Booth v. R., W. & O. T. R. Co.*, 140 N. Y. 267.

From opinion.—"Whether a particular act or thing constitutes a nuisance may depend on the circumstances and surroundings. The use of premises for mechanical or other purposes, causing great noise, disturbing the peace and quiet of those living in the vicinity, and rendering life uncomfortable, or filling the air with noxious vapors, or causing vibration of the neighboring dwellings, constitute nuisances, and such use is not justified by the right of property. *Fish v. Dodge*, 4 Denio, 311; *McKeon v. See*, 51 N. Y. 300; *Cogswell v. Railroad Co.*, 103 id. 10. These and like cases are those where the property of the owner is appropriated to a permanent use which is a constant and serious interference with the enjoyment by other property owners of their property. But there is a manifest distinction between acts and uses which are permanent and continuous and temporary acts which are resorted to in the course of adapting to some lawful use. For example, the erection of an iron building adjacent to a dwelling might, for the time being, cause as much noise and discomfort as would arise from conducting the business of finishing steam boilers on adjacent premises, but this would not constitute a nuisance, and the owner of the dwelling would have no remedy. The streets may be obstructed temporarily, subject to municipal regulations, for the deposit of building materials, and the party would not be chargeable with maintaining a nuisance. The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy.

The rule announced by the trial judge, that the use, by an owner of property, of explosives in excavating his land, is at his peril and imposes liability for any injury caused thereby to adjacent property irrespective of negligence, is far reaching. It would constitute, if sustained, a serious restriction upon the use of property and in many cases greatly impair its value. The situation in the city of New York furnishes an apt illustration. The rocky surface of the upper part of Manhattan island makes blasting necessary in the work of excavation, and, unless permitted, the value of lots, especially for business uses, would be seriously affected. May the man who has first built a store or warehouse or dwelling on his lot and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing when he comes to build on his lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent or tend to prevent the improvement of property. The first occupant in building on his lot exercised an undoubted legal right. But his prior occupation deprived his neighbor of no legal right in his property. The first occupant acquires no right to exclude an adjoining proprietor from the free use of his land, nor to use his own land to the injury of his neighbor subsequently coming there. *Platt v. Johnson*, 15 Jo. 213; *Thurston v. Hancock*, 12 Mass. 220; *Tipping v. St. Helena's Smelting Co., L. R.* (1 Ch. App.) 66; *Campbell v. Seaman*, 63 N. Y. 568. The fact of proximity

imposes an obligation of care, so that one engaged in improving his own lot shall do no unnecessary damage to his neighbor's dwelling, but it cannot, we think, exclude the former from employing the necessary and usual means to adapt his lot to any lawful use, although the means used may endanger the house of his neighbor.

We have found no case directly in point upon the interesting and important practical question involved in this appeal. It was held in the leading case of *Hay v. Cohoes Co.*, 2 N. Y. 159, that the right of property did not justify the owner of land in committing a trespass on the land of his neighbor, by casting rocks thereon in blasting for a canal on his own land for the use of his mill, although he exercised all due care in executing the work. In that case there was a physical invasion by the defendant of the land of the plaintiff. This the court held could not be justified by any consideration of convenience or necessity connected with the work in which the defendant was engaged. In the conflict of rights the court considered that public policy required that the right of the defendant to dig the canal on his own land must yield to the superior right of the plaintiff to be protected against an invasion of his possession by the act of the defendant. The case of *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156, was the case of an injury to the plaintiff's house, resulting from the jarring caused by the blasting of rocks in Hell Gate, and it was held that the injury was remediless, for the reason that the defendant was acting under the authority of the government of the United States by virtue of a contract authorized by Congress. It has been held that the keeping of gunpowder in large quantities near inhabited dwellings is a nuisance, and in the case of explosion subjects the party keeping it to liability for damages occasioned thereby. *Myers v. Malcolm*, 6 Hill, 292; *Heeg v. Licht*, 80 N. Y. 579. So also it has been held that the working of quarries by the use of gunpowder, to the injury of property in the vicinity, gives a right of action. *City of Tiffin v. McCormack*, 34 Ohio St. 638; *Scott v. Bay*, 3 Md. 431. Many of the cases cited by counsel are cases of the permanent appropriation of property for dangerous or noxious uses causing damage. The distinction between such cases and those where the injury arises from the acts done in the necessary adjustment of property for a lawful use by means necessary and not unusual, but involving damage to adjacent property, has been adverted to. We recognize the difficulty of formulating a general rule regulating the rights of adjacent land owners in the use of their property, and we realize how narrow the margin is which separates this from some decided cases. In *Marvin v. Brewster Iron Co.*, 55 N. Y. 557, the opinion of the learned judge who wrote in the case sustains the conclusion we have reached in this case."

The court substantiates the position taken in the foregoing case by the following analogous holdings:

If one, by carelessness in making an excavation on his own land, causes injury to an adjoining building, even where the owner of the house has no easement of support, he will be liable. *Leader v. Moxon*, 3 Wils. 460; *Lawrence v. Great Northern R. Co.*, 16 Ad. & El. 643-653; *Leake's Law of Real Prop.* 248.

If one, by excavating on his own land adjoining the land of his neighbor, using due care, causes a building on his neighbor's land to topple over, there is no remedy, provided the weight of the building caused the land on which it was to give way, because what was done by the adjacent owner was in the lawful and permitted use of his own property. *Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 3 M. & W. 220; *Lasala v. Holbrook*, 4 Paige, 170; *Thurston v. Hancock*, 12 Mass. 220.

The right of an owner of a mine to excavate the mineral in his mine, although by so doing it causes the water to collect therein and to be discharged into an adjacent mine on a lower level, thereby causing damage to the mine of such adjacent owner, is a lawful use of property, for which no action lies. *Smith v. Kenrick*, 7 C. B. 515; *Baird v. Williamson*, 15 C. B. (U. S.) 376; *Wilson v. Waddell*, 2 App. Cas. 95.

One conducting blasting operations on his own land must so adjust them as not to invade the rights of his neighbor, though they be less profitable. And where rock could have been removed by smaller blasts, defendant was liable for injuries to a neighboring house caused by the use of such as cast logs 200 feet away and over the tops of houses and shake the walls and ceilings of the surrounding buildings. *Newell v. Woodfolk*, 91 Hun, 211.

So where the effect of the blast is to shake down adjoining buildings, render them uninhabitable and compel their abandonment. *Hill v. Schneider*, 13 App. Div. 299.

Where after considerable blasting without injury, a more powerful blast caused injury which experts testified, could not have been produced except through negligence, there was sufficient evidence to leave it to the jury to say whether it was so or not. *Holland House Co. v. Baird*, 49 App. Div. 180.

Defendant's negligent blasting on his own land, necessitated the resetting of clothes poles on the land of another. Latter recovered the expense of such resetting. *Denken v. Canavan*, 17 Misc. 392.

See, also, as to the damages for negligent blasting, *Mahoney v. Dankwart*, 108 Iowa, 321.

Blasting not only jarred a building, cracking its walls, but threw pieces of rock against it. Injunction granted. *Stevenson v. Pucci*, 32 Misc. 464.

Where the owner of a lot situated in a large city, and contiguous to the dwelling-house of another, uses gunpowder to blast out rocks on his lot, he is liable for the damage proximately and naturally resulting to the house of the adjoining owner from the act of blasting, whether the damage was caused by rocks thrown against the house or by a concussion of the air around it.

Such a use of property is unreasonable, unusual and unnatural, and no care or skill exercised in the use will excuse the owner from liability for the damages proximately and naturally resulting from the blasting. *Colton v. Onderdonk*, 69 Cal. 155.

From opinion.—"The defendant seems by his contention to claim that he had a right to blast rocks with gunpowder on his own lot in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was

intrinsically dangerous, that damage would be a necessary, probable, or natural consequence. But in this he is mistaken. *Addison on Torts*, 9; *Transportation Co. v. Chicago*, 99 U. S. 635-644; *Losee v. Buchanan*, 51 N. Y. 479, explaining *Hays v. Cohoes Co.*, 2 N. Y. 159-162; *Pixley v. Clark*, 35 N. Y. 520-532; *Heeg v. Licht*, 80 N. Y. 579-583; *Tiffin v. McCormack*, 34 Ohio St. 644; *Carman v. Railroad Co.*, 4 Ohio St. 417, 418; *Sutton v. Clarke*, 6 Taunt. 44; *Joliet v. Harwood*, 86 Ill. 110-116; *Farrand v. Marshall*, 19 Barb. 381-385; *Selden v. Canal Co.*, 24 Barb. 363-364; *Fletcher v. Rylands*, L. R. 3, H. L. Cas. 330; *Wilson v. New Bedford*, 108 Mass. 261-266; *Shipley v. Fifty Associates*, 106 id. 194-200; *Ball v. Nye*, 99 id. 582-584; *Cahill v. Eastman*, 18 Minn. 324; s. c., 10 Am. Rep. 184-200."

It is negligent to blast in a thickly populated city. *Monroe v. Pac. &c. Co.*, 84 Cal. 515.

Blasting on the highway is presumed to have been lawfully done. *Mills v. Wilmington City R. Co.*, 1 Marv. (Del.) 269.

In an action for death of defendant's employé from blasting it appeared that the defendant had employed one "C." to do such blasting on the defendant's land, the deceased being in a building thereon. A large rock was thrown a distance of from seventy-five to one hundred and fifty feet, breaking through and striking the deceased inside a building. It was stated that the judge should have charged that "if the evidence showed that the blasting followed the direction of the hole drilled, and if the hole was so drilled as to direct the blast against a house near-by, in which there were a number of individuals, among whom was the deceased, they (the jury) would take this into consideration in determining whether the defendant was guilty of criminal negligence." *Bain v. Athens Foundry &c. Works*, 75 Ga. 718.

Driver proceeding from a blast, but still within dangerous proximity, was entitled to the statutory notice of its going off. He was negligent, however, if he was in the street with a vicious and unbroken horse particularly liable to fright. *Wadsworth v. Marshall*, 88 Me. 263.

Plaintiff, on highway, was injured by blasting in a mine. Question was for the jury. License from the owner of the land on which was the highway was no defense. *Auchamp v. Saginaw &c. R. Co.*, 50 Mich. 163.

Lack of notice of a blast did not give recovery to one in charge of a horse 500 feet away. *Mitchell v. Prang*, 110 Mich. 78.

Setting off a blast near a highway at dusk without warning is negligence. *Gates v. Latta*, 117 N. C. 189.

Authority to do work does not authorize dangerous agencies therefore. *McAndrews v. Collerd*, 42 N. J. L. 189.

Consequences of public construction not avoidable by the exercise of due care cannot be made the subjects of complaint. *Simon v. Henry*, 62 N. J. L. 486.

Licensee assumes the risks obviously incident to the ordinary prosecution of blasting operations on the premises. *Smith v. Day*, 100 Fed. Rep. 244.

(c). GUNPOWDER.

The keeping of gunpowder or other explosive materials in a place or under circumstances where it will be liable in case of explosion, to injure the dwelling-houses or the persons of those residing in close proximity, may constitute a private nuisance, for which the person so keeping them is liable to respond in damages, in case of injury resulting therefrom; and that, without regard entirely to the question whether he was chargeable with carelessness or negligence.

The keeping of such materials does not, however, necessarily constitute a nuisance *per se*; that depends upon the locality, the quantity and the surrounding circumstances. *Heeg v. Licht*, 80 N. Y. 579.

From opinion.—"The judge upon the trial charged the jury that they must find for the defendant, unless they found that the defendant carelessly and negligently kept the gunpowder upon his premises. The judge refused to charge: That the powder magazine was dangerous in itself to plaintiff and his property, and was a private nuisance, and the defendant was liable to the plaintiff, whether it was carelessly kept or not; and the plaintiff duly excepted to the charge and the refusal to charge.

We think that the charge made was erroneous and not warranted by the facts presented upon the trial. The defendant had erected a building and stored materials therein, which from their character were liable to and did actually explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the magazine was dangerous and liable to cause damage to the property of persons residing in the vicinity. The locality of works of this description must depend upon the neighborhood in which they are situated. In a city, with buildings immediately contiguous and persons constantly passing, there could be no question that such an erection would be unlawful and unauthorized. An explosion under such circumstances independent of any municipal regulations, would render the owner amenable for all damages arising therefrom. That the defendant's establishment was outside of the territorial limits of a city, does not relieve the owner from responsibility or alter the case, if the dangerous erection was in close contiguity with dwelling-houses or buildings, which might be injured or destroyed in case of an explosion. The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application. The keeping or manufacturing of gunpowder or of fireworks does not necessarily constitute a nuisance *per se*. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used. In the case at bar, it should have been left for the jury to determine whether from the dangerous character of the

defendant's business; the proximity to other building, and all the facts proved upon the trial, the defendant was chargeable with maintaining a private nuisance and answerable for the damages arising from the explosion.

A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Bl. Com. 216. Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use. Wood's Law of Nuis., sec. 1, and authorities cited. The cases which are regarded as private nuisances are numerous, and the books are full of decisions holding the parties answerable for the injuries which result from their being maintained. The rule is of universal application that while a man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance to the injury of an adjoining proprietor or of his neighbors, even in the pursuit of a lawful trade. Aldred's Case, 9 Coke, 58; Brady v. Weeks, 3 Barb. 159; Dubois v. Budlong, 15 Abb. 446; Wier's Appeal, 74 Penn. St. 230.

While a class of the reported cases relate to the prosecution of a legitimate business, which of itself produces inconvenience and injury to others, another class refers to acts done on the premises of the owner, which are of themselves dangerous to the property and the persons of others who may reside in the vicinity, or who may by chance be passing along or in the neighborhood of the same. Of the former class are cases of slaughter-houses, fat and offal boiling establishments, hog-styes, or tallow manufactories, in or near a city, which are offensive to the senses and render the enjoyment of life and property uncomfortable. Catlin v. Valentine, 9 Paige, 575; Brady v. Weeks, 3 Barb. 157; Dubois v. Budlong, 15 Abb. 445; Rex v. White, 1 Burr. 337; 2 Bl. Com. 215; Farrand v. Marshall, 21 Barb. 421. It is not necessary in these cases that the noxious trade or business should endanger the health of the neighborhood. So also the use of premises in a manner which causes a noise so continuous and excessive as to produce serious annoyance, or vapors or noxious smells. Tipping v. St. Helen's Smelting Co., 4 B. & S. (Q. B.) 608; Brill v. Flagler, 23 Wend. 354; Pickard v. Collings, 23 Barb. 444; Wood's Law of Nuis., sec. 5; or the burning of a brick kiln, from which gases escape which injure the trees of persons in the neighborhood. Campbell v. Seaman, 63 N. Y. 568. Of the latter class also are those where the owner blasts rocks with gunpowder, and the fragments are liable to be thrown on the premises and injure the adjoining dwelling-houses, or the owner or persons there being, or where persons traveling may be injured by such use. Hay v. Cohoes Co., 3 Barb. 42; s. c., 2 N. Y. 159; Tremain v. Cohoes Co., id. 163; Pixley v. Clark, 35 id. 523.

Most of the cases cited rest upon the maxim '*sic utere tuo,*' &c., and where the right to the undisturbed possession and enjoyment of property comes in conflict with the rights of others, that it is better, as a matter of public policy, that a single individual should surrender the use of his land for especial purposes injurious to his neighbor or to others, than that the latter should be deprived of the use of their property altogether, or be subjected to great danger, loss and injury, which might result if the rights of the former were without any restriction or restraint.

The keeping of gunpowder or other materials in a place, or under circumstances, where it would be liable, in case of explosion, to injure the dwelling-houses or the persons of those residing in close proximity, we think, rests upon

the same principle, and is governed by the same general rules. An individual has no more right to keep a magazine of powder upon his premises, which is dangerous, to the detriment of his neighbor, than he is authorized to engage in any other business which may occasion serious consequences.

The counsel for the defendant relies upon the case of *The People v. Sands*, 1 J. R. 78, to sustain the position that the defendant's business was neither a public or private nuisance. That was an indictment for keeping a quantity of gunpowder near dwelling-houses and near a public street; and it was held (Spencer, J., dissenting), that the fact as charged did not amount to a nuisance, and that it should have been alleged to have been negligently and improvidently kept. It will be seen that the case was disposed of upon the form of the indictment, and while it may well be that an allegation of negligence is necessary where an indictment is for a public nuisance, it by no means follows that negligence is essential in a private action to recover damages for an alleged nuisance. In *Myers v. Malcolm*, 6 Hill, 292, it was held that the act of keeping a large quantity of gunpowder insufficiently secured near other buildings, thereby endangering the lives of persons residing in the vicinity, amounted to a public nuisance, and an action would lie for damages where an explosion occurred causing injury. Nelson, Ch. J., citing *The People v. Sands*, *supra*, says: 'Upon the principle that nothing will be intended or inferred to support an indictment, the court said, for aught they could see the house may have been one, built and secured for the purpose of keeping of powder in such a way as not to expose the neighborhood; and he cites several authorities which uphold the doctrine that where gunpowder is kept in such a place as is dangerous to the inhabitants or passengers, it will be regarded as a nuisance. The case of *The People v. Sands*, is not therefore controlling upon the question of negligence.

Fillo v. Jones, 2 Abb. (Ct. of App. Dec.) 121, is also relied upon, but does not sustain the doctrine contended for; and it is there held that an action for damages caused by the explosion of fireworks may be maintained upon the theory that the defendant was guilty of a wrongful and unlawful act, or of default, in keeping them at the place they were kept, because they were liable to spontaneous combustion and explosion and thus endangered the lives of persons in their vicinity, and that the injury was occasioned by such spontaneous combustion and explosion.

It is apparent that negligence alone in the keeping of gunpowder is not controlling, and that the danger arising from the locality where the fireworks or gunpowder are kept, is to be taken into consideration in maintaining an action of this character. We think that the request to charge was too broad and properly refused."

Maintenance of a large quantity of dynamite within 1000 feet of a dwelling is negligence *per se*; it being a nuisance. *Reilly v. Erie R. Co.*, 72 App. Div. 476.

So, as to the maintenance of 5000 pounds of gunpowder in a magazine. *Kleebauer v. Western Fuse & Co.*, (Cal.) 69 Pac. Rep. 246.

So, as to allowing a car of explosives to be unreasonably delayed at a station. *Ft. Worth & C. R. Co. v. Beauchamp*, (Tex.) 68 S. W. Rep. 502.

Gunpowder not shown to have been improperly stored, though in a public place, is not *per se* negligence. *Kinney v. Koopman*, 116 Ala. 310.

Otherwise where it is kept in a wooden store, in the heart of the city. *Rudder v. Koopman*, 116 Ala. 332.

Care in storage is no defense to one's keeping nitro-glycerine on his premises. *Bradford Glycerine Co. v. St. Mary's &c. Co.*, 60 Oh. St. 560.

A corporation exceeds the limit fixed by statute for the storage of giant powder on its premises within city limits at its own risk. Permission by ordinance is no excuse. *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312.

Keeping explosive caps in a vacant lot, does not raise the duty of guarding same against mischievous acts. *Afflick v. Bates*, 21 R. I. 281.

(d). FALLING BUILDING.

The owner of a building adjoining a street must use reasonable care lest it fall into the street and injure those lawfully there. The event itself puts the burden of explanation on the defendant. *Mullen v. St. John*, 57 N. Y. 567.

There were three adjoining lots on a city street, owned severally by "E.," "P." and "L.," upon which were brick stores, separated by walls and the fronts of which formed a uniform wall. After the buildings burned a portion of the walls was left standing. Shortly after the front wall began to lean towards the street, and its inclination increased until it gave way near the partition wall which separated the buildings of "L." and "P." and carried down the entire front, doing injury in the street. The inclining walls were public nuisances, and "E.," "P." and "L." were severally liable, whatever part of the wall did the actual injury. *Simmons v. Everson*, 124 N. Y. 319.

Defendant erected a grandstand for the purpose of exhibitions and during the course of its ownership, leased it to another for an exhibition. During the exhibition a portion of it collapsed owing to its defective construction. It was held that having constructed it for the use of public exhibitions, defendant was bound to make it reasonably safe for that purpose, and the employment of a competent architect did not excuse it. *Fox v. Buffalo Park*, 21 App. Div. 321.

Owner of a building which collapsed in the course of erection knew that it was being built pursuant to plans which called for a weight at a given point beyond that permitted by statute. That he had employed a competent architect and that the building department had passed the plans did not excuse him. *Pitcher v. Lennon*, 12 App. Div. 356.

As to the latter point, see, also *Burke v. Ireland*, 47 App. Div. 428.

Thornton v. Lennon, 29 App. Div. 628, was brought upon the basis of *Pitcher v. Lennon*, but in the latter case, no plans or specifications

were in evidence and it was not shown that defendant contracted for or participated in the particular construction complained of, though he was often about the premises.

But where the building is not inherently dangerous and the owner does not know of the defect in the design which caused a collapse during construction, the employment of a competent architect relieves him. *Burke v. Ireland*, 26 App. Div. 487.

As a result of the same accident it appeared in another action, *Burke v. Ireland*, 47 App. Div. 428, that the owner had reserved the right to make a change in the construction of the building, and had directed the contractor in some of the operations of the work. And upon these facts the court held that there was sufficient to show that he had not committed the matter entirely to the contractor, and that he knew of the unstable condition of the earth which the foundation was to be erected upon, and consequently that the negligence in laying the foundation in an improper manner and place did not excuse negligence in regard to the soil provided for it to rest upon.

The attention of defendant's superintendent was called to the fact that heavy iron trusses being placed in the roof of a building were out of plumb. He was negligent in failing to observe the fact until about 30 minutes before they fell when he sent men to remedy the defect. *May v. Berlin Iron-Bridge Co.*, 43 App. Div. 569.

Where the architect employed was competent and was left in sole charge of the construction and the collapse resulted from his directing a column to be built on the wall of an old cistern and 12 instead of 18 inches thick, both in violation of his contract, owner was held not chargeable. *Fox v. Ireland*, 46 App. Div. 541.

The ultimate agency, in causing the fall of walls in course of erection, held not the storm but the failure to brace the walls with iron work. Those so protected were uninjured. *Meyer v. Haven*, 37 App. Div. 194.

Dettmering v. English, 64 N. J. L. 16.

Owner not chargeable where fall of the building is the result of the negligence of independent contractors. *Bjornson v. Saccone*, 88 Ill. App. 6.

Walls were left standing in a dangerous condition. Intervention of a wind storm held no defense. *Schwartz v. Adsit*, 91 Ill. App. 576.

The owner of a building is liable for the fall thereof from neglect in repairing or constructing. *Barnes v. Beirne*, 38 La. Ann. 280.

Factor &c. Ins. Co. v. Werlein, 42 La. Ann. 1046; *O'Connor v. Andrews*, 81 Tex. 28.

Owner of burned buildings who has had opportunity to discover their

danger, is chargeable with the damage they do. *Ainsworth v. Larkin*, 180 Mass. 397.

And mere threats against repairing such walls is no defense. *Lauer v. Palms*, (Mich.) 89 N. W. Rep. 694.

Liability attaches for failure to keep roof in repair by reason whereof passer-by on the street is injured. *Hannem v. Pence*, 40 Minn. 127.

A contractor to build a house may recover from adjoining owner for injuries done the same from fall of wall through negligence. *Lynds v. Clark*, 14 Mo. App. 74.

Defective construction of a wall which would not have fallen except for a fire, held not the moving cause of its fall. *Kitchen v. Carter*, 47 Neb. 776.

Where walls are in a dangerous condition the owner must use extraordinary care in their removal. *Steinbock v. Covington &c. Co.*, 4 Oh. N. P. 229.

It is not necessary to allege that defendant constructed a building where he is the owner. *Waterhouse v. Joseph Schiletz Brew. Co.*, 12 S. D. 397.

Owner may rely on the report of an expert mechanic as to the safety of a wall. *Freeman v. Carter*, (Tex. Civ. App.) 67 S. W. Rep. 527.

Defendant's buildings were insufficiently supported and fell. Adjoining owner recovered. *Johnson v. Chapman*, 43 W. Va. 639.

See "Evidence," p. 1095.

(e). DISCHARGING WATER UPON OR DIVERTING WATER FROM PREMISES OF ANOTHER.

The sidewalk received the drip from the steps and grounds of adjoining property and was arranged to carry the discharge to the gutter, but the water froze on the sidewalk and the plaintiff was thereby hurt. There was no ordinance against it and there was no improper construction or interference with the walk. No liability. *Moore v. Gadsden*, 87 N. Y. 84.

Drip and discharge from the grounds, steps and leader flowed over the sidewalk and froze. There had been a heavy snow storm some days before. The dwelling was not occupied and the snow was not removed, and having melted it flowed over the sidewalk. There was an ordinance that snow should be removed within four hours after it fell, but that did not *per se* give a cause of action. The defendant was not liable. *Moore v. Gadsden*, 93 N. Y. 12.

The action was for damages from water flowing upon the premises of the plaintiff's assignor on account of conditions caused in constructing

the next westerly building. The causes of the injury were the removal of the curb and gutter and an excavation in the street outside of the curb line, and the front wall of the defendant's vault, whereby, on the breaking away of the dam made by the defendant to keep back the water, the water poured from the street gutter into said excavation, and thence onto the premises of the plaintiff's assignor and thence into his vault and cellar. *Mairs v. Manhattan Real Estate Ass'n.*, 89 N. Y. 498.

From opinion.—"The general rule is well established that an unauthorized interference with, or excavation in a highway, or a street of a city, for the private benefit of adjoining premises, is wrongful, and the party responsible for it is liable to all persons injured thereby, irrespective of any question of negligence. *Irvine v. Wood*, 51 N. Y. 224; 10 Am. Rep. 603; *Creed v. Hartman*, 29 N. Y. 591; *Dygert v. Schenck*, 23 Wend. 446; *Congreve v. Morgan*, 18 N. Y. 84. It is said in some of these cases that where an excavation in a street is made by consent of the municipal authorities, it is not *per se* unlawful and a nuisance, and that the person making it is not absolutely liable to persons suffering injury by reason thereof, but only for want of proper care to avoid such injury, and the defendants in this case, for the purpose of showing such consent, put in evidence, under objection, a permit, of which the following is a copy: (Permit from commissioner of public works to excavate for a vault in front of premises.) * * *

As to the traveling public it may be that the municipal authorities can license acts in reference to the streets, which they might lawfully perform themselves, and that a person acting under such a license is not chargeable with creating a nuisance, or unlawfully obstructing or injuring the public highway, if he exercises due care. But a different question arises where the wrong complained of consists in doing damage to neighboring property by collecting surface water, or diverting it from its accustomed channel without providing another, and thus throwing it upon the land of an adjacent owner.

The rights of the parties in such a case do not depend upon the same principles as in cases where the wrong complained of consists of an interference with a public highway to the injury of the traveling public, but upon the principle of *Hay v. Cohoes Co.*, 2 N. Y. 159; *St. Peter v. Denison*, 58 id. 416; 17 Am. Rep. 258; *Jutte v. Hughes*, 67 N. Y. 267, in which it is held that where one is making improvements on his own premises, or without lawful right, trespasses upon or injures his neighbor's property by casting material thereon, he is liable absolutely for the damage, irrespective of any question of care or negligence. A license from the municipal authorities cannot affect the question of responsibility in such cases. A municipal corporation has itself been held liable for throwing water collected in the gutter of a street, upon the land of a private owner (*Byrnes v. City of Cohoes*, 67 N. Y. 204), and in *Jutte v. Hughes* (id. 267), where a private owner paved his yard, thus rendering it less penetrable by water, and conducted water in leaders from the roofs of his houses to his yard in a quantity beyond the capacity of the drains to carry away, and thus flowed the premises of his neighbor, it was held that he was absolutely bound to prevent the water which accumulated on his own premises from causing injury to his neighbor's, and that it was error to submit to the jury whether he had done everything that was possible under the circumstances, and practicable in the way of drainage to carry off the water.

A municipal corporation may, in many cases, in the exercise of powers legally granted to it for public purposes, do acts with reference to the public streets which may result in consequential injuries to the property of adjacent owners, and be exempt from liability except for negligence, but it cannot delegate power to private individuals, to be exercised for their own private benefit, to do injury to the property of their neighbors, and relieve them from responsibility for the damages they may occasion, or reduce their liability to such as may result from want of care. At all events no such power has been shown to exist in the present case."

A dam should be constructed in such manner as to resist such extraordinary floods as might have been reasonably expected occasionally to occur, but not phenomenal floods such as one could not expect. *Cottrell v. The Marshall Infirmary*, 70 Hun, 495.

Where the means by which defendant has diverted water from a stream is such that the water thereof flows by virtue of its own gravity and continues after the transfer of its water works, defendant is still liable after such transfer in the absence of proof that such condition has been changed and the diversion has been stopped. *Gallagher v. Kingston Water Co.*, 25 App. Div. 82.

A natural water course into which the discharge of waters of a salt mining company may not be diverted (from a ditch already constructed for them) may be characterized as a stream of water flowing in a defined bed or channel, with banks and sides, having permanent sources of supply, although it is not essential that the flow should be uniform or interrupted. *Mann v. Retsof Min. Co.*, 49 App. Div. 454.

By maintaining a building with a roof constructed so that snow and ice collecting on it from natural causes will naturally and probably fall into the adjoining highway, the owner of the building is liable, without other proof of negligence, to a person injured by such a fall upon him while traveling on the highway with due care; and it is immaterial that all the rooms in the building are occupied by tenants, if he retains control of the roof. *Shipley v. Fifty Associates*, 106 Mass. 194.

From opinion.—"The plaintiff, at the time of the accident, was where she had a right to be, and was not guilty of any want of due and reasonable care. For the purpose for which she was using the sidewalk, her rights were exactly the same as if she owned the soil in fee simple. The case in our judgment depends on the same rules and is to be decided on the same principles as if it raised a question between adjoining proprietors, in which the lands or buildings of one were injured by the manner in which the other had seen fit to occupy or use his own land and buildings. In contemplation of law, the person is at least as much entitled to protection as the estate. The right to discharge snow and ice from one's own house upon the person of the next door neighbor, is certainly no better or stronger than the right to subject that neighbor's building or land to the same kind of inconvenience. *Shipley v. Fifty Associates*, 101 Mass. 251. It is well settled that although every land owner has a right to use

his own land for any lawful purpose for which in the natural course of enjoyment it can be used, yet he cannot use his neighbor's land, except upon proof of express grant or permission, or prescription which furnishes a presumption of a grant. Water naturally collecting on the surface of his land, and naturally passing off upon the land of his neighbor, would not injure the latter in such a sense as to give him a remedy by action. But if the landowner, 'not stopping at the natural use of his close,' to use the language of Lord Cairns in *Rylands v. Fletcher*, Law Rep., 3 H. L. 330, 339, 'had desired to use it for any purpose which I may term a natural use,' the case would stand on very different ground. It has been settled that no one has a right, by an artificial structure of any kind upon his own land, to cause the water which collects thereon in rain or snow to be discharged upon his neighbor's land, either in a current or stream, or in drops. *Martin v. Simpson*, 6 Allen 102. If the defendants had constructed a reservoir in their attic, to be filled by the rain, they would clearly be liable for damage occasioned to their neighbor by the breaking down of such a reservoir. It can of course make no difference that the rain comes in the form of snow, and is lodged on the outside of the roof; in either case it is collected by an artificial structure, for the convenience of one party, without the concurrence of the other. In the case already cited, at an earlier stage, *Fletcher v. Rylands*, Law Rep., 1 Ex. 265, Mr. Justice Blackburn, in giving the judgment which was afterwards affirmed in the house of lords, expresses himself substantially thus: Whoever for his own purposes brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril. He illustrates this proposition by putting various cases in which a party is damaged without any fault of his own, and in which he declares it to be reasonable and just that the neighbor, who has brought something on his own property not naturally there, harmless so long as it is confined to his own property, but which he knows well to be mischievous if it should get upon his neighbor's land, should be held responsible to make good all damages, if he should not succeed in confining it to his own property. The case of *Fletcher v. Rylands* was one in which the defendant had constructed a reservoir upon his own ground, which gave way and inundated the plaintiff's mine.

In the case at bar, it was convenient to the defendants to place their building on the line of the street, and to have their roof so constructed that the snow, which would be harmless if allowed to reach the ground as it falls from the clouds, is intercepted and lodged upon the roof at a great height above the heads of passengers. In the case of a building so situated and so constructed it is a matter substantially certain and inevitable, that there will be occasions, and perhaps frequent occasions, in the winter season, when, with the alterations of the weather common in this climate, the accumulation upon the roof may become very great, so as to come down suddenly upon the sidewalk in a dangerous manner. Accidents from such causes are well known to be frequent, and as we understand the defense, could not be prevented by any amount of care or diligence, under the circumstances of the present case. It is well settled, however, that no man has a right to so construct his roof as to discharge upon his neighbor's land water which would not naturally fall there. *Washburn on Easements*, 390; *Reynolds v. Clarke*, 2 Ld. Raym. 1399; *Martin v. Simpson*, 6 Allen, 102. In such a case the maxim *sic utere tuo et alienum non laedas* would be applicable. *It is not at all a question of reasonable care and diligence in the management of his roof*, and it would be of no avail to the party

to show that the building was of the usual construction, and that the inconvenience complained of was one which, with such a roof as his, nothing could prevent or guard against. He has no right so to construct his building that it will *inevitably*, at certain seasons of the year, and with more or less frequency, subject his neighbor to that kind of inconvenience; and no other proof of negligence on his part is needed. *Ball v. Nye*, 99 Mass. 582. He must, at his peril, keep the ice or the snow that collects upon his roof, in his own limits; and *is responsible for all damages, if the shape of his roof is such as to throw them upon his neighbor's land, in the same manner as he would be if he threw them there himself.* He has no right to appropriate his neighbor's land in that manner for his own convenience, as a place into which he may pour the accumulated snow from his own premises."

Reasonable diversion of surface water may be made. *Oftelie v. Hammond*, 78 Minn. 275.

By the erection of a building. *Jessup v. Bamford Man. Co.*, 66 N. J. L. 641.

Only ordinary care is required in respect thereto. *Edgar v. Walker*, 106 Ga. 454.

A lower owner is bound to receive surface water only in its natural course and quantity. *Grinstead v. Sanders*, (Ky.) 56 S. W. Rep. 665.

See, also, *Jewett v. Sweet*, 178 Ill. 96; aff'g s. c., 77 Ill. App. 641.

But no complaint can be made of a barring levee where a sufficient drain is constructed along it. *Saginville v. Pock*, (Cal.) 69 Pac. Rep. 98.

Or where there is no change in the quantity, direction or manner of the flow. *Blaise v. Schroeder*, (Iowa) 74 N. W. Rep. 1114.

See, also, *Rock Island &c. R. Co. v. Krapp*, 173 Ill. 219; *Scrope v. Trustees*, 111 Iowa, 113; *Parker v. Atchinson*, 58 Kan. 29; *Connell v. Stark*, 108 Wis. 92; *McKeesport Gas Co. v. Carnegie Steel Co.*, 189 Pa. St. 509.

It has been held, however, that he may protect his own land by the erection of a reasonable levee. *Baker v. Allen*, 66 Ark. 271.

And it has been held that a lower owner may prevent the water of a stream overflowing its banks on his land regardless of its effect upon the upper owner. *Cass v. Dicks*, 14 Wash. 75.

But see *Broker v. McBride*, 16 Tex. Civ. App. 348.

But where the natural consequence of placing a grating in a water course is to accumulate rubbish so as to cause an obstruction, recovery may be had. *Babbitt v. Safety Fund Nat. Bank*, 169 Mass. 361.

Provided he does not cast the water off on a third person's land. *Town v. Missouri P. R. Co.*, 50 Neb. 768; *Cushing v. Pires*, 124 Cal. 663.

So, a lower owner was not allowed to protect himself against an unlawful discharge of water on his land by stopping up a culvert so as to injure the intervening highway. *Myers v. Nelson*, (Cal.) 44 Pac. Rep. 801.

See, also, *Galbraith v. Yates*, 79 Minn. 436.

The whole question has been held in New Hampshire to turn upon

whether the reasonable use of the respective premises demand that the upper owner should be allowed to drain off on the lower, or the lower to protect himself from drainage. *Franklin v. Durgee*, (N. H.) 51 Atl. Rep. 911.

Collection and discharge of surface water in accumulated quantities is not allowed. *Rudel v. Los Angeles County*, 118 Cal. 281.

Upper owner may accelerate the flow by the construction of drains. *Dill v. Oglesbee*, 5 Oh. N. P. 271; *Parker v. Norfolk &c. R. Co.*, 123 N. C. 71; *Mizell v. McGowan*, 129 N. C. 93; distinguished in *Porter v. Armstrong*, 129 id. 101.

And guide the natural flow by drains and ditches. *Crossville v. Stuart*, 77 Ill. App. 513; *McCormick v. Kinsay*, 10 Pa. Super. Ct. 607.

Provided water is not diverted from other sources. *Throop v. Griffen*, 77 Ill. App. 505; *Parker v. Norfolk &c. R. Co.*, 123 N. C. 71; *Sweetwater v. Pate*, (Tenn.) 59 S. W. Rep. 480.

Surface water which has worked a natural and well defined channel cannot be diverted by lengthening the ditch and making a new culvert. *Fossum v. Chicago &c. R. Co.*, 80 Minn. 9.

See, also, *Jordan v. Mt. Pleasant*, 15 Utah, 449.

That the water from buildings as situated naturally flows on another's land, does not constitute a natural surface flow. *Peters v. Lewis*, 28 Wash. 366.

An upper owner cannot drain off surface water which collects in a pond on his premises onto a lower owner. *Brandenburg v. Zeigler*, 62 S. C. 18.

See, also, *Magee v. Pennsylvania &c. R. Co.*, 13 Pa. Supr. Ct. 187; *Hunter v. Cincinnati &c. R. Co.*, 7 Oh. N. P. 202.

So, where it is collected in a reservoir, and is allowed to escape. *Gembler v. Echterhoff*, (Tex. Civ. App.) 57 S. W. Rep. 313.

See, also, *Texas &c. R. Co. v. O'Mahoney*, (Tex. Civ. App.) 60 S. W. Rep. 902.

Detention of water for two or three days while a pond created by a dam was filling was not unreasonable. *Gehlen v. Knorr*, 101 Iowa, 700.

See, also, *Mott v. Consumer's Water Co.*, 188 Pa. St. 521.

Defendant was not allowed the right to take the water which flowed to a stream at one place by sinking tunnels which absorbed such water, on the ground that it had added the water discharged by such tunnels, at another place. *Herriman Irr. Co. v. Butterfield Min. Co.*, 19 Utah, 453.

See further as to the diversion of water from a stream to the injury of a lower owner, *Valparaiso City Water Co. v. Dickover*, 17 Ind. App. 233; *Sparks Mfg. Co. v. Newton*, 57 N. J. Eq. 367; *North Powder Milling Co. v. Cougnaour*, 34 Or. 9; *Philadelphia &c. R. Co. v. Pottsville Water Co.*, 182 Pa. St. 418; *Brown v. Kistler*, 190 id. 499; *Heh v. Consol. Gas Co.*, 201 id. 443; *Standard Plate*

Glass Co. v. Butler Water Works, 5 Pa. Super. Ct. 563; *Union Mill &c. Co. v. Danberg*, 81 Fed. Rep. 73; *United States &c. Co. v. Gallegos*, 89 id. 769; *North Point Consol. &c. Co. v. Utah &c. Co.*, 16 Utah, 246.

Authorization for a municipality to divert is no defense. *Irving v. Media*, 10 Pa. Super. Ct. 132.

See, also, *Forbell v. New York &c. R. Co.*, 26 Misc. 12; *Los Angeles v. Pomeroy*, 124 Cal. 597; *East Jersey Water Co. v. Bigelow*, 60 N. J. L. 201. The same has been held as to obstruction of flow, *Carlson v. St. Louis &c. Co.*, 73 Minn. 128; *Hueston v. Mississippi &c. Co.*, 76 id. 251; *contra*, see, *Hamor v. Bar Harbor Water Co.*, 92 Me. 364; see, also, *Green Bay &c. Co. v. Patten Paper Co.*, 172 U. S. 58.

Defendant was not allowed to obstruct a water course, the natural channel of surface water, which the city had maintained by authority and at considerable expense. *Waverly v. Page*, 105 Iowa, 225.

See further as to interference by city with drainage, *Cedar Falls v. Hansen*, 104 Iowa, 189; *Mulvihill v. Thompson*, 114 Iowa, 734.

A person unlawfully diverted water, and in its new course it was dammed up by leaves and did damage. Person was liable. *Cheeves v. Danielly*, 80 Ga. 114. But see *Schmidt v. Brouse*, 89 Mo. App. 218.

In an action for the diversion of a stream, the plaintiff was guilty of contributory negligence, and did not recover. *Hoepl v. Muscatine*, 57 Iowa, 457; *Fulieau v. Muscatine*, 57 id. 457.

See same principle in action for injury to a dam, *Huff v. Kentucky Lumber Co.*, (Ky.) 45 S. W. Rep. 94.

A ditch dug so near the street as to encroach by erosion may be abated. *Reinhart v. Sutton*, 58 Kan. 726.

That the independent acts of adjoining owners in draining into an open sewer combined to injure plaintiff's wall did not make them joint trespassers. *Bonte v. Postel*, (Ky.) 58 S. W. Rep. 536.

Breen v. Hyde, (Mich.) 89 N. W. Rep. 732.

Selecting a competent engineer to plan and execute the work of drainage, was no defense. *Lion v. Baltimore City Pass. R. Co.*, 90 Md. 266.

Owner allowed a stream to be diverted and the natural outlet closed. Subsequent conditions having rendered the new channel inadequate he applied to have the stream brought back along a roadbed a thousand feet or so to its natural outlet. No relief was given. *Harrelson v. Kansas City &c. R. Co.*, 151 Mo. 482.

Grass grew in a stream whereon was a dam, and so impeded the flow as to back water on to the land above. If the growth was without the defendant's negligence there was no liability. *Knoll v. Light*, 76 Pa. St. 268.

See further as to injury by lower riparian owner to an upper, *Gehlan v. Knorr*, 101 Iowa, 700 (dam failed to back water to its original height); *Cline v. Baker*, 118 N. C. 780 (dam caused sand to accumulate above).

Damage to the land of plaintiff from the lawful use by defendant of a stream of water, is *damnum absque injuria*. *Penn. Coal Co. v. Sander-son*, 113 Pa. St. 126.

Underground water having no defined channel may be diverted by the digging of a ditch without liability. *Miller v. Black Rock Springs Co.*, 99 Va. 747.

Storm was held the cause of an irrigation ditch breaking where no precaution could have averted the accident. *Grand Valley Irr. Co. v. Pitzer*, 14 Colo. App. 123.

As to the measure of damages for obstructing or diverting the water from streams, see *Woodford v. Brinker*, 47 App. Div. 632; s. c., aff'd, 168 N. Y. 662; *Kentucky Lumber Co. v. King*, (Ky.) 65 S. W. Rep. 156; *Reisery v. City of New York*, 69 App. Div. 302; aff'g s. c., 35 Misc. 413; *Green Bay &c. Co. v. Kankanna Water Power Co.*, 112 Wis. 323; *Lampley v. Atlantic Coast Line Co.*, 63 S. C. 462.

1. FLOODING OF LANDS BY RAILROADS.

Although a railway company be authorized to construct a road over a stream, yet if it be done in such a manner as to cause an overflow on land not situated on the stream, the company would be liable. *Brown v. Cayuga & Susquehanna R. Co.*, 12 N. Y. 486

A railway company, necessarily diverting a stream, is bound to restore it to its former state of usefulness, as nearly as practicable and so maintain it. *Cott v. Lewiston R. Co.*, 36 N. Y. 214.

Action for injuries to property sustained by a flood which, by reason of the defendant's embankment being an obstruction to the course of a river, and on account of the culvert therein being insufficient to carry off the water, caused the plaintiff's land to become flooded. Where the evidence as to the cause of the flood is contradictory, a question of fact is presented to be determined by the jury.

Party should construct a dam so as to resist such extraordinary floods as may be reasonably expected occasionally to occur, and it is for the jury to determine whether a flood of an extraordinary character should have been anticipated and provided against. The same principle applies as to the construction of a culvert in an embankment traversing the overflow bed of a river.

Statutory sanction which will justify an injury to private property must be express, or clearly and unquestionably implied from the powers expressly conferred, and must authorize the very act which occasioned the injury; and where the terms of a statute giving authority to a railroad corporation are only permissive, it does not confer license to commit an act which would otherwise be a nuisance, although such act is required to exercise the power.

The powers granted to a railroad corporation are to be construed as privileges conferred, and exercised in strict conformity to private rights, and under the same responsibility as though the acts done in execution of such powers were done by an individual.

When the complaint in an action alleged the obstruction by a railroad of the natural course of the water of a river by a culvert, and the insufficiency of the culvert, whereby water was thrown upon the plaintiff's property to his injury, a nuisance is in substance alleged, and if it be shown that one in fact existed, there is no statutory authority to relieve the defendant from the consequences thereof. *Mundy v. The New York, Lake Erie & Western Railroad Company*, 75 Hun, 499.

From opinion.—"In the *Mayor &c. v. Bailey*, 2 Denio, 433, 441, it was said by the chancellor that a party constructing a dam should construct it in such a manner as to resist such extraordinary floods as might have been reasonably expected occasionally to occur. This rule was approved in *Gray v. Harris*, 107 Mass. 492, and it was there held that it was a question for the jury whether a flood of an extraordinary character was such that it should have been anticipated and provided against. A like view is taken as applicable to a case like the present one in *The Ohio & Miss. R. Co. v. Ramey*, 139 Ill. 9; same *Co. v. Thillman*, 143 id. 127; *Railway Co. v. Pomeroy*, 67 Tex. 498; *Borchardt v. The Warsaw Boom Co.*, 54 Wis. 107. In *Hartshorn v. Chaddock*, 135 N. Y. 116, 120, a recovery was sustained for damages from a flood occurring at the same date as in the present case, although the defendant claimed it was so extraordinary and unusual as to be deemed an act of God, it appearing that though the freshet was unusual with respect to the volume of water, yet that similar ones, but of less power, have occurred in the past and are liable to occur in the future.

The flood of 1889 was higher than ever before, but similar ones had occurred in 1833 and in 1865, and numerous others not so large. It was shown that the river for many years prior to 1889 had been subject to sudden variations and heavy rises, and that there had been a steady increase in the floods, and that they rose quicker in later years than formerly.

We think that it should not be held that the flood was so extraordinary that the defendant was relieved from all liability.

It is further claimed by the defendant that it was authorized by law to construct its road upon its own land and is not liable under the rule laid down in *Moyer v. N. Y. C. & H. R. R. Co.*, 88 N. Y. 351. In that case damages had been awarded to the plaintiff as having been caused by the raising of the bed of defendant's road. It was said that there was no proof that that cause contributed in any way to the damage; that the defendant was authorized by law to construct its road upon its own land, and if it constructed it in a skillful and proper manner it could not be made responsible to persons receiving incidental or consequential damages; that there was no allegation or proof that it was unskillfully or improperly done, but it was found that the embankment was built in a workmanlike and skillful manner, and the case of *Bellinger v. Railroad Co.*, 23 N. Y. 47, was referred to as sustaining the position that the defendant was not liable for consequential damages to any persons caused by the necessary and proper elevation of its roadbed, not in a channel of a stream, but on its own land. In the *Bellinger* case, which related to the same railroad as the *Moyer*

case, it was said that the defendant was liable only on the basis of negligence. The Bellinger case was considered in the case of Cogswell v. N. Y., N. H. & H. R. R. Co., 103 N. Y. 10, and it is said that the ruling in the Bellinger case was based on the fact that the company was authorized by statute to construct its road across the creek at the point where it was located, and that it, therefore, was liable only for such consequences as were attributable to a failure to exercise due care and skill in executing the statute authority. The Cogswell case was an action for damages for a nuisance in the maintenance of an engine house, and it was held to be no defense that it was necessary for the defendant to have its engine house located where it was or that in the management thereof it exercised all practicable care. The rule was laid down that the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury; that where the terms of a statute giving authority to a railroad corporation are not imperative, but permissive, this does not confer license to commit nuisance, although what is contemplated by the statute cannot be done without. In Morton v. Mayor &c., 140 N. Y. 207, a similar view is taken. In Booth v. R. W. & O. T. R. R. Co., 140 N. Y. 272, it is said to be now the settled doctrine in this state that the powers granted to railroad corporations are to be construed as privileges conferred, but upon the understanding that they shall be exercised in strict conformity to private rights, and under the same responsibility as though the acts done in execution of such powers were done by an individual.

In the present case no statute authority is shown to relieve the defendant from the consequences of a nuisance, if one in fact existed, or to require the plaintiff to base his action on negligence simply. In the absence of such authority the ordinary rule of liability would apply. See Angell on Watercourses, (6th ed.) sec. 331a; Campbell v. Seaman, 63 N. Y. 577; People v. N. Y. C. & H. R. R. R. Co., 74 id. 302; Brown v. Cayuga & Sus. R. R. Co., 12 id. 486. The complaint alleges an obstruction by defendant of the natural course of the water and the insufficiency of the culvert, by means of which the water was thrown upon plaintiff's property to his injury. A nuisance is, in substance, alleged, and the evidence warranted the finding that one existed."

A lower land owner not being bound to receive the surface drainage of an upper owner, a railroad may construct an embankment though its effect be to set back such drainage on such owner's land. *Egener v. New York &c. R. Co.*, 3 App. Div. 157.

Authority to construct a bridge over a stream does not permit construction so as to cause an obstruction to the overflow of such stream. *Orvis v. Elmore &c. R. Co.*, 17 App. Div. 187.

Plaintiff's lands were originally swampy, by reason of the overflow of a stream called Samp's Creek. When the Genesee Valley canal was constructed, this with another creek (White's) further down, formerly crossing the canal, were carried into a ditch along the canal to a third creek, (Baird's) still further down into which it was emptied, the latter being conducted under the canal by means of a culvert. After the canal was

vacated, the ditch filling up and overflowing, the state authorities authorized the adjoining owners to turn such waters into the canal prism. While plaintiff's land had been relieved of its swampy condition by these acts it did not thereby acquire a right to a continuance of such immunity as against defendant who had purchased the canal from the state, and had, to protect its tracks which it had erected along its bank, constructed a spillway so as to let the overflow of waters of Samp's creek, overflow the canal above a certain height and go back on plaintiff's land causing it to revert to its original condition. *Dailey v. Western &c. R. Co.*, 53 App. Div. 551.

Parties turned water into a railroad ditch, whence it did damage. Railroad company was not liable. *Chicago &c. R. Co. v. Glenney*, 118 Ill. 487.

Railroad construction should not interfere with surface drainage. *Kirk v. Kansas City &c. R. Co.*, 51 La. Ann. 667; *Fremont &c. R. Co. v. Harlin*, 50 Neb. 698; *Texarkana &c. R. Co. v. Spencer*, (Tex. Civ. App.) 67 S. W. Rep. 196.

Especially where it is collected and cast off in quantities. *New York &c. R. Co. v. Jones*, 94 Md. 24; *Rice v. Norfolk &c. R. Co.*, (N. C.) 41 S. E. Rep. 1031; *Cain v. Southbound R. Co.*, 62 S. C. 25; *Churchill v. Rose* (Cal.) 69 Pac. Rep. 416; *Borchsenius v. Chicago &c. R. Co.*, 96 Wis. 448.

See, also, *Town v. Missouri P. R. Co.*, 50 Neb. 768.

Railroad must provide for a reasonable rise of water. *Indiana &c. R. Co. v. Patchette*, 59 Ill. App. 251.

But not for an extraordinary one. *Georgia R. &c. Co. v. Bohler*, 98 Ga. 184.

Or such as is due to a subsequent alteration and not reasonably to be anticipated. *San Antonio &c. R. Co. v. Horken*, (Tex. Civ. App.) 45 S. W. Rep. 391.

Negligence in others in allowing sand to wash down into defendant's culvert was not shown to have been the sole cause of injury so as to exempt defendant from its own negligence in failing to keep its culvert open. *Shahan v. Alabama &c. R. Co.*, 115 Ala. 181.

The liability for a company's failure to perform its duty, inures to a tenant of the premises. *Indiana &c. R. Co. v. Patchette*, 59 Ill. App. 251.

Though unable to obstruct drainage it has reasonable discretion as to furnishing an outlet. *Harrelson v. Kansas City &c. R. Co.*, 151 Mo. 482.

Railroad may obstruct surface drainage or change its direction. *Lawton v. South Bound R. Co.*, 61 S. C. 548; *Clausen v. Chicago &c. R. Co.*, 106 Wis. 308; *Central &c. R. Co. v. Windham*, 126 Ala. 552; *Cleveland &c. R. Co. v. Huddleston*, 21 Ind. App. 621.

That is, in a reasonable manner, wherever the exact conditions required by statute do not occur. *Graves v. Kansas City &c. R. Co.*, 65 Mo. App. 574.

See, also, *Kennedy v. Kansas &c. R. Co.*, 69 Mo. App. 569; *DeLapp v. Kansas City &c. R. Co.*, id. 572.

And provided it does not cause an unhealthful accumulation. *Baltzeger v. Carolina Midland R. Co.*, 54 S. C. 242.

Grant of the right of way, carries with it such privilege to a reasonable extent. *Harrelson v. Kansas City &c. R. Co.*, 151 Mo. 482.

See, also, *Parker v. Norfolk &c. R. Co.*, 119 N. C. 677.

Though the construction of embankments somewhat deepens and prolongs overflows of a low land, a railroad is not liable where it provides numerous trestles. *Yazoo &c. R. Co. v. Davis*, 73 Miss. 678.

See, also, *Priest v. Boston &c. R. Co.*, 71 N. H. 114; *Walker v. New Mexico &c. R. Co.*, 165 U. S. 593; *Canton &c. R. Co. v. Paine*, (Miss.) 19 So. 199; *New York &c. R. Co. v. Hamlet*, 149 Ind. 344.

Obstruction of the natural flow of vagrant waters by the construction of railroad embankments held not to make it liable for the deposit of sand and silt, not due to misconstruction. *Illinois C. R. Co. v. Wilbourn*, 74 Miss. 284.

A railroad cannot obstruct the flow of a natural stream. (Other means of escape must be provided). *St. Louis &c. R. Co. v. Ellis*, 58 Ill. App. 110; *Penley v. Maine C. R. Co.*, 92 Me. 59; *Baltimore &c. R. Co. v. Hackensack*, 87 Md. 224; *Mullen v. Lake Drummond Canal &c. Co.*, 130 N. C. 496; *Williams v. Same*, id. 746; *Gulf &c. R. Co. v. Clark*, (Ind. Terr.) 51 S. W. Rep. 962.

Or a well-defined channel formed by melting snow or rain. *Chicago &c. R. Co. v. Shaw*, 63 Neb. 380; *Missouri Pac. R. Co. v. Hemmingway*, id. 610.

And a grant of the right of way does not carry with it such privilege. *Norfolk &c. R. Co. v. Carter*, 91 Va. 587.

That land had overflowed before construction of the road was no defense where construction contributed to an overflow thereafter. *Texas &c. R. Co. v. Padgett*, 14 Tex. Civ. App. 435.

That a canal used to divert a river was insufficient, did not render the railroad liable where the river itself was not sufficient. *Powers v. St. Louis &c. R. Co.*, 71 Mo. App. 540.

Railroad must take into consideration an ordinary flood. *Brown v. Pine Creek R. Co.*, 183 Pa. St. 38.

But need not, an extraordinary one. *James v. Kansas City &c. R. Co.*, 69 Mo. App. 431.

Failure to provide sufficient drainage held not the proximate cause of a building's collapse. *Peoria v. Adams*, 72 Ill. App. 662.

If construction of railway embankments will probably cause damage, landowner is not precluded from using his land and recovering damage if any occur. *Clark v. Dyer*, 81 Tex. 339.

Contra, *Emery v. Raleigh &c. R. Co.*, 109 N. C. 589.

A railroad may relieve the flooding of one proprietor by restoring a stream to its natural flow though another has had eight years of freedom therefrom. *Missouri &c. R. Co. v. Bishop*, (Tex. Civ. App.) 34 S. W. Rep. 323.

(f). UNWHOLESOME AND OFFENSIVE OCCUPATIONS.

One carrying on a lawful business on his premises in such a manner as to prove a nuisance to his neighbor is liable in damages.

It is not necessary to the right of action, that the neighbor be driven from his dwelling; it is enough that his enjoyment of life and property is rendered uncomfortable. *Rex v. White*, 1 Burr. 337; *S. H. S. Co. v. Tipping*, 11 H. L. Cas. 642; *Fish v. Dodge*, 4 Denio 311; *Catlin v. Valentine*, 9 Paige 575; *Campbell v. Seaman*, 63 N. Y. 568; *Cogswell v. N. Y., N. H. & H. R. Co.*, 103 id. 10; *Wood on Nuis. sec. 497*.

Although the acts complained of are inseparably connected with the carrying on of the business itself, and the resulting damages a necessary consequence, if those acts constitute a nuisance *per se*, it is not necessary to show negligence in order to sustain a recovery.

Every person is bound to make a reasonable use of his property, having respect for his neighbor's right; a use which produces destructive vapors and noxious smells, resulting in material injury to the property and the comfort of those dwelling in the neighborhood, is not reasonable, and is a nuisance *per se*.

As a general rule, corporations authorized by statute to carry on a business, although it may be of a *quasi* public character, are under the same obligations to make a reasonable use of their property and to respect the rights of others as are citizens.

While the legislature may authorize acts, which would otherwise be a nuisance, when they affect or relate to matters in which the public have an interest, or over which they have control, the statutory authority which affords immunity for such acts must be express, or a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury.

The action was to recover damages from the use by the defendant of naphtha in the manufacture of gas, which was an offensive, noxious, unhealthy and sickening mineral substance, destructive of health and

comfort to those in proximity to it, the tank for the storage of which was within a few feet of the plaintiff's premises.

Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18.

From opinion.—"While every person has exclusive dominion over his own property and may subject it to such uses as will subserve his wishes and private interests, he is bound to have respect and regard for his neighbor's rights.

The maxim '*Sic utere tuo ut alienum non laedas*' limits his powers. He must make a reasonable use of his property, and a reasonable use can never be construed to include those uses which produce destructive vapors and noxious smells, and that result in material injury to the property and to the comfort of the existence of those who dwell in the neighborhood.

The reports are filled with cases where this doctrine has been applied, and it may be confidently asserted that no authority can be produced, holding that negligence is essential to establish a cause of action for injuries of such a character. A reference to a few authorities will sustain this assertion.

In *Campbell v. Seaman*, 63 N. Y. 568, there was no allegation of negligence in the complaint, and there was an allegation of due care in the answer. There was no finding of negligence, and this court affirmed a recovery.

In *Heeg v. Licht*, 80 N. Y. 579, an action for injuries arising from the explosion of fireworks, the trial court charged the jury that they must find for defendant, 'unless they found that the defendant carelessly and negligently kept the gunpowder on his premises.' And he refused to charge upon the plaintiff's request 'that the powder magazine was dangerous in itself to plaintiff, and was a private nuisance, and defendant was liable to plaintiff, whether it was carelessly kept or not.' There was a verdict for the defendant, and this court reversed the judgment, holding that the charge was erroneous. In *Cogswell v. N. Y. & N. H. R. Co.*, 103 N. Y. 10, the special term found, as facts, that in the construction of the engine house and coal-bins, and in the use of its premises the defendant exercised due care, so far as the same was practicable, and it refused to find, upon plaintiff's request, 'that in the construction of the engine-house, chimney, smoke-pipe and coal-bins, it had not exercised, and does not now exercise, such reasonable and proper care as was necessary not to injure the plaintiff's property.' A judgment for the defendant was reversed, this court holding that the engine-house as used was a nuisance, and that it was not an answer to the action that the defendant exercised all practicable care in its management. In *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257, the charge of the court, and the refusals to charge, were very similar to the charge in this case. The supreme court of Pennsylvania overruled the exceptions, holding that negligence was not essential to a right of recovery. To the same effect see *Cleveland v. C. G. L. Co.*, 20 N. J. Eq. 201; *O. G. L. & C. Co. v. Thompson*, 39 Ill. 598; *Wood on Nuis.*, (2d ed.) sec. 553.

The principle, that one cannot recover for injuries sustained from lawful acts, done on one's own property without negligence and without malice, is well founded in the law. Every one has the right to the reasonable enjoyment of his own property, and so long as the use to which he devotes it violates no rights of others, there is no legal cause of action against him.

The wants of mankind demand that property be put to many and various uses and employments, and one may have, upon his property, any kind of lawful business, and so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and

unavoidably sustains. Such losses the law regards as *damnum absque injuria*. And under this principle, if the steam boiler on the defendant's property, or the gas retort, or the naphtha tanks had exploded and injured the plaintiff's property, it would have been necessary for her to prove negligence, on the defendant's part, to entitle her to recover. *Losee v. Buchanan*, 51 N. Y. 476.

But *where the damage is the necessary consequence* of just what the defendant is doing, or is *incident to the business itself*, or the *manner in which it is conducted*, the law of negligence has no application and the law of nuisance applies. *Hay v. Cohoes Co.*, 2 N. Y. 159; *McKeon v. See*, 51 id. 300.

The exception to the refusal to charge the first proposition above quoted was not, therefore, well taken.

Statutory authority to carry on.—It is contended, however, by the defendant, that the acts of the legislature relating to gas companies are a protection from liability for consequential injuries flowing from the manufacture of gas, or the prosecution of the business, when want of care forms no element of the cause of injury, and it is sought to apply to this case the broad principle that that which the law authorizes cannot be a nuisance, although it may occasion damages to individual rights and property.

The cases cited to sustain this proposition are ones where municipal corporations were engaged in grading and improving public streets and highways. *Radeliff v. Mayor &c.*, 4 N. Y. 195; *Transportation Co. v. Chicago*, 99 U. S. 635. Or where the act causing the injury was done by corporations in the construction of works upon property acquired under the power of eminent domain. *Bellinger v. N. Y. C. R. Co.*, 23 N. Y. 42.

In these cases, in doing the acts complained of, the defendants acted in the performance of a public duty imposed upon them by the legislature, or in the exercise of a right conferred by law, and it is well settled that persons appointed or authorized by law to perform a public duty, or to do acts of a public character are not answerable for consequential damages if they act within their jurisdiction and with care and skill. *Trans. Co. v. Chicago*, 99 U. S. 635; *Uline v. N. Y. C. & H. R. R. Co.*, 101 N. Y. 98; *Conklin v. N. Y., O. & W. R. Co.*, 102 id. 105; *Cooley on Const. Lim.*, (5th ed.) 671.

This principle cannot, however, be applied to cases like the one under consideration. * * *

The proposition contended for by the learned counsel for the defendant has, in recent years, received full consideration in the courts of England and of this country, and the rule is now established that the statutory authority which will justify an injury to *private property and afford immunity for acts which would otherwise be a nuisance must be express, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury.* *Cogswell v. N. Y., N. H. & H. R. Co.*, 103 N. Y. 10; *B. & P. R. Co. v. Fifth Bap. Ch.*, 108 U. S. 317; *Hill v. Managers of Met. Asylum Dist.*, L. R., 4 Q. B. 433; L. R., 6 App. Cas. 193; *Pottstown Gas Co. v. Murphy*, 39 Penn. St. 257; *Eames v. N. E. W. Co.*, 11 Metc. 570; *Commonwealth v. Kidder*, 107 Mass. 188.

In *Pottstown Gas Co. v. Murphy*, the supreme court of Pennsylvania said: 'The principle invoked applies only when an incorporation clothed with a portion of the state's right of eminent domain takes private property for public use on making proper compensation, and when such damages are not a part of the compensation required.'

In *Eames v. N. E. Worsted Co.*, Chief Justice Shaw said: 'The Mill Act affords no warrant or justification for erecting or maintaining a nuisance.'

In *Commonwealth v. Kidder*, in considering the effect of a statute authorizing the storing and manufacturing of naphtha and petroleum, the supreme court of Massachusetts said: 'The reasonable, if not necessary, inference is that it was not the intention of the legislature to establish a new rule in this regard, but to leave the question whether the manufacturing is carried on at such places and in such a manner as to be unwholesome and offensive to the public, and on that account indictable as a nuisance, to be determined by the rules of the common law.'

In *B. & P. R. Co. v. Fifth Bap. Ch.*, it was said: 'The authority of the company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them where it may think proper without reference to the property and rights of others. Grants of privileges or power to corporate bodies like those in question confer no license to use them in disregard of the private rights of others, and with immunity for their invasion.'

And in *Hill v. Managers of Met. Asylum Dist.*, Lord Watson said: 'When the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put in execution or not, I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected.'

There is nothing in *Truman v. L. B. & S. C. R. Co.*, L. R., 25 Ch. Div. 45, conflicting with this rule.

The House of Lords in that case recognized fully the rule applied in *Hill v. Managers of Met. Asylum Dist.*, and held that the purpose for which the land was acquired by the defendants being expressly authorized by the act of parliament, and being incidental and necessary to the authorized use of the railway for the cattle traffic, the company were authorized to do what they did.

The Legislature may authorize acts which would otherwise be a nuisance when they affect or relate to matters in which the public have an interest, or over which the public have control, such as highways or public streams.

In such cases the legislative authorization exempts from liability to suits civil or criminal at the instance of the state, but it does not affect the claims of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large. *Crittenden v. Wilson*, 5 Cow. 165; *Brown v. C. & S. R. R. Co.*, 12 N. Y. 486; *Sinnickson v. Johnsons*, 17 N. J. L. 151; *B. & P. R. R. Co. v. Baptist Church*, *supra*."

See to same effect *Mundy v. New York, Lake Erie & Western Railroad Company*, 75 Hun, 499.

The privilege of erecting poles and stringing wires along the streets of a city, granted to an electric company by the municipal authorities thereof, confers no authority upon the corporation to interfere with or destroy private property; and where the title of the owner of a house and lot fronting on a street extends to the middle of the street such person can recover damages against an electric company caused by the unnecessary cutting by it of limbs from the shade trees which stand on such street immediately in front of the premises owned and occupied by him, and the measure of damages is the diminution in market value

of the plaintiff's premises caused by the cutting of such trees. *Gorham v. The Eastchester Electric Company*, 80 Hun, 290.

A company authorized to make gas for streets, &c., is not guilty of nuisance for creating unwholesome smells, if its processes are of the best kind and due care is used. *People v. President N. Y. Gas Light Co.*, 6 Lansing, 467.

Whenever a franchise is granted by the Legislature to erect a structure or carry on a business, the erection of the structure or the carrying on of the business is not, and cannot, of itself be unlawful or a nuisance. It may, however, become a nuisance because of the manner of its operation or of its construction, or by reason of its location under certain circumstances. Everything that is necessarily and naturally incident to its operation is embraced within the franchise and is not a nuisance although it may operate as such; damage caused thereby to third persons is *damnum absque injuria*.

It is lawful for a railroad company in connection with the operation of its road to erect and operate steam pumps, using coal which generates and discharges smoke, but if the machinery is so located that its operation becomes a nuisance, when its location might have been such that it would not have become a nuisance to others. it may be declared a nuisance by reason of such location, as to one who receives therefrom injury peculiar to himself.

The fact that a pump operated by steam and used in connection with a railroad is erected alongside a highway, and that it emits smoke and steam, and makes some noise, is not sufficient to constitute a nuisance, although the smoke settles upon such highway when the wind is in a certain direction. *Pettit v. The New York Central & Hudson River Railroad Company*, 80 Hun, 86.

Defendant maintained a steam whistle, capable of being heard for miles near to and nearly on a level with a platform of a freight station of a railroad, and he sounded the same three times in succession, whereby plaintiff's horse ran away and was injured. Defendant liable. A person has no right to do upon his own premises an act, that detracts from the safety of travelers, and the negligence of the injured person is not material. The action is founded upon the wrong done but not upon the negligent manner in which it is done. Plaintiff was lawfully at the station. *Albee v. Chap. Shoe Man. Co.*, 62 Hun, 223, aff'g judgt for plff.

Where damage to property is the necessary consequence of another's business, or is incident to that business or the manner in which it is conducted, the law of nuisance and not the law of negligence applies, as where property was ignited by a spark from the chimney of a smelting

furnace. *Campbell v. U. S. Foundry Co.*, 73 Hun, 576, aff'g judg't for pl'ff.

From opinion.—"There was evidence that appliances for arresting sparks were used, and when used, prevented sparks escaping from chimneys like defendant's; that defendant had at one time used one on its chimney, but did not use it at the time of the fire. If the jury believed this evidence a clear case of negligence was proved. But suppose the contention of the defendant be true, that it was impossible, by reason of the great heat, to maintain a spark arrester on the top of its chimney. The case then becomes one of nuisance. The law as to damages resulting from nuisance is well settled. 'Where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application and the law of nuisance applies. (Opinion of Judge Brown, *Bohan v. Port Jervis G. L. Co.*, 122 N. Y. L. 26.) The evidence clearly shows that the defendant maintained a nuisance in conducting its business at the time of the fire."

As to grantee's not being liable for a nuisance not an obvious one, which his grantor has created, without notice thereof, see *Orvis v. Elmira &c. R. Co.*, 17 App. Div. 187.

That a dam is authorized to be constructed and maintained, does not permit its maintenance in a condition in which it becomes a nuisance. *People v. Pelton*, 36 App. Div. 450; s. c. aff'd, 53 N. E. Rep. 1129.

See, also, *Kobbe v. New Brighton*, 23 App. Div. 243; *Lefrois v. Monroe Co.*, 24 App. Div. 421; *Murray v. Arthur*, 98 Ill. App. 331; *New Albany v. Slider*, 21 Ind. App. 392; *State v. Barnes*, 20 R. I. 525; *Chicago &c. R. Co. v. First &c. Church*, 102 Fed. Rep. 85.

That defendant removed the objectionable feature of his business, before trial, does not defeat an action for damages for the prior injury. *Miller v. Edison Electric Ill. Co.*, 66 App. Div. 470.

Use of profane language by workman adjoining a dwelling may be a nuisance. *Stevenson v. Pucci*, 32 Misc. 464.

So is the use of steam drills and hoisting engines before 7 a. m. or after 6 p. m. *Stevenson v. Pucci*, 32 Misc. 464.

So are deleterious odors from a tobacco dry house. *Hundley v. Harrison*, 123 Ala. 292.

See, also, *Millhiser v. Willard*, 96 Iowa, 327 (a rendering establishment).

So is the maintenance of an obstruction. *Hardin v. Sin Claire*, 115 Cal. 460.

So is the maintenance of a pig-sty near a stream near enough to a city's water supply so as to pollute it. *Durango v. Chapman*, 27 Colo. 169.

See, also, as to liability for polluting streams, *People v. Tuckee Lumber Co.*, 116 Cal. 397; *Peterson v. Santa Rosa*, 119 id. 387; *Los Angeles v. Pomeroy*, 124 id. 597; *Barnard v. Shirley*, 151 Ind. 160; *Weston Paper Co. v. Pope*, 155 Ind. 394; *State v. Wabash Paper Co.*, 21 Ind. App. 167; *Fitzpatrick v. Montgomery*, 20 Mont. 181; *Sterling Iron &c. Co. v. Sparks Man. Co.*, (N. J. L.) 38 Atl. Rep.

426; *State Board of Health v. Jersey City*, 55 N. J. Eq. 116; s. c., aff'd, 55 id. 591; *Mansfield v. Hunt*, 19 Oh. C. C. 488; *Wheeler v. Fisher Oil Co.*, 6 Oh. N. P. 309; *Magee v. Pennsylvania &c. R. Co.*, 13 Pa. Super Ct. 187; *Rarick v. Smith*, 5 Pa. Dist. Rep. 530; *North Point Consol &c. Co. v. Utah*, 16 Utah, 246; *Montana Co. v. Gehring*, 75 Fed. Rep. 384; *Sels v. Greene*, 81 id. 555; *Car-michael v. Texarkana*, 94 id. 561; *Trevett v. Prison Asso.*, 98 Va. 332.

A barn or stable near a dwelling may or may not be according to the way in which it is kept. *Kaspar v. Dawson*, 71 Conn. 405.

The maintenance of an electric plant which casts smoke and dirt on plaintiff's property adjoining, and shakes the house, materially depreciating its value, is. *Hyde Park &c. Co. v. Porter*, 64 Ill. App. 152.

See, also, *McMorran v. Fitzgerald*, 106 Mich. 649; *Matthews v. Stillwater Gas Co.*, 63 Minn. 493; *St. Paul v. Johnson*, 69 Minn. 184; but see *Downing v. Elliott*, (Mass.) 64 N. E. Rep. 201.

Filthy and offensive cattle cars left standing adjoining a dwelling for long periods of time, are. *Cleveland &c. R. Co. v. Pattison*, 67 Ill. App. 351.

Operation of rendering works may be restrained where they justly become a nuisance, but if the proper appliances are used at the proper time of the year, so as to minimize the danger the business is lawful and cannot be abated. *Canal Melting Co. v. Columbia Park Co.*, 99 Ill. App. 215.

But see *Ducktown Sulphur &c. Co. v. Barnes*, (Tenn.) 60 S. W. Rep. 593.

Cattle yards within city limits, are. *Opelousas &c. v. Norman*, 51 La. Ann. 736.

State v. Henzler, N. J. L., 41 Atl. Rep. 228; *Anderson v. Chicago &c. R. Co.*, 85 Minn. 337; *Neville v. Mitchell*, (Tex. Civ. App.) 66 S. W. Rep. 579.

Gasoline and coal oil tanks within 75 feet of a dwelling and within 50 and 60 feet of a railroad held not to be, where properly guarded against danger from sparks. *Harper v. Standard Oil Co.*, 78 Mo. App. 338.

See, also, *Gavigan v. Atlantic Ref. Co.*, 186 Pa. St. 604.

The distribution of lint dust and smoke from an adjoining shoddy mill, held not to be. *Davis v. Whitney*, 68 N. H. 66.

A garbage plant near enough to a dwelling to affect the health of its inmates, is. *Munk v. Columbus Sanitary Works Co.*, 7 Oh. N. P. 542.

The only annoyance from a factory, contracting with a city for the disposal of its garbage, properly located and conducted without the city limits, was the odor incident to its removal. Held not abatable. *Fisher v. Flinn*, 28 Pittsburg, L. J. (N. S.) 237.

That the noxious vapors arise on plaintiff's own land is no defense where they are caused to do so by defendant. *Carland v. Aurin*, 103 Tenn. 555.

The planting of Bermuda grass on defendant's right of way, held not

to be. It spread onto adjoining premises. *Gulf &c. R. Co. v. Oakes*, 94 Tex. 155.

So, where it did not appear that the smoke and dust from a coal depot entered the house or that its noise created an annoyance. *Daniel v. Ft. Worth &c. R. Co.*, (Tex. Civ. App.) 69 S. W. Rep. 198.

See, also, *Faulkenbury v. Wells*, (Tex. Civ. App.) 68 S. W. Rep. 327; also *Faucher v. Trudel*, 71 N. H. 621.

Where the structure is temporary and movable, permanent damages cannot be obtained. Exemplary damages may, if it is continued after suit. *Pickins v. Coal River Boom &c. Co.*, 51 W. Va. 445.

See *Dumoix v. New York*, 37 Misc. 614.

(g). LATERAL SUPPORT.

Buildings erected by a tenant were injured by the negligent excavating of adjoining owners. The tenant recovered although a sub-tenant was occupying. *Austin v. Hudson R. Co.*, 25 N. Y. 334.

The owner who makes excavations on his land is liable, if he thereby deprives that of adjoining properties of its lateral support, while it is in its natural condition. *Transportation Co. v. Chicago*, 99 U. S. 635; *Losee v. Buchanan*, 51 N. Y. 476; (see *ante*, p. 2062); *Harvard v. Marshall*, 21 Barb. 409.

This rule is qualified when necessary excavations are made for building in villages and cities. *Radcliff's Executors v. Mayor*, 4 Comst. 203; (see history and discussion of the rules in this case, and authorities cited); *Losee v. Buchanan*, 51 N. Y. 476.

See *ante*, p. 2091.

Act of 1855, chap. 6, requires the owners of land in the cities of New York and Brooklyn, when intending to excavate to the depth of more than ten feet, to preserve from injury and to support any wall upon adjoining land standing upon or near the boundary line, "if afforded the necessary license to enter on the adjoining land, and not otherwise." The adjoining land owner need not tender this license, but the party "causing the excavation to be made" should request it, and the latter is not exempt from the statutory duty because he has made a contract for the performance of the work. *Dorrity v. Rapp*, 72 N. Y. 307, rev'g 11 Hun, 374, and aff'g judg't for pl'ff.

From opinion.—"By the common law an owner of land contiguous to the land of another, upon which a building is erected, is not bound to protect the owner of the building against injuries which may result thereto from excavations on his own land, in the absence of any right by prescription or grant in the owner of the building to have it supported by the land of the person making

the excavation. The natural right of support, as between the owners of contiguous lands, exists in respect of lands only, and not in respect of buildings or erections thereon. *Panton v. Holland*, 17 J. R. 92; *Thurston v. Hancock*, 12 Mass. 221; *Humphrey v. Boyden*, 12 Q. B. 139; *Goddard on Easements*, 31. The owner of land, however, in making an excavation on his own premises which may endanger a building on his neighbor's land, is bound to use reasonable care in the prosecution of the work, and is liable for injuries to his neighbor's property resulting from his negligence. *Panton v. Holland*, *supra*; *Dodd v. Holmes*, 1 Ad. & El. 493; *Foley v. Wyeth*, 2 Allen, 131. But he is under no obligation to shore up his neighbor's house, nor is there any duty arising from contiguity merely that he should give his neighbor notice of his intention to excavate on his own premises. 2 Was. on Easements, 444; *Trower v. Chadwick*, 3 Bing., (N. C.) 334; *id.* 4 Bing., (N. C.) 1. This being the state of the common law upon the subject, the legislature, in 1855, interposed to regulate the exercise by owners of land in the cities of New York and Brooklyn of the right of excavation, and to afford to owners of buildings a new protection against injuries from excavations on adjoining lands. By the act chapter six of the laws of that year, it is declared that whenever excavations on any lot in New York or Brooklyn 'shall be intended to be carried to the depth of more than ten feet below the curb, and there shall be any party or other wall wholly or partly on adjoining land, and standing upon or near the boundary lines of such lot, the persons causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, shall at all times from the commencement until the completion of such excavation, at his own expense, preserve the wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavations were commenced.'"

If one, by carelessness in making an excavation on his own land, causes injury to an adjoining building, even where the owner of the house has no easement of support, the former will be liable. *Booth v. R., W. & O. T. R. Co.*, 140 N. Y. 267; *Leader v. Moxon*, 3 Wils. 460; *Lawrence v. Great N. R. Co.*, 16 Ad. & El. 643-653; *Leake's Law of Real Property*, 248.

Where plaintiff's wharf did not exert any pressure on defendant's land under the water of the bay, defendant was liable for its fall caused by his excavating on his own land and the land of the state intervening (without its permission) to a depth far exceeding the natural depth of the water at such place. *White v. Tebo*, 43 App. Div. 418.

Defendant sold sand to another and deposited it on a lot which he leased, but on which he gave his vendee the permission of storing it. He was liable for its breaking down a wall on the lot of an adjoining owner, notwithstanding such vendee increased the weight against such wall. *Barnes v. Masterson*, 38 App. Div. 612.

"Notice" of an intention to excavate premises directly adjoining, permits excavation anywhere thereon. *Nippert v. Warneke*, 128 Cal. 501.

Owner, not liable for damage incident to the lack of lateral support, which is the natural result of the location of the foundation and wall

permitted. *Kramer v. Northern Hotel Co.*, 185 Ill. 612; aff'g s. c., 85 Ill. App. 264.

Removal of lateral support whereby child of adjoining owner was injured created liability. *Mayhew v. Burnes*, 103 Ind. 328.

Giving notice brings the duty down from extraordinary to ordinary care; and the duty of shoring a contiguous building is imposed on the adjacent owner himself where the latter has notice of intention to excavate. *Bohrer v. Dienhart Harness Co.*, 19 Ind. App. 489; aff'g s. c., 45 N. E. Rep. 668.

See, also, *Lapp v. Gutenkunst*, (Ky.) 44 S. W. Rep. 964; *Bass v. West*, 110 Ga. 698; also *Taylor v. Day*, 6 Oh. N. P. 447.

Owner is liable for negligence in excavating, which should have been anticipated, though an independent contractor be employed to do the work. *Bonaparte v. Wiseman*, 89 Md. 12.

Sewer commissioners knowing that the underlying soil of the locality was composed largely of water and quicksand which would be drained and pumped out in constructing a sewer, failed to require the contractors to take unusual and extraordinary precautions to prevent such a consequence. They were liable for the withdrawal of the lateral support of an adjoining building. *Cabot v. Kingman*, 166 Mass. 403.

Owner of premises excavating thereon within four and one-half feet of adjoining premises, whereby the land of such adjoining premises is caused to fall by its own weight, taking buildings thereon down with it, was held liable for the damage. The latter was not required to protect himself by shoring up his own property where he was informed by the former that he would be protected in that respect. *Gildersleeve v. Hammond*, 109 Mich. 431.

From opinion.—"While a land owner has the undoubted right to excavate close to the boundary line, he must take reasonable precautions to prevent his neighbor's soil from falling.

If he has taken such reasonable precautions, and yet the soil falls from its own pressure, he is still liable for injury to the land, but not for any injury to the superstructure.

If the pressure of the superstructure causes the land to fall, he is not liable either for injury to the land or superstructure.

If he fails to take such reasonable precautions to protect his neighbor's soil, and to preserve it in its natural state, he is liable for the injury to both the land and the superstructure, if the pressure of the superstructure did not cause the land to fall, and it fell in consequence of the failure to take such reasonable precautions."

The damages is the diminution of value caused by the caving in, incident to the removal of the lateral support. *Schultz v. Bower*, 64 Minn. 123.

There is no other duty as to lateral support in Ohio than the statutory

one, where that has been complied with. *Hall v. Kleeman*, 4 Oh. N. P. 201.

Earth may be removed up to the boundary line of the premises. *Kilgour v. Wolf*, 4 Oh. N. P. 183.

See, also, *Gildersleeve v. Hammond*, 109 Mich. 431.

An owner is not entitled to the lateral support of land as encumbered by a building, so as to require a neighbor to excavate in parcels to prevent injury. *Obert v. Dunn*, 140 Mo. 476.

See, also, *Novotny v. Danforth*, 9 S. D. 301.

But where an adjoining owner is required to protect a part of his wall and is promised that sufficient earth shall be left to protect the remainder, he may rely on such promise of the excavating owner. *Delaney v. Bowman*, 82 Mo. App. 252.

So, where the latter agrees to protect the building of the former, the latter is not excused from exercising due care to by the fact that the agreement is without consideration. *Walters v. Hamilton*, 75 Mo. App. 237.

Where owner without giving notice of intention to excavate, dug below foundation wall of adjoining building, he was held liable for the negligent prosecution of the work. *Spohn v. Dives*, 174 Pa. St. 474.

Whether 20 feet was sufficient width under the circumstances to allow between an adjoining building and the excavation was for the jury. *Witherow v. Tannehill*, 194 Pa. St. 21.

Negligence in excavation is for the jury where the braces at the top of the excavation were insufficient and there was none at all at the bottom. *Witherow v. Tannehill*, 194 Pa. St. 21.

An owner deposited earth on his own premises in such a way as to necessitate the strengthening of the foundation walls of an adjoining owner. Damages recovered by the latter included the cost of such strengthening. *McKnight v. Denny*, 198 Pa. St. 323.

Statute providing that an owner excavating below 15 feet shall protect neighboring wall at his own expense is constitutional. *Shenk v. McKinnan*, 11 Pa. Super. Ct. 84.

Actual knowledge of intention to excavate dispenses with the statutory notice. *Novotny v. Danforth*, 9 S. D. 301.

The right to lateral support does not protect whatever has been placed upon the soil increasing the downward and lateral pressure, and it must appear that irrespective thereof, the removal of the lateral support is the cause of the injury. *Transportation Co. v. Chicago*, 99 U. S. 635; *Booth v. R., W. & O. T. Co.*, 140 N. Y. 267; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Partridge v. Scott*, 8 M. & W. 220; *Lasala v. Holbrook*, 4 Paige 170; *Thurston v. Hancock*, 12 Mass. 220.

Defendant built on top of the ground adjoining plaintiff's foundation. Latter sought to restrain the former increasing the weight on his walls on the ground that it would prevent him from safely removing his own. Injunction denied. *Graves v. Mattison*, 67 Vt. 630.

(h). PREMISES ADJOINING ONE ANOTHER.

Where a tree is in close proximity to a house on adjoining land it was negligence to allow it to remain standing when it was so dangerously decayed as to fall during an ordinary gale. *Gibson v. Denton*, 4 App. Div. 198.

An owner was not rendered liable to a fireman on adjoining premises by the fact that the unguarded wall over which he fell was a party wall, of which he was part owner. He was not obliged to build over all his premises or fence out persons coming on the adjoining premises. *Woods v. Miller*, 30 App. Div. 232.

An owner, leaving the scuttle on his roof open into which water was thrown from adjacent premises, was not negligent. *Yikhon v. Springfield Water Works*, 65 Cal. 619.

See "Fires from Locomotives," p. 1250.

Increase of insurance risk and decrease of desirability of premises were not grounds for recovery, for a structure not amounting to a nuisance. *Siskiyou Lumber &c. Co. v. Rostel*, 121 Cal. 511.

Rocks placed in a stream to protect a bridge were carried away by extraordinary freshet on plaintiff's adjoining land. No liability. *Ill. Central R. Co. v. Bethel*, 11 Ill. App. 17.

Where furnace, requiring great heat, is dangerous to adjoining property corresponding care is required. *Hauch v. Hernandez*, 41 La. Ann. 992.

Proof of failure to construct a furnace pursuant to city rules is insufficient without proof that such failure was the proximate cause of the accident. *Siebert v. McManus*, 104 La. 404.

The construction of a roof so as to slide snow and ice on plaintiff's premises, held to have been the cause of his slipping thereon. *Ferris v. Board of Education of Detroit*, 122 Mich. 315.

A grain elevator containing much inflammable material when adjoining a dwelling, should have an automatic sprinkler in it. *Cox v. Central Vt. R. Co.*, 170 Miss. 129.

Crude oil is kept on the premises, at one's peril. *Lanabough v. Anderson*, 22 Oh. C. C. 178.

But see *Cleveland &c. R. Co. v. Ballentine*, 84 Fed. Rep. 935.

As to keeping water in a reservoir, see *ante*, subd. (e).

A workman employed on a boiler knowing the purpose of his work, did it so negligently as to injure adjacent property. Liability attached. *Erie Co. Iron Works v. Barker*, 102 Pa. St. 156.

Though a fence cuts off air, light and view, and is erected through malice, an adjoining owner cannot complain. *Saddler v. Alexander*, (Ky.) 56 S. W. Rep. 518.

See, also, *McCorkle v. Driskell*, (Tenn.) 60 S. W. Rep. 172; *Karasek v. Peier*, 22 Wash. 419.

(i). MISCELLANEOUS CASES.

Failure to collect within a given time logs broken from a raft by a storm, held not the proximate cause of injury to an embankment during a subsequent storm. *New Orleans &c. R. Co. v. McEwen*, 49 La. Ann. 1184; s. c., 38 L. R. A. 134.

Wrecked oil cars allowed oil to flow into an adjoining field where plaintiff pastured his cows. Failure to drain off the oil did not charge defendant with the damage done thereby. *Rooks v. Alabama &c. R. Co.*, 78 Miss. 91.

Failure to open a draw bridge was the proximate cause of injury from collision with submerged piles in attempting to avoid collision with the unopened draw. *Boland v. Combination Bridge Co.*, 94 Fed. Rep. 888.

The breaking away of a heavy log on a hillside by a land slide, held the natural and probable consequence of bracing it against small trees. *Howe v. West Seattle Land &c. Co.*, 21 Wash. 594.

Defendant failed to guard a washout in a ditch. A snow storm which started plaintiff's cattle toward it was not such an intervening agency as to discontinue the operation of the original cause. *Big Goose &c. Ditch Co. v. Morrow*, 8 Wyo. 537.

II. Injuries Thereon.

PERSONS UNINVITED AND LICENSEES.—An owner of private premises owes no active or affirmative diligence to a person going thereon without invitation, express or implied, nor to one who is upon the premises by mere license. But the owner may not maintain a dangerous animal (See "Domestic Animals," *ante*, p. 983) or dangerous appliances, like spring guns or traps, so as to subject to injury a person innocently going on the premises, though without actual permission or license. *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391.

CUSTOMARY WAYS AND FREQUENTED PLACES.—Where, by the license or acquiescence of the owner of premises, persons are accustomed to go thereon, the owner should use reasonable care to protect them while passing thereon in the customary manner, from injury from a dangerous act, and this em-

braces dangerous excavations and pitfalls, *Driscoll v. Newark & Co.*, 37 N. Y. 637; but the owner need not observe care toward such person in his usual and ordinary occupation of his premises. *Nicholson v. Erie. R. Co.*, 41 N. Y. 525. However, in operating trains over a track crossed by a frequented way, reasonable notice of an approaching train is required.

Excavations near highway.—Where the owner of land makes or negligently maintains an excavation thereon so near to the highway as to render it unsafe for persons of ordinary caution, he is liable for injury therefrom.

INVITED PERSONS.—Where the owner of premises, by invitation express or implied, invites another to enter thereon, the former must use reasonable and ordinary care to protect the latter from injury.

TRESPASSERS.—Subject to the qualifications above stated, the owner of premises owes no duty to provide for the safety of trespassers thereon.

Railway tracks.—The general rule is that those in charge of a railway are not bound to keep a lookout or use other means to discover persons trespassing upon the track; but there are decisions to the contrary and to the effect that precautions should be taken for this purpose. The rule is applied, however, that upon *discovering* a trespasser upon a track, in a position of danger, the proper trainmen should, in good faith, use the available means to prevent injury. Unless the person on the track be a child or helpless, the engineer may presume that he will leave the track, and the train need not be placed under immediate control, nor its speed reduced, unless the proximity of the person or other obvious conditions require at once active measures to secure his safety.

CHILDREN.—The rules applicable to adults as above given, are in some respects essentially modified when applied to children *non sui juris*. It is considered that the owner of private premises should use reasonable care not to permit unguarded upon his premises machinery, structures or other dangerous conditions, to which children would be likely to be attracted, in proximity to places frequented by them, and form an interference with which injury would be likely to result. The doctrine of contributory negligence applicable to children under other circumstances pertains to this subject.

TRESPASSERS ON RAILWAY TRAINS.—A person jumping on or off railway trains, or riding thereon without authority, or even by invitation of an employe, if he have no real or apparent authority to extend such invitation, cannot recover for the mere negligence of the company or its servants in the operation of its railway, but due care must be used in removing such persons.

PLACES OF BUSINESS, AMUSEMENT, &c.—Where one invites, expressly or impliedly, specially or generally, persons to come upon his premises, in the course of or in connection with his business, he must use reasonable care to protect them from injury resulting from his own act, that of his servants, within the scope of their employment, or from the condition of the premises. This rule embraces places of business, stores, factories, shops, mills, wharves, &c. Under this rule the invitee's property, such as his clothing, watch, &c., have been held entitled to protection.

(a). TRESPASSERS.

A switch extended from the defendant's main line to the iron works, for the benefit of such works, and was owned jointly by the defendant and the owner of the works. The plaintiff's intestate, shortly before in the employ of such works, and others who were accustomed to cross the switch to go home, started to cross the switch; the day was rainy and windy, and as he stepped on the track with his hat pulled down and not looking, cars not secured by a brake came down the switch from the works and killed him. If he had looked he could have seen the cars.

No duty rested on the company to fasten these cars by brakes, and the intestate was guilty of contributory negligence. *Nicholson v. Erie R. Co.*, 41 N. Y. 525.

An uninvited person went on another's land to secure employment, whereupon some machinery fell and injured him. The defendant was not liable. *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391.

From opinion.—"The owner of land in general may use it as he pleases, and leave it in such condition as he pleases. But he cannot, without giving any warning, place thereon spring-guns or dangerous traps, which may subject a person innocently going on the premises, though without actual permission or license, to injury, without liability. The value of human life, forbids measures for the protection of the possession of real property against a mere intruder, which may be attended by such ruinous consequences. The duty in this case grows out of the circumstances, independently of any question of license to enter the premises. *Bird v. Holbrook*, 4 Bing. 628. So, also, where the owner of land, in the prosecution of his own purpose or business, or of a purpose or business in which there is a common interest, invites another, either expressly or impliedly, to come upon his premises, he cannot, with impunity, expose him to unreasonable or concealed dangers as, for example, from an open trap in a passage way. The duty in this case is founded upon the plainest principles of justice. *Corby v. Hill*, 4 C. B. (N. S.) 556; *Smith v. London & St. K. Docks Co., L. R.*, 3 C. P. 326; *Holmes v. North Eastern Railway Co., L. R.*, 6 Exch. 123. The duty of keeping premises in a safe condition, even as against a mere licensee may also arise where affirmative negligence in the management of the property or business of the owner would be likely to subject persons exercising the privilege theretofore permitted and enjoyed to great danger. The case of running a locomotive without warning over a path across the railroad which had been generally used by the public without objection, furnishes an example. *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289. See, also, *Beck v. Carter*, 68 id. 283. The cases referred to proceed upon definite and intelligible grounds, the justice of which cannot reasonably be controverted. But in the case before us, there were no circumstances creating a duty on the part of the defendant to the plaintiff to keep the whimsey in repair, and consequently no obligation to remunerate the latter for his injury. The machine was not intrinsically dangerous; the plaintiff was a mere licensee; the negligence, if any, was passive and not active, of omission and not of commission. Under the circumstances, we think the motion for nonsuit should have been granted. See *Severy v. Nickerson*, 120 Mass. 306; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731."

The owner of private premises owes no diligence to one going, uninvited, thereon, and is not liable for injuries for lack of repair. The plaintiff was injured on a private bridge used by the public by sufferance. *Cusick v. Adams*, 115 N. Y. 55.

Distinguishing *Beck v. Carter*, 68 N. Y. 292.

Citing *Gautret v. Egerton*, L. R., 2 C. P. 371; *Hounsell v. Smith*, 7 C. B. N. S. 743; *Burchell v. Hickisson*, 50 L. J. Q. B. C. P. and Exch. 101; *Ivay v. Hedges*, 9 L. R. Q. B. Div. 80; *Sutton v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 243; *Larmore v. Crown Point Co.*, 101 id. 391; *Splittorf v. State*, 108 id. 205; *Donahue v. State*, 112 id. 142; *Hargreaves v. Deacon*, 25 Mich. 1; *Severy v. Nickerson*, 120 Mass. 306; *Parker v. Portland Pub. Co.*, 69 Me. 173; *Vanderbeck v. Henry*, 34 N. J. L. 467.

There was no recovery in the following cases of mere licenses on private premises:

Galveston O. Co. v. Morton, 70 Tex. 400; *Campbell v. Lunsford*, 83 Ala. 512; *McIntyre v. Roberts*, 149 Mass. 450; *Matthews v. Bensel*, 51 N. J. L. 30; *Malloy v. Hibernia &c. Society*, (Cal.) 21 Pac. 525.

Plaintiff's intestate was guilty of negligence *per se* in unlawfully walking upon switch track from one street to another, where a train came up behind and killed him. *McCarthy v. D. & H. C. Co.*, 17 Hun, 74.

Man and wife were returning from a ball ground by the way of defendant's track on a very narrow bank, that descended sharply to a ditch half full of water; a locomotive coming at the rate of ten or twelve miles per hour was discovered six hundred and forty feet away; the people ran to get off the embankment and the husband was killed just as he was stepping from the track. Nonsuit error; case retried; verdict for pl'ff aff'd, 48 Hun, 352. *Remer v. L. I. R. Co.*, 36 Hun, 253.

Defendant was kicking cars on a switch on its own land; it was charged that they ran over the leg of a small child. No one saw the accident and there was no other evidence of how it happened, except that the wheel of the car did it. No negligence on the part of the defendant shown. Defendant was not bound to expect child to be thus unattended. *Malone v. B. & A. R. Co.*, 51 Hun, 532.

The defendant's tracks ran alongside of a public highway near a creek, but upon private property, the earth sloping gradually from the tracks to the edge of the embankment, and a child twelve years old fell over the embankment and was killed. The defendant was not liable. The circumstances of the accident seem to have been entirely unknown. Unless by implication it invited the public to go on the land, or had permitted thereon something in the nature of a snare, as an excavation or pile of material, the defendant was not bound affirmatively to guard the surroundings so that no one could stray thereon to his injury. *Hooper v. Johnstown &c. Horse R. Co.*, 59 Hun, 121.

A boy started from the platform of a circus car standing on a branch

track, between two passenger tracks, whence he had a view of an approaching train, and attempted to run across one of the passenger tracks upon which an express train was approaching at a speed of thirty-five miles per hour, and was killed. Verdict for the defendant was sustained. The deceased was a trespasser and there was no obligation upon the company to blow a whistle or ring a bell, as he was not at a crossing and the defendant owed him no obligation or protection, except that obligation which belongs ordinarily to the business of life. *Collis v. N. Y. C. & H. R. R. Co.*, 71 Hun, 504.

Where the engineer of a locomotive finds a person on the engine, who is there without authority, he is not bound to stop his engine and put him off. *McGucken v. Western New York & Penn. R. Co.*, 77 Hun, 69.

It is not the duty of an engineer on a locomotive running on a steam railroad to slow up or stop his train upon seeing an object on the track 400 or 500 feet distant before he becomes aware that such object is a human being. He has the right to assume in the first instance that if it is a man he will leave the track, but when he discovers that the trespasser is not aware of the approach of the train, it is his duty in good faith to do all that he reasonably can to avert the disaster. *Murch v. Western New York & Penn. R. Co.*, 78 Hun, 601.

Where a horse is trespassing upon the tracks of a railroad the engineer of an approaching train, *seeing the horse thereon, is not bound to lessen the speed of the train, and his failure to do so cannot be deemed a reckless, wanton or malicious act.* *Magilton v. N. Y. C. & H. R. R. Co.*, 82 Hun, 308.

Where plaintiff fell into an excavation adjoining the sidewalk not from the sidewalk but from a plank runway within defendant's premises constructed for workmen only and where he had no business to be, going there simply to satisfy his curiosity, he was a trespasser merely and not a licensee, assuming all the risk incident to his venture. *McNeven v. Arnott*, 4 App. Div. 133.

Defendants were the owners of a fish and game preserve, protected by law, and their employé was furnished with a gun and cartridges for use in patrolling the premises, to frighten trespassers, and kill depredating animals. The latter hearing a noise one night in the bushes, called out to know if anyone was there, discharging his rifle twice. The plaintiff, returning from poaching in the preserve, called out to hold on; but the latter discharged several other shots nevertheless, one of which struck plaintiff. It was held to be negligent to discharge a rifle recklessly in the direction in which there was reason to believe a human being might be. *Magar v. Hammond*, 54 App. Div. 532.

In an action against an elevated railroad from causing death by negligence, where it appears that the decedent fell or jumped upon the track from the platform, and the engineer saw him, and the evidence is conflicting as to whether the train was only twenty-five feet or a block and a half distant at the time, a question of fact is presented for the jury. *Walsh v. Manhattan R. Co.*, 8 Misc. 1. (N. Y. Supr. Ct.)

Trespasser may recover for willful injury. *Hector Min. Co. v. Robertson*, 22 Colo. App. 491.

But care in his entering a building partially destroyed by fire is not an element of consideration. *Hutson v. King*, 95 Ga. 271.

Defective gate did not permit recovery as there was no inducement to use it. *North American Provision Co. v. Hart*, 66 Ill. App. 659.

Pistol accidentally went off while frightening off a boy of six. Defendant was liable. *Seltzer v. Saxton*, 71 Ill. App. 229.

Small boy climbed through a window of a building, the door being locked. The agent tried to stop him. Owner did not know of the presence of dynamite in the building or of the boy's frequenting the premises. He was not liable for an explosion. *Ball v. Middlesboro Town &c. Co.*, (Ky.) 68 S. W. Rep. 6.

Where one used improper passage to house. No recovery. *Walker v. Winstanley*, 155 Mass. 301.

Water was spilled on a stove to frighten away trespassing boys. Negligence was for the jury. *Palmer v. Gordon*, 173 Mass. 410.

Defendant erected a barbed wire fence across his own premises to prevent trespassing. Plaintiff strayed from the street in the dark. No liability. *Quigley v. Clough*, 173 Mass. 429.

For injury to trespasser choosing his own mode of ingress and egress defendant was not liable. No recovery. *Bedell v. Berkley*, 76 Mich. 435.

Defendant set off a giant firecracker near one who had stolen into his show. Held to show negligence. *Herrick v. Wixom*, 121 Mich. 384.

For death of horse which had strayed into uninclosed lot and fell into a hole. No recovery. *Turner v. Thomas*, 71 Mo. 596.

Defendant failed to enclose a dangerous hole as required by ordinance; but plaintiff voluntarily ran into it. No recovery. *Butz v. Cavanaugh*, 137 Mo. 503.

Owner revoked a license by removing a plank of a bridge, but barricaded the entrance thereto. He was not liable for its removal by a trespasser, unknown to him. There was evidence of notice however, and defendant was held liable for creating a dangerous trap on his premises. *Wheeler v. St. Joseph &c. R. Co.*, 66 Mo. App. 260, 272.

Where defendant has not lead plaintiff to commit a trespass he does

not, in the absence of notice of his presence, owe him any duty. *O'Leary v. Brooks Elevator Co.*, 7 N. D. 554.

But see *Holtzinger v. Pennsylvania R. Co.*, 6 Pa. Dist. 430; *Berlin Mills Co. v. Crotean*, 88 Fed. Rep. 860.

Licensee became a trespasser upon asking workman to take him down an elevator which he knew the defendant did not use. *Leavitt v. Mudge Shoe Co.*, 69 N. H. 597.

So, where deceased used the scaffolding erected for the use of other men, merely for his own convenience. *Brady v. Prettyman*, 193 Pa. St. 628.

One need not keep his premises safe for those entering the same without invitation, implied or otherwise, but in pursuance of his own pleasure and convenience, unless contrivances be placed thereon with intent to injure intruders. No recovery. *Moore v. Logan & Steel Co.*, 4 Cent. (Pa.) 505.

Metcalf v. Cunard Steamship Co., 147 Mass. 66; *Klix v. Nieman*, 68 Wis. 271; *Morgan v. Penn. R. Co.*, 19 Blatch. (U. S.) 239.

Nor where a person diverged twenty-five feet from usual means of access. *Armstrong v. Meadbury*, 67 Mich. 250.

Plaintiff climbed over the wall inclosing a lot to pick out coals. No recovery for injury from hot ashes. *Feehan v. Dobson*, 10 Pa. Super. Ct. 6.

There is no defense to the erection of a water tower on insufficient foundation. *Rigdon v. Temple Waterworks Co.*, 11 Tex. Civ. App. 542.

Willfulness or maliciousness is not essential to liability where plaintiff is seen to be in a position of peril from which it appears he is not likely to extricate himself. *Anderson v. Hopkins*, 91 Fed. Rep. 77.

Nor is the fact of trespass a defense where it is but technical. *Lowe v. Salt Lake City*, 13 Utah, 91.

Where defendant's park used for exhibition purposes was not in a safe condition for those to whom it extended an invitation it was held to be immaterial how he got there, whether as a licensee or a trespasser. *Richmond &c. R. Co. v. Moore*, 94 Va. 493.

Invitee of one whose license has expired, is entitled only to the care due a trespasser. *Brehmer v. Lyman*, 71 Vt. 98.

See, also, *Anderson v. Northern P. R. Co.*, 19 Wash. 340.

1. CHILDREN.

Plaintiff, eleven years of age, playing on the property of the defendant was injured by moving a flagstone leaning up against a fence, so as to cause it to fall upon her foot. The stone had been in the same position

for several months and the plaintiff had seen it there; she understood the danger which overtook her. *Schmidt v. Cook*, 1 Misc. 227; this case was affirmed in common pleas, in 4 id. 85.

Defendant is not liable to children frequenting the premises, where they know the pool of water is hot and appreciate the danger of getting into it. *Brinkley Car &c. Co. v. Cooper*, 70 Ark. 331.

Child was injured at a turntable to which he had gone on an errand. For jury. *Ferguson v. Columbus R. Co.*, 75 Ga. 637.

When adults enter upon property no duty is imposed upon the owner thereof, but greater care must be exercised in relation to children. *Indianapolis &c. R. Co. v. Pitzer*, 109 Ind. 179.

Kentucky R. Co. v. Gastineau, 83 Ky. 119; *Schmidt v. Kansas R. Co.*, 90 Mo. 284; *Nolan v. N. Y. &c. R. Co.*, 53 Conn. 461.

No recovery for injury was allowed where a child was playing on track. *Masser v. Chicago &c. R. Co.*, 68 Iowa, 602.

A single invitation for a child to come into defendant's switch yard held not to extend so as to permit his entrance on his own accord on a different occasion three weeks thereafter. *Jackson v. Louisville &c. R. Co.*, (Ky.) 46 S. W. Rep. 5.

Child used the track for a playground. No liability. *Morrissey v. Eastern R. Co.*, 126 Mass. 377.

Same principle, *Central R. Co. v. Henigh*, 23 Kas. 347.

Failure to drive children from an alley is not such an invitation to remain as creates a duty with reference to them. *Galligan v. Metacommet &c. Co.*, 143 Mass. 527.

In action by father for injury to child left by him on track there was no recovery. *Reed v. Minneapolis Street R. Co.*, 34 Minn. 557.

Small brother of an employé taken into the shop to learn the trade. was a trespasser. *Buch v. Amory Man. Co.*, 69 N. H. 257.

Infancy does not give a trespasser a right which he would not have if he were an adult. *Delaware &c. R. Co. v. Reich*, 61 N. J. L. 635; *Uthermohlen v. Bogg's Run. Min. Co.*, 50 W. Va. 457; *Ritz v. Wheeling*, 45 W. Va. 262; *Dobbins v. Missouri &c. R. Co.*, 91 Tex. 60.

See, also, *Alabama &c. R. Co. v. Moorers*, 116 Ala. 642; *Keegan v. Luzerne County*, 8 Kulp, (Pa.) 160.

Defendant was not bound to prevent children crossing his premises to a place of danger. *Magner v. Frankford Baptist Church*, 174 Pa. St. 84.

Boy of eight was entitled only to the rights of a trespasser where he climbed a fence post to look at a parade. *Keegan v. Luzerne County*, 8 Kulp, 160.

Barge owner was not held liable upon permitting children to frequent it to assume the duty of protecting them against unusual and unanticipated occurrences. *Re Demarest*, 86 Fed. Rep. 803.

(b). MERE LICENSEES, INVITEES, &C.

It is the duty of persons, engaged in blasting, to give notice to all persons, passing within limits of possible danger at the time of blasting, and an omission to do so presents a question for the jury. The habitual use of a footpath across the land of the defendants for many years, without objection, warranted the finding of a license from the defendants to cross the same by such path. *Driscoll v. Newark &c. Co.*, 37 N. Y. 637.

Parties erecting a storehouse constructed under a license on defendant's premises were not allowed to complain of the lack of a watchman at a switch in its vicinity which was the condition of affairs existing when they obtained their license. *Crofoot v. Syracuse &c. R. Co.*, 77 N. Y. Supp. 389.

A mere licensee assumes the risks incident to the condition of the premises. (Plaintiff stepped on a grate in a portion of the premises where he should not have gone and which tipped and let him into hot water.) *Castoriano v. Millers*, 15 Misc. 254.

See, also, *Lake Erie &c. R. C. v. Maus*, 22 Ind. App. 36; *Taylor v. Haddonfield &c. Co.*, 65 N. J. L. 102.

His only right is that he shall not be wantonly injured. *McCann v. Thelman*, 36 Misc. 145; rev'g s. c., 35 id. 855.

A railroad's duty to a trespasser or bare licensee is no greater in the case of children than in case of adults. *Alabama &c. R. Co. v. Moorer*, 116 Ala. 642.

Steps had not only been voluntarily erected, but their care had been abandoned to private parties, who had undertaken the duty of keeping them in repair. No recovery. *St. Louis &c. R. Co. v. Dooley*, 70 Ark. 389.

The duty is the same with licensees as with invitees. Reasonable precautions. *Pomponio v. New York &c. R. Co.*, 66 Conn. 528.

Plaintiff was on the premises lawfully, though not by invitation, but his departure through a window was not authorized, nor induced. No recovery for his injury was allowed. *Seward v. Draper*, 112 Ga. 673.

For injury to a fireman entering to save premises from fire. No recovery. *Gibson v. Leonard*, 37 Ill. App. 344.

Failure to guard one hole in a floor concealed by paper will not give recovery for falling through another so concealed. *Eilenberger v. Nelson*, 64 Ill. App. 277.

Where one merely suffers others to cross his land, and injury arises from pitfalls or obstructions. No recovery. *Evansville &c. R. Co. v. Griffin*, 100 Ind. 221.

Customary passage across a lot for a long time gave the public an implied permission to so use it, so as to make the owner liable for injury caused by making an excavation dangerously near the path and leaving it unguarded. The path was held to be regarded as temporarily devoted to public use and those passing were not to be deemed trespassers or mere licensees. *De Tarr v. The Ferd. Heim Brewing Co.*, 62 Kan. 188.

No recovery was given where licensee fell through a trap door on the platform of railroad station. *Redigan v. Boston &c. R. Co.*, 155 Mass. 44.

Where a person, although a licensee, goes upon the premises of another he cannot recover. *Stevens v. Nichols*, 155 Mass. 472.

No recovery was permitted where one went to an office strictly on his own business. *Plummer v. Dill*, 156 Mass. 426.

Notice at the entrance of a way that it is not a public street imposes on a mere licensee the risks incident to its use. *Harobine v. Abbott*, 177 Mass. 59; *Moffatt v. Kenney*, 174 Mass. 311.

Customer after leaving a livery stable with a check for his horses therein, returns for the purpose of putting a package in his wagon, as a licensee only. *Cowen v. Kirby*, 180 Mass. 504.

A customer could not complain of defects in a railing where it gave way through misuse; leaning against it. *Kinney v. Onsted*, 113 Mich. 96.

A person whose lease has expired, but who has been suffered to remain "at his own risk," is entitled to the protection of a mere licensee only. *Clarkin v. Biwabik-Bessemer Co.*, 65 Minn. 483.

By inviting a customer to watch the process of pitching barrels, a brewer was held to undertake the duty of warning him of the danger of an explosion. *Hartman v. Muelbach*, 64 Mo. App. 565.

Failure to discover defects in stage brackets did not make the lender liable for injuries to the borrower. *Gagnon v. Dana*, 69 N. H. 264.

Defendant consented to keep plaintiff's cat. On being told that it would run away unless put in a closet, he opened the cellar door sufficiently to put in the cat. Plaintiff could not recover by going through the door herself. *Ryerson v. Bathgate*, 67 N. J. L. 337.

Reasonable care is due to invitee. *Land v. Fitzgerald*, (N. J. L.) 52 Atl. Rep. 229.

Where the defect was obvious, grantor was not liable for the condition of the premises which he turned over. *Palmore v. Morris &c. Co.*, 182 Pa. St. 82.

Where a wagon blocked the sidewalk, the jury should have decided

whether the surroundings implied an invitation to the plaintiff to use the grating on defendant's premises, rather than to pass around in the roadway. *Clapp v. La Grill*, 103 Tenn. 164.

Defendant was not liable where occupants of an adjoining building made use of his premises without his knowledge or consent; the existence of a door between them and the leasing of both buildings by their owners to one party who had abandoned the defendant's portion not being sufficient to show an invitation; especially where the door deceased fell out of, was provided with a lock and intended to be fastened. *Fleming v. Texas Loan Agency*, 24 Tex. Civ. App. 203.

Licensee held to assume the risks obviously incident to the ordinary prosecution of blasting operations on the premises. *Smith v. Day*, 100 Fed. Rep. 244; rev'g s. c., 86 Fed. Rep. 62.

By creating a dwelling district, a company extends an implied invitation to visit the premises. An unguarded shaft in the vicinity of a path gave recovery. *Foster v. Portland Gold Min. Co.*, 114 Fed. Rep. 613.

A person was making a friendly call at a telegraph office which was wrecked by a train running off the track. No recovery. *Woolwine v. Chesapeake &c. R. Co.*, 36 W. Va. 329.

Persons other than parties to a contract, may sue for its negligent performance where it involves matters inherently dangerous. *Peters v. Johnson*, 50 W. Va. 644.

1. CUSTOMARY WAYS AND FREQUENTED PLACES.

A private lane tacitly open to the public, extends a license and imposes on the owner the duty not to unnecessarily frighten the horse of another by the operation of an automobile. *Knight v. Lanier*, 69 App. Div. 454.

See *McCann v. Thellman*, 36 Misc. 145.

A woman standing between two cars talking to a person on one of them was injured by the engineer coupling on to the train. No liability. *East Tenn. R. Co. v. King*, 81 Ala. 177.

See *Nicholson v. Erie R. Co.*, 41 N. Y. 525, where defendant was not liable (*ante*, p. 2105).

Where there was an unguarded area near a frequented alley, recovery was allowed. *Grogan v. Schmiele*, 53 Conn. 186.

Indianapolis v. Emmelman, 108 Ind. 530.

Where animals lawfully on the highway and attempting to get into a field were injured by a defective wire fence. Plaintiff recovered. *Sisk v. Crump*, 112 Ind. 504.

But see *Krum v. Anthony*, 115 Pa. St. 431.

Children accustomed to play in a field of defendant's were injured by hot ashes placed in a pit, and defendant was liable. *Penso v. McCormick*, 125 Ind. 116.

Where lumber was negligently piled on land where children were accustomed to play, recovery was allowed. *Branson v. Labrot*, 81 Ky. 638.

Plaintiff recovered where the public had used a road, and without notice a barbed wire was stretched across it injuring a horse in the dark. *Retter v. Dawson*, (Minn.) 52 N. W. Rep. 955.

Where the company customarily kept a freight train divided at the depot to allow passengers to pass, it was negligent to close such space without warning. *L. & C. R. Co. v. Thompson*, 64 Miss. 584.

To charge the public who have been licensed to use a roadway, as trespassers, owner must show revocation of the license. *Wheeler v. St. Joseph & C. Co.*, 66 Mo. App. 260, 272.

Permission for the son of an employé to come on the premises to bring his father's dinner, does not impose any active duty on the owner. *Fitzpatrick v. Cumberland Glass Man. Co.*, 61 N. J. L. 378.

Where the owner induces or leads others on his premises and there are defects known to him thereon, or in the approaches thereto, he recovered. *Bennett v. Louisville & C. R. Co.*, 102 U. S. 577.

Davis v. Central & C. Society, 129 Mass. 367; *Fisher v. Jansen*, 30 Ill. App. 91; *Eisenberg v. Mo. Pac. R. Co.*, 33 Mo. App. 85; *Atlanta & C. Oil Mills v. Coffey*, 80 Ga. 145; *Schmidt v. Bauer*, 80 Cal. 565.

Where an owner who maintains his premises in a highly dangerous condition knows that a person is apt to come upon his premises in the performance of a duty, he cannot regard him as a mere trespasser or positive wrongdoer, but must take such precaution as a sensible man would ordinarily take to avoid doing fatal or other serious injury. *Newark & C. Co. v. Garden*, 78 Fed. Rep. 74.

Where the public, by the defendant's long acquiescence, had walked upon its tracks, although the same was prohibited by law, the company was liable for negligent injury to one so doing. *Davis v. Chicago & C. R. Co.*, 58 Wis. 646.

But, the defendant was not liable where the presence of a mere licensee was unknown or unexpected, and the usual signals and caution were observed. *Hogan v. Chicago & C. R. Co.*, 59 Wis. 139.

2. PREMISES ADJOINING THE STREET.

The owner of a hotel made an excavation beside a building, siding on an alley, and kept it covered with boards for a time, and finally removed them. The alley had been used as a public place and as a portion of the highway. The plaintiff fell in and the defendant was liable.

If an owner of land make an excavation thereon so near to the highway as to render it unsafe for persons of ordinary caution, he is liable. *Beck v. Carter*, 68 N. Y. 283.

See p. 1916.

An excavation was on private premises near high-water mark of the sea shore, wherein the plaintiff fell. The defendant was not liable. The case would have been different had the excavation been so near the highway as to cause a person to fall into it. *Murphy v. City of Brooklyn*, 98 N. Y. 642.

Blasting operations were carried on on defendant's own land, and were for a lawful purpose and were conducted with care and skill. They were liable, however, for a trespass in casting wood out into the highway, negligence not being the gist of the action. *Sullivan v. Dunham*, 161 N. Y. 290; aff'g s. c., 35 App. Div. 342; s. c., 10 id. 438.

Defendant maintained a ditch along the southerly side of its tracks at a crossing. The sidewalk connecting the bridge was guarded with a fence, but the sidewalk and fencing stopped a short distance beyond, beyond which there was no defined path across the tracks. So that a person coming from the opposite direction across the tracks on a dark night, by missing the sidewalk might fall into the ditch adjoining the highway. The maintenance of such a condition for 21 years was held to charge defendant with negligence. *Thompson v. New York &c. R. Co.*, 41 App. Div. 78.

Where a wharf company's premises have been used by the public as a thoroughfare under an implied license for 20 odd years, it must upon erecting a railroad thereon, use reasonable care to protect travelers from injury. *Boer v. Brooklyn Wharf & Warehouse Co.*, 51 App. Div. 289.

It was for the jury to say whether a manufacturer of ammunition was negligent in depositing its refuse containing explosive material in an adjoining vacant lot, into which boys were liable to find their way. *Traverell v. Bannerman*, 75 N. Y. Supp. 866.

Cellar in dangerous proximity to a street should be enclosed. *Hutson v. King*, 95 Ga. 271.

Whether noise of machinery adjacent to street was calculated to frighten ordinary horses was for the jury. *Barber v. Manchester*, 72 Conn. 675.

See, also, *Gordin v. Fuson*, (Ky.) 60 S. W. Rep. 293.

See, also, *Dobbins v. Missouri &c. R. Co.*, 91 Tex. 60; *Gorr v. Mittelstaedt*, 96 Wis. 296; *Butz v. Cavanah*, 137 Mo. 503.

Defendant concreted the space between his building and the sidewalk line even with the latter. He was negligent in maintaining a retaining

wall 2 feet high from the former to the latter. *Sears v. Merrick*, 175 Mass. 25.

Where a person slipped on the sidewalk and struck on a pointed fence about an areaway. No recovery. *Kelly v. Bennett*, 132 Pa. St. 218.

(c). VISITORS ON BUSINESS AND PLACES OF AMUSEMENT.

One doing business with a saw mill, must keep the same reasonably safe for those rightfully on the premises. *Ackert v. Lansing*, 59 N. Y. 646.

A boy went to pay the defendant a bill, and fell into a vat directly over which was a skylight. The defendant was not liable. *Victory v. Baker*, 67 N. Y. 366.

The defendant owned one-half of a pier. A horse driven thereon was scared by the rush of the water seen through a hole, and backed the cart against a string piece at the end of the pier, which being decayed, broke and let the horse and cart off into the water. There was no evidence that the horse was vicious, and the defendant was liable. *Macauley v. Mayor*, 67 N. Y. 602.

The grating of a window fell and killed a person who was delivering coal at the building for the defendant. The accident was not seen and the occasion of the presence of the intestate at the precise place was not known, but he was presumed to have been lawfully there. The case was for the jury. The fact that his co-servant contributed to the accident was immaterial. *Galvin v. Mayor &c.*, 112 N. Y. 223.

There was an area three feet wide and eight feet deep in the rear of a store, and bordering on an alley running back of the stores, but not a thoroughfare. A watchman, who had been there for thirteen nights before, fell in the area and was killed. No liability. *Bond v. Smith*, 113 N. Y. 378; 44 Hun, 219.

The omission of the owner of a building in the city of New York used for business purposes, in which there is a hoisting elevator, to comply with the requirements of the statute of 1874, (chap. 547, Laws of 1874) requiring that the openings in each floor shall be protected by such a substantial railing, and trap-doors to close the same, as shall be approved by the superintendent of buildings, and that such trap-doors shall be closed at all times, except when in actual use, is *prima facie* evidence of negligence, in an action by one lawfully upon the premises who has sustained injury in consequence of a failure to comply with the statute. *McRicard v. Flint*, 114 N. Y. 222, aff'g 13 Daly, 541, and judg't for pl'ff; s. c., 97 N. Y. 641.

The presence of a figure for exhibiting clothing upon a broad carpeted

stair-case, and the absence of brass plates and rubber pads, do not make the owner liable to a customer who falls on the stairs. *Larkin v. O'Neill*, 119 N. Y. 221; 48 Hun, 591.

The plaintiff followed the defendant, a storekeeper, to the rear of his store and fell over a truck. The defendant was not liable as he did not warrant the safety of his premises to those invited thereon, but he was bound to use reasonable care. *Hart v. Grennell*, 122 N. Y. 371.

The plaintiff, a grain shoveler, on board an elevator lying alongside defendant's pier, was transferring grain to a car standing on a track, between which track and the elevator was another track upon which empty cars were standing, which cars were separated, however, to allow the plaintiff and others to pass. Such cars were suddenly forced together and plaintiff was injured. The court charged, that, if a person invites another to come upon his premises, which he controls, he "is responsible for any injury which ensues, * * * unless the fact is that the person is negligent himself." Held, error, that only reasonable prudence and care was required to keep premises in such condition that those who go thereon shall not be unreasonably and unnecessarily exposed to danger. *Flynn v. Cent. R. Co. of N. J.*, 142 N. Y. 439.

Wharfingers do not guarantee the safety of vessels coming to their wharves, but must use ordinary care to make the places in front of their wharves reasonably safe for vessels to approach and lie there. A vessel approaching a wharf struck a rock seventy feet therefrom. The rock had been previously unknown and no similar accident had previously happened. The rock was not in the ordinary approach to the wharf; defendant's had no control of it and had caused the basin in front of their wharf to be dredged. Defendant was not liable. *McCaldin v. Parke*, 142 N. Y. 564, rev'g 66 Hun, 323, and 69 Hun, 614.

Citing *Vroman v. Rogers*, 132 N. Y. 167; *Smith v. Havermeyer*, 36 Fed. Rep. 927; *Carleton v. Franconia I. & S. Co.*, 99 Mass. 217; *Docks v. Gibbs*, 11 H. L. Cases, 712; *The Moorcock*, 14 Prob. Div. Law Rep. 64; *The Calliope*, id. 138; s. c., House of Lords App. Cases, L. R., vol. 1, 1891, p. 11; *Hubbell v. City of Yonkers*, 104 N. Y. 434; *Laffin v. Buffalo R. Co.*, 106 id. 136.

In *Nugent v. Vanderveer*, 38 Hun, 487, same case, on re-argument, 39 Hun, 322, the plaintiff sued to recover damages for the death of her husband while bathing at defendant's bathing establishment at Coney Island. Upon the trial the court incorporated into its charge the act of the legislature, for the protection of human life at bathing places (Laws 1879, chap. 328), which requires the proprietors of bathing establishments to provide the means to rescue drowning persons who pay for the privilege of bathing, and declared the rule of law to be that, if the performance of the statutory duty would have prevented the accident, the negligence of the deceased, if any, was not available as a defense.

It was held that this was error; that if the person injured or drowned had been reckless or negligent, and had caused his own peril or death by such recklessness or negligence, the owner of the bathing place was not liable, inasmuch as the statute did not declare that such liability should follow from injury or death.

Where the driver of a cart backed the same against a string-piece at the outer edge of a dock, along side of which refuse material had accumulated, making it obviously dangerous, and which the driver by a little labor might have removed, and the horse backed the cart off the dock and was lost; the owner was not allowed to recover on account of the negligence of his servant. *Fitzpatrick v. Tweddle*, 73 Hun, 105; s. c. aff'd, 144 N. Y. 704.

As a general rule, people have the same right to go upon the docks and wharves of the city of New York as upon any other of the highways and public places of the city, and it is the duty of the occupants of piers and wharves to keep them in sufficient repair for the public safety; in the event of their failure to do so, a person injured by reason of such failure, without fault on his part, may recover compensation therefor from such occupants.

It is the duty of the occupants of such wharves to warn the public that the docks and wharves, which are in their possession and undergoing repairs, constitute an exception to the general rule, if such be the case.

The principal exception to the general rule that an owner has the right to make such use of his premises as he pleases without being liable for injuries sustained by one who goes upon them, is where the injured party goes upon the land by the invitation, express or implied, of the owner.

The public were accustomed, and it was their privilege, to use at pleasure a certain avenue in the city of New York and many of the wharves along its highways. The right to the possession of a particular wharf had become vested in a railroad company by a contract entered into between it and the authorities of the city, of which fact the public could not have had knowledge, and there was nothing to indicate to the people going upon it that they had not the same right to use it, with the same impunity, as any of the other wharves in that vicinity or along that avenue.

Under such circumstances, it was the duty of the occupant of such wharf to take precautions to warn the public not to come upon the same, and that, in the absence of any such precaution on its part, it was liable for injuries sustained by a person going thereon without contributory negligence on his part. *Delaney v. Penn. R. Co.*, 78 Hun, 393; s. c. aff'd, 144 N. Y. 718.

Where a person owning a sand bank knows that it is in a dangerous

condition, it is his duty to warn a person buying and carting sand therefrom.

Where a person has been in the habit of drawing sand from sand banks for years, and has seen sand banks cave in, and has knowledge of the dangerous condition of a sand bank from which he is loading his cart with sand, and yet goes to work and continues to work at such bank under such circumstances, he assumes the risk of the position, and if an accident occurs he is guilty of contributory negligence, and is not in a position to charge negligence upon the vendor of the sand. *Carr v. Sheehan*, 81 Hun, 291.

A customer in a store was negligent in laying down her purse upon the top of her hat she had taken off and placed upon the counter of the store for the purpose of trying on others with a view to purchase, though she remained by it, where her attention was taken up with trying on the hat. *Powers v. O'Neill*, 89 Hun, 129.

An agent is not directly liable to third persons for a breach of a duty owing to his master not amounting to a misfeasance; for example, permitting a grand stand which his master had charged him to construct, to be defectively built. *Van Antwerp v. Linton*, 89 Hun, 417.

Defendant, the owner of a steam lighter discharged a quantity of heavy iron piping upon a bulk head between two piers in New York City consigned to the East River Gas Company; piling it in two piles, with a passageway between, so that it fell injuring plaintiff, an inspector of lighters along the bulkhead while walking from the street to the edge of the bulkhead. Defendant was negligent. Whether the danger was so obvious as to make plaintiff contributorily negligent in using the passageway, was left to the jury. *Dunn v. Ballantyne*, 5 App. Div. 483.

Defendant's servants engaged in work upon a school building had occasion to use a doorway leading from a cellar to an alleyway used by the children as an access to the school building. One of them being suddenly called away slammed the door and hearing the latch click started on. He was not bound to anticipate that children might lean against the door and force it open and so was not bound to take especial caution to see that the door was closed, it appearing to be so from casual attention. *Cleary v. Blake*, 14 App. Div. 602.

Where the owner of a building did not know of the defective condition of an elevator which caused the accident, he was not liable to an employé of his employé for injury therefrom. He did not know of another defect, but that did not cause the injury. *Sellers v. Dempsey* 26 App. Div. 22.

Defendant constructed a grandstand in a park to be used for exhibition purposes to which the public were invited. He was not allowed to avoid liability for its defective construction by which a visitor was in-

jured, by the fact of his having employed a competent architect and contractor, or by the fact that he had leased it for a day to another for the purposes of an exhibition, especially where he received a portion of the receipts. He had no notice of its defectiveness, but being a defect in original construction it was held the question of notice was inapplicable to the case. *Fox v. Buffalo Park*, 21 App. Div. 321; s. c., aff'd, 163 N. Y. 559.

Defendant, a contractor has the right to place mortar, &c., upon the flooring placed in the building by a subcontractor, which the latter is bound to adequately support. The former claimed that the collapse of the floor was due to the weakening of a tie beam by the latter's employé mortising and boring into it. The latter claimed that it was due to the former's negligence in placing an undue amount of brick on the flooring. A verdict in favor of plaintiff, an employé of the latter injured by its fall, against both, was not disturbed. *Gardner v. Friederich*, 25 App. Div. 521; s. c. aff'd, 163 N. Y. 568.

One engaged to remove furniture out of another's storehouse is not a trespasser or mere licensee, but is an invitee entitled to the exercise of reasonable care on the part of the latter. Former fell through an open trap door in a room from which he was moving furniture which the evidence tended to show had been opened during his temporary absence. The defendant's liability should have been submitted to the jury. *Wilson v. Olano*, 28 App. Div. 448.

Defendant was liable for another's slipping on something upon a platform constructed by him over the sidewalk along his premises for the purposes of delivering and receiving goods from trucks backed up thereto, as he was maintaining a nuisance in compelling pedestrians to go over it in using the street. *Murphy v. Leggett*, 29 App. Div. 309.

Owner of lumber yard who invited plaintiff and her husband to visit it for the purpose of looking at some lumber he wished to sell, was liable to the latter for the fall of a pile of lumber which was insecurely fastened. He was held not to have used reasonable care not to expose those he brought there to unnecessary danger. *Davis v. Ferris*, 29 App. Div. 623.

Plaintiff hired to cart material from defendant's premises left off work and went over to a portion of the premises to which his duties did not call him, for purposes purely his own, and while there was injured by a gate falling on him for some unexplained reason. By going where his duties did not call him, plaintiff was not entitled to the exercise of care in case of one invited to use the premises, but took his chances. *Flanagan v. Atlantic Alcatraz Asphalt Co.*, 37 App. Div. 476.

Where defendant had extended an implied invitation to people to visit

the premises by exhibiting the sign "Flat to Let," it was for the jury to say whether he was negligent in doing so without giving warning of the dangerous proximity of the cellar stairs to a basement gate which he might apprehend parties would seek to inquire at in the dark. *Fogarty v. Bogert*, 43 App. Div. 430.

The question whether a customer was negligent in slipping on a skid placed in the middle of steps leading from one level of a floor for the purpose of the conveyance of trucks, was for the jury where there were seven feet of steps on each side but the light was poor and she did not see the skid. She had been there before when the skid was not there. *Quirk v. Siegel-Cooper Co.*, 43 App. Div. 464; aff'g s. c., 26 Misc. 244.

The fact that defendants who were engaged to place heavy iron trusses upon a building, placed them in position so that they were out of plumb, was sufficient evidence of negligence to go to the jury, though at the time of their fall they were engaged in remedying it. Plaintiff was an employé of one engaged to erect the piers supporting the trusses. *May v. Berlin Iron-Bridge Co.*, 43 App. Div. 569.

Where the owner of an enclosure opened to the public for the purposes of an exhibition of a balloon ascension invites those attending to assist in the preparation of it, including the use of the appliances therefor, it is bound to see that they are sufficient to protect them from injury by reason of being subjected to a strain in addition to their natural use to which it may reasonably apprehend they will be subjected. *Peckett v. Bergen Beach Co.*, 44 App. Div. 559.

Plaintiff had left her baggage in charge of one of defendant's employés after landing from a boat discharging baggage at his dock. In returning for it she was injured as she approached the building by his employé throwing out the braces supporting its front wall and allowing it to fall into the street. No warnings having been given to those passing in the street, defendant was liable for the negligence. *Reynolds v. Starin*, 50 App. Div. 535.

Ordinary care held due to an employé of a company employed to put in a switch system on defendant's tracks. *Wells v. Heights*, 67 App. Div. 212.

Owner of a toboggan slide was held not negligent towards one who fell off its platform where it was 11 feet square and protected with a railing four feet high. It did not appear to be dangerous on this occasion, and no accident had ever happened thereon. *Barrett v. Lake*, 68 App. Div. 601.

Plaintiff, leaving defendant's store by a side door, fell through an open cellar door in the floor. He knew of the cellar door and had crossed it when closed. It was defendant's duty to maintain means of entrance

and departure at all times in such condition that those visiting his store on business might enter and depart in safety; that customers were not bound to ascertain by careful inspection whether the way was safe. Question was for the jury. *James v. Ford*, 30 N. Y. St. Rep. 667. (N. Y. C. P.)

Citing *Dunn v. Durant*, 9 Daly, 389; *Ackert v. Lansing*, 59 N. Y. 646; *Swords v. Edgar*, id. 28; *Leary v. Woodruff*, 4 Hun, 99; 76 N. Y. 617; *Coughtry v. Globe Woolen Co.*, 56 id. 124.

Recovery was allowed in the following cases:

Tomle v. Hampton, 129 Ill. 379; *Johnson v. Spear*, 76 Mich. 139; *Malloy v. Hibernia &c. Loan Soc.*, 21 Pac. 525.

Plaintiff before the elevator had been entirely lowered thrust his foot into the space under it and began loading without warning the elevator-man of his position. He was not allowed to recover. *Bromberg v. Friend*, 67 N. Y. Supp. 698.

Contractor for one kind of work fell through a hole in the floor concealed by rubbish left by workmen of another, but was not allowed to recover. *Hogan v. Arbuckle*, 77 N. Y. Supp. 22.

In the case of a bath house, it was held that failure to provide a watchman to guard the room in which the clothing of patrons was left, was negligence, so as to render the proprietor liable for the loss. *Bird v. Everard*, 4 Misc. (N. Y.) 104.

The presence of a mischievous human being on premises may constitute the danger against which the law requires of the occupant reasonable care to protect his invitee.

A customer in a store is there by invitation of the merchant, who owes him the duty of reasonable care to secure him against injury, as well from the misconduct of the merchant's employés as from the dangerous condition of his premises, and for breach of the duty with consequent injury, the customer may maintain an action for negligence against the merchant. *Swinarton v. Le Boutillier*, 7 Misc. 639. (New York Common Pleas.)

From opinion.—"It is conceded that, at the time of her injury, the plaintiff was on the defendant's premises by his invitation and for his advantage, and that she suffered the hurt by effect of a mischievous agency operating on those premises, of which she was without notice. But this is not enough. To complete a case of actionable negligence, on the theory under consideration, the plaintiff must go farther, and show the defendant responsible for the harmful agency, by proof that it exists in consequence of his want of care. Imposing authority might be adduced for the proposition that the duty of defendant was more absolute, that is, not to permit the hurtful agency on his premises, *Beck v. Carter*, 68 N. Y. 283, 292, and citations; but we prefer to limit his liability to the absence of proper diligence in the protection of the plaintiff. *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124; *Bennett v. Railroad Co.*, 102 U. S. 577.

It being settled law that an occupant of land is bound to use ordinary care and diligence to keep the premises in a safe condition for the presence of persons who come thereon by his invitation, express or implied, or for any other purpose beneficial to him, 2 S. & R. on Neg., sec. 704, the questions presented by the facts as found are: First, were the premises in an unsafe condition, in the legal sense? And, secondly, if so, was that condition the effect of defendant's want of care and diligence?

Had plaintiff sustained the injury from a defect in the premises, or in machinery upon them, assuming negligence in keeping them, the liability of the defendant would be beyond dispute. But here the injury was inflicted by the act of a boy with a propensity to do mischief, in the employ of the defendant, and by him placed on the premises, in a position to do the injury. Why does not such boy, so employed and placed, constitute a danger upon the premises as effectual for evil as a trap door, or pitfall, or a dilapidated stairway? That the cause of the injury need not be an inanimate agency, is shown by the decision in *Loomis v. Ferry*, 17 Wend. 197, where it was held that even a trespasser may maintain an action for the bite of a ferocious dog left at large on the defendant's lot. *Carroll v. Railroad Co.*, 58 N. Y. 126, 136.

In *Mallach v. Ridley*, 24 Abb. N. C. 172, 181, it is said that, "The storekeeper invites the public to enter his premises and to subject themselves to the custody and control of his subordinates, and by parity of reasoning," with that prevailing in common carrier cases, "he should be held responsible for the brutalities of such subordinates, even where they are not committed within the strict line of his employment."

In *Dean v. St. Paul Union Depot Co.*, 37 Am. & Eng. R. R. Cas. 360, the court said that, "The defendant was bound to use ordinary care and diligence to keep its premises in a safe condition for those who legitimately come there. It had no more right, therefore, to knowingly and advisedly employ, or allow to be employed, in its depot building a dangerous or vicious man than it would have to harbor a ferocious or savage dog, or to permit a pitfall or trap into which a passenger might step as he was passing to or from his train."

The presence of the boy on the premises with his propensity to evil-doing was a danger against which it was the duty of the defendant by the exercise of proper care to protect the plaintiff.

We hold, furthermore, that having invited the plaintiff into his store for his benefit, and having authorized and induced her to confide in the good conduct of his servants to whom, in the transaction of his business, he committed her, he thereby assumed the duty, by the exercise of reasonable care, of protecting her from injury by the misconduct of such servants; and that he is answerable to her for any injury she has sustained by such misconduct, which, in the exercise of reasonable care, he might have prevented.

The verdict involves the fact of his failure in the exercise of the duty so incumbent upon him, *Sutter v. Vanderveer*, 122 N. Y. 652, 654, and we are to inquire whether the evidence suffices to justify the finding of the jury.

The proof is ample to authorize these inferences: "That the defendant kept in his store a number of 'cash boys' for attendance on customers; that among those boys the propensity and habit of 'snapping pins' at objects and persons in the store were prevalent; that this snapping or shooting pins by these boys was likely to inflict injury on defendant's customers, and did, in fact, inflict the injury of which the plaintiff complains; that this habit of snapping or

shooting pins by these boys had existed for months and was known or ought to have been known by the defendant; that no reasonably sufficient precaution was taken by him to suppress the dangerous practice, and that he had not exercised a reasonable degree of care and diligence to secure the plaintiff against injury from such dangerous practice."

It is the duty of the managers of a theatre to be vigilant to see that the stairs therein are in such a condition that a theatre-goer, although an aged person, can with safety descend them, provided the care of a reasonably prudent person is exercised.

The existence of twenty-four hours of a patent defect in the stairs is sufficient to charge the managers with constructive notice thereof. *Butcher v. Hyde*, 10 Misc. 275. (City Court of Brooklyn.)

Servant of a firm running an independent business was killed in the efforts of his fellow servants to move material of defendant to more conveniently manage their own business. Defendant incurred no liability. *Connelly v. Rist*, 20 Misc. 31.

Proprietor of auction room held not liable to one attending the sale for the fall of a table caused by another so attending. *Geelan v. Cooke*, 23 Misc. 460.

When a barber, whose shop was a place of great resort, had a closet for the safe keeping of the apparel of his customers, whilst they were getting shaved, and also a boy in attendance to receive garments and give customers a check for them, the barber was not answerable for the loss of the overcoat of a customer, who, knowing of this regulation, hung his coat upon a peg near the door, from which it was taken. *Trowbridge v. Schriever*, 5 Daly, 11.

One constructing a bridge on the land of a railroad company for its use, to connect the railroad with such person's hotel, is not liable for the company's neglect to repair the same. *Watson v. Oxanna Land Co.*, 92 Ala. 320.

Latent defect in a platform between steps and a sidewalk, in good condition and repair for eight years did not permit recovery. *Baddeley v. Shea*, 114 Cal. 1.

Persons negligently constructing buildings at a fair for the use of their patrons are liable for injuries received in consequence of the falling of such buildings. *Latham v. Roach*, 72 Ill. 179.

If one connects a part of his own premises with a public sidewalk, he thereby invites the public to treat the part connected as belonging to the sidewalk and cannot be heard to say that the whole is not a public way, and must exercise care to keep the same reasonably safe.

Between a building and a sidewalk was a flagging six feet wide, slightly raised above the level of the sidewalk; this was the approach to the store in the building and to the show windows thereof. Just below

the show windows was an opening five feet long and ten inches wide to admit light, unguarded and unprotected. Person looking into the show window in the dark fell into the opening and was injured; owner of the building leasing the same in this condition was liable. *Tomle v. Hampton*, 129 Ill. 379.

Citing *Stephani v. Brown*, 40 Ill. 428; *Gridley v. City of B.*, 68 id. 47; *City of Peoria v. Simpson*, 110 id. 294.

Work taking a plumber next to a steam pipe in a trench imposes on the owner duty of reasonable protection from an explosion. *Webster Man. Co. v. Mulvany*, 68 Ill. App. 607; s. c. aff'd, 168 Ill. 311.

Defendant was liable to employé of one whom he has engaged on the premises, for the negligence of his own men. *John Spry Lumber Co. v. Duggan*, 182 Ill. 218; s. c., 80 Ill. App. 394.

See, also, *Klapproth v. Baltic Pier &c. Co.*, (N. J. L.) 43 Atl. Rep. 981.

Party engaged on a building owes no duty of providing protection for others independently engaged thereon. *Mueller v. Schwecht*, 62 Ill. App. 622.

But see *Union Traction Co. v. Fetters*, 99 Fed. Rep. 214.

Owner of heavy machinery on a wagon was liable to one engaged to haul it for failing to protect it against falling. *Liebold v. Green*, 69 Ill. App. 527.

Owner of a building has fulfilled his duty to one using his elevator where he has provided an elevator of an approved kind and pattern, with machinery and appliances of like nature, and has been reasonably prudent and careful in its operation and inspection. *Springer v. Ford*, 88 Ill. App. 529.

A person delivered a load at a warehouse in the night and was injured by defective approach and recovered. *Nave v. Flack*, 90 Ind. 205.

Owners of fair ground were liable for horse shot on a part of the ground allotted to target shooting. *Conradt v. Clauve*, 93 Ind. 476; same principle, *North Manchester &c. Ass'n v. Wilcox*, 4 Ind. App. 141.

A person excavating a cellar near a path, long used by the public, was held liable to one who fell in on a dark night. *Graves v. Thomas*, 95 Ind. 361.

The owner and occupant of premises must use reasonable care to keep the same in a suitable condition for those entering thereon by invitation express or implied. *Hawkins v. Johnson*, 105 Ind. 29.

Indiana &c. R. Co. v. Barnhart, 115 Ind. 399; *Diamond State Iron Co. v. Giles*, 7 Houst. (Del.) 556.

Woman fell through a trap-door in floor of store where she was a customer. Questions of negligence were for the jury. *Brosnan v. Sweetser*, 127 Ind. 1.

Both owner and lessee using an elevator open to the public are liable for leaving it unguarded. *Rhodus v. Johnson*, 24 Ind. App. 401.

Where plaintiff's employer was a mere licensee or at most a tenant in the use of defendant's tank, plaintiff could not himself recover for the breaking of a ladder thereon, while climbing it to fix his employer's connection therewith. *Lake Erie &c. R. Co. v. Maus*, 22 Ind. App. 36.

Plaintiff was invited to look through the premises with the view of his being hired as watchman. More care was due him than to a mere licensee. *Warner v. Mier Carriage &c. Co.*, 26 Ind. App. 350.

Proprietor of a bathing resort left dangerous timbers concealed in the pond and was required to pay damages for an injury. *Bass v. Reitdorf*, 25 Ind. App. 650.

The right to clean out a ditch on another's land does not include the right to throw the refuse on his land and within reach of his cattle. *Sprankle v. Bart*, 25 Ind. App. 681.

Builder was not liable where the danger arose by reason of the building being left unfinished in which condition he was obliged to leave it. *De Graffenried v. Wallace*, (Ind. Terr.) 53 S. W. Rep. 452.

Lessors of an opera house held not liable, where the trap door in the stage could have been seen and closed, had plaintiff sufficiently lit that part of the stage. *Holton v. Waller*, 95 Iowa, 545.

A car improperly secured by brakes was blown by wind against an employé of shipper to whom it was furnished, and by whom it was loaded. Liability. *Union Pacific Railroad Co. v. Harwood*, 31 Kas. 388.

Plaintiff drove under a feed chute at a mill, where there was nothing to show him that there was danger from the expulsion of bags therefrom. His acts were not inconsistent with diligence. *Salina Mill & Elevated Co. v. Hoyne*, 10 Kan. App. 579; s. c., 63 Pac. Rep. 660.

Gas company is liable for so negligently turning off gas as to create an explosion and injury to one entering the cellar with a light. *L. Gas Company v. Gutenkuntz*, 82 Ky. 432.

Yates v. Southwestern &c., Co., 40 La. Ann. 467.

Inspector from the U. S. stores is not a mere licensee and is entitled to the exercise of ordinary care. *Anderson &c. Co. v. Hair*, (Ky.) 44 S. W. Rep. 658.

See, also, *The City of Naples*, 69 Fed. Rep. 794.

Failure to guard elevator shaft, held willful negligence as to tenants of a different portion of the building accustomed to be in its vicinity. *Union Warehouse Co. v. Prewitt*, (Ky.) 50 S. W. Rep. 964.

The proprietor of a hall to which the public is invited is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition for persons attending in pursuance of such invitation; and if

he neglects his duty so that the hall is in fact unsafe, his knowledge or ignorance of the defect is immaterial. *Currier v. Boston Music Hall Assn.*, 135 Mass. 414.

A coal merchant furnished a defective tackle, whereby a customer's servant was injured, and was liable. *Hayes v. Phila. &c. R. Co.*, 150 Mass. 457.

A woman coming from a public dining-room opened the wrong door and fell down cellar. No liability. *Gaffney v. Brown*, 150 Mass. 479.

Same principle, *Johnson v. Wilcox*, 135 Pa. St. 217.

Child visiting a store with her father, put her fingers into the spout of a coffee grinder. No recovery. *Holbrook v. Aldrich*, 168 Mass. 15.

An exhibition hall must be sufficient to stand the use spectators ordinarily put it to. *Schofield v. Wood*, 170 Mass. 415.

Presence of a flight of stairs if obvious does not raise a duty to give warning thereof. *Hunnewell v. Haskell*, 174 Mass. 557.

Contractors subletting a portion of the job and only retaining the right to secure conformity to the contract owed sub-contractor the duties of a contractor only and not that of a master. *Eldred v. Mackie*, 178 Mass. 1.

Proprietor of a theatre allowed stairs to wear so far that a nail projected; but only three-sixteenths of an inch. He was held not negligent. *Jennings v. Tompkins*, 180 Mass. 302.

As to what is sufficient notice of the defectiveness of a mat at the top of a stairway in a store so as to charge its proprietor with liability, see *Tolland v. Paine Furniture Co.*, 175 Mass. 476.

Office floor $4\frac{7}{8}$ inches lower than the hall, did not charge owner in favor of a licensee. *Ware v. Evangelical Baptist &c. Soc.*, 181 Mass. 285.

One going about in a building must exercise at least ordinary care. *Hutchins v. Priestly &c. Co.*, 61 Mich. 252.

Same principle, *Johnson v. Ramberg*, (Minn. '92) 51 N. W. Rep. 1043.

The owner of a coal dock, contracting for unloading coal during the season of navigation at a specified price per ton, and to furnish the contractor a stationary engine upon the dock, and the appliance connected therewith, including the chain attached to the buckets in which the coal is hoisted from the vessels to the dock (under which ascending buckets the contractor's employes are obliged to work), which contract is silent as to repairs, is charged with the duty of examining and inspecting such engines and appliances; and is liable to one of contractor's employes for injury from the weak and worn out condition of said chain, if he *knows*, or *could* know, by inspection, of its insufficiency by the exercise of reasonable diligence. *Johnson v. Spear*, 76 Mich. 139.

Citing *Mulchey v. Methodist &c. Soc.*, 128 Mass. 487: The court said the case was analogous to that class of cases where the owner of real property is liable

to one, who, expressly or impliedly, invited upon his premises, is injured by a concealed defect thereon. *Elliott v. Pray*, 10 Allen, 378; *Gilbert v. Nagle*, 118 Mass. 278; *Pickard v. Smith*, 10 C. B. (N. S.) 470; *Holmes v. N. E. Ry. Co.*, L. R., 4 Exch. 254; *Powers v. Harlow*, 53 Mich. 514; *Semuelson v. Cleveland Iron Co.*, 49 id. 164; *McKone v. Mich. Cent. R. Co.*, 51 id. 601; *Bennett v. Railroad Co.*, 102 U. S. 580.

Lessee agreed to take lumber as delivered from cars, pile and dry it, and manufacture so much as necessary into doors for a price per door. Lessor was not liable for negligence to a railroad brakeman. *Wright v. Big Rapids Door &c. Co.*, 124 Mich. 91.

Defendant employing plaintiff to haul steel, required to use reasonable care to inspect scales used. *McIntyre v. Detroit Safe Co.*, (Mich.) 89 N. W. Rep. 39.

Defect in rope furnished to one employed to repair a grain elevator, not discoverable by reasonable inspection did not permit recovery. *McGregor v. Grand Trunk Elevator Co.*, (Mich.) 89 N. W. Rep. 332.

A merchant allowed customers to enter his store by passing through an adjoining wareroom used by him for receiving and storing goods. While so passing, plaintiff fell down cellar by reason of not looking where he went. Defendant was not liable. *Johnson v. Ramberg*, 49 Minn. 341.

Owner held to owe a fireman, entering a building in the discharge of his duty, no duty to keep it in a reasonably safe condition. *Hamilton v. Minneapolis Desk Man. Co.*, 78 Minn. 3.

See, also, *Kitchen v. Carter*, 47 Neb. 776.

An innkeeper is not obliged to erect a railing about a gallery when the possibility that some one might fall off was not sufficient to suggest the necessity of it. *Sneed v. Morehead*, 70 Miss. 690. See *West v. Thomas*, 11 So. (Ala.) 768, where complaint alleging absence of railing to a stairway was held good on demurrer.

One owner is not concerned with the negligence of a contractor on the premises of another, though the contractor is the builder of both structures and though the arrangement is that each is to share the expense in proportion to the extent of work on his own premises. *Independence v. Ott*, 135 Mo. 301.

One occupying a building for business is liable for its reasonably safe condition to all entering it for ordinary business transactions. *Welch v. McAllister*, 15 Mo. App. 492.

Ingalls v. Adams Express Co., 44 Minn. 128.

Defendant held grossly negligent in not guarding a trap door, knowing that customers frequented the place, a storeroom. *Moore v. Korte*, 77 Mo. App. 500.

That a wagon repairer is entitled to notice of peculiar dangers connected with article left for repair, see *King v. National Oil Co.*, 81 Mo. App. 155.

Liability to invitee does not depend upon the derivation of a benefit. *Hartman v. Muelbach*, 64 Mo. App. 565.

A person went to defendant's freight track on business and was struck by a car while standing on the track. No liability. *Diebold v. Penn. R. Co.*, 50 N. J. L. 478.

Same principle, *Schoenfeld v. Mill City R. Co.*, 74 Wis. 433; *Evans v. Adams*, 122 Ind. 362.

An owner of a park held not exempt by employment of an independent contractor to exhibit fireworks unless he used reasonable care in his selection. *Sebeck v. Plattdeutsche Volkfest Verein*, 64 N. J. L. 624.

A shipper who constructs a side track on his premises must use reasonable care toward railroad employes. *Smith v. Newark Ice &c. Co.*, 8 Oh. S. & C. P. Dec. 283.

See, also, *Fry v. Hillan*, (Tex. Civ. App.) 37 S. W. Rep. 359; *Towles v. Briggs*, 116 Mich. 425; *Wright v. Big Rapids Door &c. Co.*, 124 Mich. 91.

Failure of independent contractor to perform his contract with the owner gave no right of recovery for injuries to master's servant who was not a party thereto. *Strabler v. Toledo Bridge Co.*, 11 Oh. C. D. 87.

An owner is not responsible to others for injuries caused by occult defect. *Walden v. Finch*, 70 Pa. St. 460.

Owner of wharf was not liable for neglect to provide guard rail, if it would have interfered with his business. *Phila. &c. R. Co. v. Ervin*, 89 Pa. St. 71.

Where a city, owning a wharf, licensed "A." to use the same, it was the duty of the city to keep it in repair, even as regards "A." *City of Allegheny v. Campbell*, 107 Pa. St. 530.

Citing *City of Pittsburg v. Grier*, 10 Harris, 54.

While a customer was trying on some clothes in a store, the clerk suggested that his watch and chain, which he had taken off, be deposited in a drawer. The merchant was liable for the exercise of ordinary care to preserve it from loss; he was a bailee for hire, as his act was incident to his business.

A shop-keeper, by opening his store, invites the public to come there for the transaction of business in the usual way, and from this invitation there arises an implied contract that no harm or damage that could reasonably be averted shall happen to the persons of those so coming or to such property as they necessarily or habitually, in pursuance of a universal custom, carry with them; and the consideration for such promise is the chance of profit from their patronage.

Whatever a customer necessarily or, in common with people generally, habitually carries with him, and must necessarily lay aside in the store while making or examining his purchases. he is invited to lay aside by

the invitation to come and purchase; and, having laid it aside upon such invitation and with the knowledge of the dealer, he has committed it to his custody. And this being a necessary incident of the business upon which the customer was invited to come to the store, the care of the property would be within the authority of the salesman assigned to wait upon the customer; it would be a part of the transaction in which the salesman is authorized to represent his employer.

A bailment for hire, where no hire is paid, exists in such cases only where the bailment is a necessary incident of the business in which the bailee makes profit, as in the case of a customer and shop-keeper. The bailment in such case is reciprocally beneficial to both parties, and the law requires ordinary diligence on the part of the bailee and makes him responsible for ordinary neglect.

While proof of failure of a bailee to return the property upon demand, is not proof of loss, the absence of any such explanation of the neglect to restore the property as will enable the bailor to test his good faith, is sufficient to hold the bailee to prove that he has exercised ordinary diligence in the care of the property. *Logan v. Matthews*, 6 Pa. St. 417, applied.

While the bailee is entitled to the benefit of inferences fairly deducible from his conduct when a return of the property is demanded, such inferences are for the jury. If the jury find as an inference from the facts proved that the property was stolen, such finding would be a complete exculpation, if the bailee exercised ordinary care. *Woodruff v. Painter & Eldridge*, 150 Pa. St. 91.

But where articles were left in the machine shop, the owner was not liable for their loss by incendiary fire, in the absence of evidence of custom to employ a watchman under such circumstances. *Zell v. Dunkel*, 156 Pa. St. 353.

Mining company's servants forced car from a switch leading to its works on to the railroad track, causing a collision. Brakeman of railroad recovered for injuries caused thereby. *Hess v. Berwind-White Coal &c. Co.*, 178 Pa. St. 239.

Waiter in restaurant instinctively threw from him a blazing lamp. Customer injured was not allowed recovery against proprietor. *Donahue v. Kelly*, 181 Pa. St. 93.

The presence of water in a pipe would not have caused the accident had the employé of another contractor turned on the steam in the pipe gradually. A drip or trap designed to prevent the accumulation of water was not shown to be a sure protection against such an accident. Owner not liable for failure to provide it. *Jones v. Philadelphia Traction Co.*, 185 Pa. St. 75.

A contractor by undertaking to erect a scaffold for the use of the employés of an independent sub-contractor assumes the duty of making it reasonably sufficient for the purposes for which it is designed. *Hoffner v. Prettyman*, 6 Pa. Super. Ct. 20.

See, also, *Sincer v. Bell*, 47 La. Ann. 1548.

A pond in picnic grounds does not invite boys to swim. *Le Grand v. Wilkesbarre &c. T. Co.*, 10 Pa. Super. Ct. 12.

A plank to cover pipes, across an aisle in a store was raised from one to two inches above the level of the floor, though beveled. Proprietor was negligent. *Polenske v. Lit Bros.*, 18 Pa. Super. Ct. 474.

Defendant agreeing to furnish the materials to the constructor of a bridge assumed the duty to the employés of the latter of furnishing proper material. *Gross v. Carnegie Steel Co.*, 28 Pittsb. L. J. (N. S.) 318.

Owner and occupier of dock is responsible for its safe condition. *Penn. &c. R. Co. v. Atha*, 22 Fed. Rep. 920.

Absence of railing to approach of hotel did not make the owner liable for guest falling therefrom. *Tenebroeck v. Wells, Fargo & Co.*, 47 Fed. Rep. 690.

A creditor of an employé in a mill, went about the mill to find him to secure the means of paying for the material he intended to get there. Mill-owner owed him no duty of protection against dangers incident to the operation of the mill. *Berlin Mills Co. v. Croteau*, 88 Fed. Rep. 860.

Mooring posts which pulled out in an unusual storm, had stood the test of years and gave no indication of insufficiency. Wharf owners were not liable. *Girard Point Storage Co. v. Roy*, 93 Fed. Rep. 574; rev'g s. c., 79 id. 113.

The defendant, one of the marshals of an agricultural society, while clearing the track preparatory to a race, turned one "S." off the track, and, in the act of turning, "S." was thrown out of his carriage, his horses ran away and against plaintiff's carriage and injured him. The question for the jury was whether, if the defendant negligently turned the team of "S." up the bank, off the track, and "S." thereby lost control of his team, without any superior, uncontrollable force, or without the negligence of a responsible agent having intervened, the defendant would be liable; and this was so, although the negligent act was committed in the performance of a legal duty. *Stevens v. Dudley*, 56 Vt. 157.

Person engaged to repair a digester is entitled to reasonable care not to increase his risks. *Hoadley v. International Paper Co.*, 72 Vt. 79.

Defendant's clerk was negligent in taking a customer into storeroom having an unguarded elevator shaft. Negligence established. *Smith v. Parkersburg Co-Op. Ass'n*, (W. Va.) 37 S. E. Rep. 645.

The occupant of one of several stores in a block had for years main-

tained a platform over a roadway in the rear, sufficient to enable a horse and wagon, but not the driver standing upright, to pass thereunder. A servant of one of the other occupants of the block, in ignorance of the situation, was, while standing up, killed by contact with such platform. Defendant was not liable. *Cahill v. Layton*, 57 Wis. 600.

Owner of premises was negligent in maintaining an unguarded hatchway in the vicinity of a dark passage. Plaintiff was employed to repair the roof of the building. *Barowski v. Schultz*, 112 Wis. 415.

Defendant sold its refuse and allowed the customers to stir it about in the vat. They were not mere licensees but on the premises engaged in a business for the mutual benefit of both. Defendant was liable for the bursting of the vat. *Hupfer v. National Distilling Co.*, 114 Wis. 279.

(d). PREMISES CREATING AN ATTRACTION.

1. TO PEOPLE IN GENERAL.

A large number of people attracted by the sight of a burning wreck, who came upon defendant's premises unsolicited and without its knowledge or instigation, attempted to remove adjoining structures to prevent the spread of the fire. It was held that it owed them no duty other than to abstain from intentionally injuring them; especially where it had given general and frequent warnings as to the danger of an explosion. *Cleveland &c. R. Co. v. Ballentine*, 84 Fed. Rep. 935.

2. TO CHILDREN.

The defendant maintained on its premises a suitable turn-table, liable to inflict injury when moved, easily movable, without appliances to fasten it or stop it when in motion. The premises were open, used as a thoroughfare, frequented by children who played upon the turn-table, some turning and others riding upon it. While doing so a child of about six years was injured. The question of the defendant's negligence was for the jury. *Walsh v. Fitchburg R. Co.*, 67 Hun, 604.

This case cites and discusses *Lynch v. Nurdin*, 1 Adol. & Ellis, New Series, 29; *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289; distinguishes *McAlpin v. Powell*, 70 id. 126; *Larmore v. Crown Pt. Iron Co.*, 101 id. 391; *Miller v. Woodhead*, 104 id. 471; *Splittorf v. State*, 108 id. 205.

If a corporation erects and maintains upon its own land for its own use a structure capable of inflicting injury on persons, and by its appearance and operation calculated to attract or allure children *non sui juris*, and to endanger their life or limbs, and leaves the same unguarded and

injury results therefrom to such children, without the fault or negligence of their parents or guardians, it constitutes negligence on the part of such corporation for which a recovery may be had; under such circumstances the party erecting and maintaining such dangerous structure owes a duty to society to so guard the same that young children shall not be lured thereto to their destruction. *Walsh v. Fitchburg R. Co.*, 78 Hun, 1; (67 Hun, 604, *ante*, 2132), *rev'd*, 145 N. Y. 301.

Citing *Railroad Co. v. Stout*, 17 Wall. 657; *Mullaney v. Spence*, 15 Abb. N. S. 319; *Linch v. Nurdin*, 1 Ad. & Ell., (N. S.) 31; 41 Eng. C. L. 422; *Vale v. Bliss*, 50 Barb. 358; *Birge v. Gardiner*, 19 Cow. 506; *Whirley v. Whitman*, 1 Head, (Tenn.) 610; *Mangan v. Brooklyn*, 38 N. Y. 455; *Cosgrove v. Ogden*, 49 id. 255.

An owner of premises facing an alley was not liable for failure to secure a heavy milk wagon standing on a slope backing down to the alley other than such as would keep it in place when not meddled with. It was started down by children playing in it and struck plaintiff walking along the alley. *Groake v. Laemmle*, 56 App. Div. 61.

An appliance calculated to attract children and injure them, if interfered with, imposes on the owner the duty of protecting them. *Alabama &c. R. Co. v. Crocker*, 131 Ala. 584.

Defendant was not liable where its foot bridge over its canal was not a dangerous one though it had a 2-inch cleat nailed to one end over which deceased, a child of nine, stumbled and fell through an opening 9¼ inches wide left to clear away ice accumulating in the headgate below. *Thomas v. Pocatello Power &c. Co.*, (Id.) 63 Pac. Rep. 595.

A moving elevator is an attraction to children and requires the owner to guard the shaft. *Liddall v. Jansen*, 168 Ill. 43; *rev'g s. c.*, 67 Ill. App. 102.

Father held not negligent in leaving an ice pick temporarily on the sidewalk in reach of his four-year-old son, who injured another child with it. *Malmberg v. Bartos*, 83 Ill. App. 481.

Reasonable care should be taken to prevent injury to children likely to enter upon private premises and be injured. *Coppner v. Penn. R. Co.*, 12 Ill. App. 600.

Company was liable for injury to child playing about turntables and similar appliances. *Kas. City R. Co. v. Fitzsimmons*, 22 Kas. 686.

Fink v. Mo. Furnace Co., 10 Mo. App. 61; *Evansich v. Gulf &c. Co.*, 57 Tex. 126; *Nagel v. Mo. &c. R. Co.*, 75 Mo. 653; *Harriman v. Pittsburg &c. R. Co.*, 45 Oh. St. 11; *Callahan v. Eel River &c. R. Co.*, 92 Cal. 89; *Barret v. S. P. &c. R. Co.*, 91 id. 296; *Porter v. Anheuser &c. Assn.*, 24 Mo. App. 1; *Houston &c. R. Co. v. Simpson*, 60 Tex. 103; *East Tenn. &c. R. Co. v. Cargillie*, 105 Tenn. 628.

Whether knowledge that small boys were engaged by a licensee to sweep

out empty cars in a grain elevator, was sufficient to charge owner with the duty of protecting them against a steam exhaust barrel whose top was on the level of the floor of the elevator and was insecurely covered, was held to be a question for the jury. *Kinchlow v. Midland Elevator Co.*, 57 Kan. 374.

So, in case of a reservoir known to be frequented by small boys, owner must use reasonable care to protect them from injury. *Price v. Atchison &c. R. Co.*, 58 Kan. 551.

So, in case of an overhanging embankment. *Ann Arbor R. Co. v. King*, 12 Oh. C. D. 379.

So, in case of dangerous machinery. *Biggs v. Consolidated Barb-Wire Co.*, 60 Kan. 217.

Boys got into an enclosed coal dump and were riding down the same. No liability. *O'Connor v. Ill. C. R. Co.*, 44 La. Ann. 339.

Although a boy had been ordered away from machinery used for a building standing near or on the sidewalk, he was injured thereby and the question of negligence was for the jury. *Moynihan v. Whidden*, 143 Mass. 287.

Where a turntable was 500 feet from the highway no recovery was allowed. *Daniels v. N. Y. C. & H. R. R. Co.*, 154 Mass. 349.

Same principle, *Gillespie v. McGowan*, 100 Pa. St. 144.

That a water wheel may be attractive to children does not charge defendant where they have to commit a trespass to reach it; and the fact that they are known to frequent the vicinity does not change their relation. *Ryan v. Towar*, 128 Mich. 463.

That a pond is attractive to children does not impose the duty upon its owner to fence it in or guard it so as to prevent children trespassing. *Stendal v. Boyd*, 73 Minn. 53.

See, also, *Smith v. Jacob Dold Packing Co.*, 82 Mo. App. 9; *Cooper v. Overton*, 102 Tenn. 211; *Missouri &c. R. Co. v. Dobbins*, (Tex. Civ. App.) 40 S. W. Rep. 861; s. c. aff'd, 91 Tex. 60; s. c., 38 L. R. A. 573; *Peters v. Bowman*, 115 Cal. 545; s. c., id. 355.

So, as to burning rubbish on a right of way. *Erickson v. Great Northern R. Co.*, 82 Minn. 60.

Railroad must guard piles of cross ties, known to be used by children in play. *Kramer v. Southern R. Co.*, 127 N. C. 328; s. c., 52 L. R. A. 359.

Requirement to protect children against dangerous machinery attracting them, held not to apply to trains. *Steele v. Pittsburg &c. R. Co.*, 4 Oh. Dec. 350.

Failure to absolutely exclude entrance to premises containing a dangerous piece of machinery, held not negligence, though it is known that

children have frequently passed in. *O'Leary v. Brooks Elevator Co.*, 7 N. D. 554.

See, also, *Missouri &c. R. Co. v. Edwards*, 90 Tex. 65; rev'g s. c., 32 S. W. Rep. 815.

See, also, *Buch v. Amory Man. Co.*, 69 N. H. 257.

Toledo Real Estate &c. Co. v. Putney, 44 Oh. C. C. R. 486.

A boy about six years of age, for amusement, stood at the edge of the depot platform to watch an approaching train; a projecting step on the engine injured him. No liability. *Baltimore &c. R. Co. v. Schwindling*, 101 Pa. St. 258.

A boy trespassing was injured by falling from a hoisting apparatus, which he got upon, disregarding warning. No liability. *Rogers v. Lees*, 140 Pa. St. 145.

Negligence, which allowed a child to approach unboxed machinery, although the child is a trespasser renders defendant accountable. *Whirley v. Whiteman*, 1 Head. (Tenn.) 610.

Nashville &c. R. Co. v. Carroll, 6 Heisk, (Tenn.) 347.

When turntable was fastened the defendant was not liable for injury to boy who unfastened it. *Bates v. Nashville &c. R. Co.*, 15 S. W. (Tenn.) 1069.

But where it was fastened with a rope which was cut or untied the company was liable. *Ilwaco R. & Nev. Co. v. Hedrick*, 1 Wash. 446.

And so although it was fastened according to custom of railroads this was not conclusive of care. *O'Malley v. St. Paul &c. R. Co.*, 43 Minn. 289.

Recovery was claimed on the ground that child was injured by a dangerous condition attractive to children. The only evidence of attractiveness was a plank floating on water dammed back by the construction of city works. It also appeared that defendant had no notice of either the plank or the pond. No recovery. *Cooper v. Overton*, 102 Tenn. 211.

Where the warning to beware of the danger from the machinery did not come from the defendant, it could not avoid the consequences of permitting small children to frequent it. *Dublin Cotton-Oil Co. v. Jarrard*, 91 Tex. 289.

The unusual attractiveness of a turntable to a child held to constitute an implied invitation to use it, regardless of whose land she was on when it is extended. *San Antonio &c. R. Co. v. Skidmore*, (Tex. Civ. App.) 65 S. W. Rep. 215.

The management only, of turntables, constitutes negligence. They are not nuisances *per se*. *Thomason v. Southern R. Co.*, 113 Fed. Rep. 80.

Boy with others, lifted a large hand car on the track, and was injured. No liability. *Robinson v. Oregon &c. R. Co.*, 7 Utah, 493.

Defendant by operating a tramway on his premises though within reach of the public did not undertake the duty of providing against the possible contingency of a child getting on the track. *Dicken v. Liverpool Salt &c. Co.*, 41 W. Va. 511.

Especially adjoining the highway.—Defendant carried on business that naturally drew people together in a public place and employed dangerous instruments. Some boys gathered on a dock where a ferry boat landed passengers; the ferry company neither owned nor leased it. The bridge was fastened to a pulley with a weight at the other end; the boys brought this bridge down so heavily as to break its fastening with the bridge and let the pulley weight fall on one of the boys. Defendant was deemed negligent. *Fitzpatrick v. Garrison & West Point Ferry Co.*, 49 Hun, 288.

Defendant was not negligent in leaving a windlass on the sidewalk of a street in a populous quarter of the city on Sunday where it secured it so that it could not be operated—which only, made it dangerous—unless the cords by which it was tied were removed. Boys, however, cut such cords, procured other rope and started it agoing whereby plaintiff's foot was caught into its wheels. *Saverio-Cella v. Brooklyn Union El. R. Co.*, 55 App. Div. 98.

Evidence that defendant left a winch in a street projected only, and still uncompleted, after the men had quit work, which boys in the neighborhood had played with by pushing it around the boom which wound the cable on the drum, was not sufficient to establish that it was a machine likely to attract children and that it was left in a dangerous condition. *Fitzgerald v. Rodgers*, 58 App. Div. 298.

Defendant was not allowed to set up that the child was a trespasser where the excavation adjoined the street and was insufficiently guarded. *Dwyer v. McLaughlin*, 31 Misc. 510; rev'g s. c., 27 Misc. 187.

Car was left on the track in the street but the brake, sufficient to hold it unless removed, was set. Boys were playing about it and set it in motion. Boy could not recover where the danger was obvious to one of his age and intelligence. *George v. Los Angeles R. Co.*, 126 Cal. 357.

See, also, *Kaumier v. City Electric R. Co.*, 116 Mich. 306.

Knowledge that a child was hanging on the rear of an ice wagon was not sufficient to charge the driver with negligence. *Walsh v. Hayes*, 72 Conn. 397.

See, also, *Conlon v. Bailey*, 58 Ill. App. 261.

City held not negligent in constructing a drain four feet wide and two feet deep to carry away accumulations of surface water. *Rome v. Cheney*, 114 Ga. 194.

City was not liable where the pond in its common was a considerable distance from the highway. *Schauf v. Paducah*, (Ky.) 50 S. W. Rep. 42.

See, also, *Peters v. Bowman*, 115 Cal. 545; s. c., id. 355; *Moran v. Pullman Palace Car Co.*, 134 Mo. 641; s. c., 33 L. R. A. 755; *Arnold v. St. Louis*, 152 Mo. 173.

That a turntable, a structure necessary for business purposes, happens to be attractive to children, does not make them invitees instead of trespassers, even though it is entirely unguarded and adjoins a public street. *Delaware &c. R. Co. v. Reich*, 61 N. J. L. 635.

The exercise of reasonable care did not require the defendant, in excavating sand from the bottom of a public stream, to foresee the negligence of a boy of 15 in walking over its bed knowing the likelihood of stepping into such excavations. *Hunt v. Graham*, 15 Pa. Super. Ct. 42.

Leaving a chest of caps in a vacant lot unguarded held not the proximate cause of an explosion in the hands of a boy who had stolen them. *Afflick v. Bates*, 21 R. I. 281.

Spikes in poles along a highway used as a means of ascent for employ  s do not invite children to use them. *Simonton v. Citizens' Electric &c. Co.*, (Tex. Civ. App.) 67 S. W. Rep. 530.

III. Railroad Premises.

(a). GENERAL PRINCIPLES.

Concurring negligence of a child or its parents is no defense to an action for the negligent killing thereof after discovering its peril. *Alabama &c. R. Co. v. Burgess*, 116 Ala. 509.

See, also, *Lake Erie &c. R. Co. v. Bradford*, 15 Ind. App. 655.

The doctrine of comparative negligence not prevailing in Illinois, the deceased must have been free from the lack of ordinary care. *Chicago &c. R. Co. v. Kelly*, 75 Ill. App. 490.

Where a fireman on one road is negligent, he cannot complain of the negligence of the engineer on the other. *Thompson v. Chicago &c. R. Co.*, 64 Minn. 159.

Where defendant was not willful or reckless, the deceased's negligence willfully superinduced by intoxication may be considered the proximate cause of the accident. *Coatney v. St. Louis &c. R. Co.*, 151 Mo. 35.

Contributory negligence may apply to boys. *Engleman v. Lake Shore &c. R. Co.*, 8 Oh. C. D. 583.

Though defendant was negligent in a greater degree than plaintiff's

the latter's negligence barred recovery. *Missouri &c. R. Co. v. Rodgers*, 89 Tex. 675; rev'g s. c., 35 S. W. Rep. 412.

The doctrine of comparative negligence not prevailing in Texas. *International &c. R. Co. v. Eason*, (Tex. Civ. App.) 35 S. W. Rep. 208.

(b). WHO IS A TRESPASSER.

1. IN GENERAL.

A child, though but two years of age, may be a trespasser. *Baltimore &c. R. Co. v. Bradford*, 20 Ind. App. 348.

See, also, *Meehan v. Chicago &c. R. Co.*, 67 Ill. App. 39; *Trudell v. Grand Trunk R. Co.*, 126 Mich. 73.

But, see, *Ludden v. Columbus &c. R. Co.*, 7 Oh. N. P. 106.

One entitled to ride to D. if he would throw a switch there, became a trespasser, upon returning to the train after doing so. *Cincinnati &c. R. Co. v. Jackson*, (Ky.) 58 S. W. Rep. 526.

Boy watching cattle to keep them off the track, was a trespasser where he sat down thereon. *Louisville &c. R. Co. v. Vittitoe*, (Ky.) 41 S. W. Rep. 269.

Though the hands at a mine to which defendant ran a track were accustomed to walk to and from their work on the track, they were held to be entitled only to the rights of trespassers. *Egan v. Montana &c. R. Co.*, 24 Mont. 569.

See, also, *Atchison &c. R. Co. v. Mendoza*, 60 S. W. Rep. 327; s. c., 62 id. 418.

Representative of decedent cannot recover when decedent was out of employment and near defendant's depot not for the purpose of transacting any business, and was struck by a piece of the roof torn off by the wind, and killed. *Pittsburg &c. R. Co. v. Bingham*, 29 Oh. St. 364.

Duty toward those permitted to use a space along tracks as a passageway, held not to apply to one not using it as such. Boy, who without authority was assisting station agent, found torpedo and was injured in opening it. *Cleveland &c. R. Co. v. Marsh*, 63 Oh. St. 236; s. c., 53 L. R. A. 142.

By riding on the steps of a freight engine without permission, deceased became a trespasser, unable to recover in the absence of willfulness. *Baltimore &c. R. Co. v. Railroad Co.*, 3 Oh. S. & C. P. Dec. 687.

A person unlawfully on a train is an intruder. *Bicker v. R. Co.*, 132 Pa. St. 1.

Wharton on Negligence, sec. 354; *Alabama R. Co. v. Hoffman*, 76 Ala. 192.

That plaintiff went into the cab of a construction train at the invita-

tion of the conductor and engineer, did not prevent his being a trespasser. *Burns v. Southern R. Co.*, 63 S. C. 46.

Plaintiff, who was refused passage on freight train by conductor, but permitted to board it by another, is a trespasser and cannot recover. *Gulf &c. R. Co. v. Campbell*, 76 Tex. 174.

Candiff v. Louisville &c. R. Co., 42 La. Ann. 477.

One riding on hand car without consent of agent, cannot recover for injuries received. *Gulf &c. R. Co. v. Dawkins*, 77 Tex. 228.

2. AT CROSSINGS.

Stopping on a crossing to converse converts one into a trespasser. *Tennessee &c. R. Co. v. Hansford*, 125 Ala. 349.

Failure to give the statutory signals for a crossing was not negligence *per se* as to a person on the track 135 yards beyond it. *Georgia R. &c. Co. v. Clary*, 103 Ga. 639.

See, also, *Boggers v. Southern R. Co.*, 64 S. C. 104; *Huff v. Chesapeake &c. R. Co.*, 48 W. Va. 45.

One becomes a trespasser in walking along tracks, though in the vicinity of a station, for purposes of his own. *James v. Illinois C. R. Co.*, 195 Ill. 327; *aff'd* s. c., 93 Ill. App. 294.

One going beyond the limits of the crossing to pass around cars obstructing it is not to be regarded as a trespasser until a reasonable time to accomplish the object has elapsed. *Mayer v. Chicago &c. R. Co.*, 63 Ill. App. 309.

See, also, *Brague v. Northern R. Co.*, 192 Pa. St. 242; *Thompson v. Missouri &c. R. Co.*, 93 Mo. App. 548; *Scott v. St. Louis &c. R. Co.*, 112 Iowa, 54.

Trespasser may recover for wanton injury at a crossing. *O'Connor v. Illinois C. R. Co.*, 77 Ill. App. 22.

See, also, *Oconee &c. R. Co. v. Ramsay*, 110 Ga. 266.

Though plaintiff was struck at the crossing, he was a trespasser; being only in the act of passing over it as he traveled along the tracks. *Robards v. Wabash R. Co.*, 84 Ill. App. 477.

See, also, *Lyon v. Illinois C. R. Co.*, (Ky.) 59 S. W. Rep. 507; *Brague v. Northern &c. R. Co.*, 192 Pa. St. 242.

Defendant had maintained steps at a crossing used by the public for many years together with the approach to the same along its tracks, notwithstanding a sign forbidding its use except by employes. Not allowed to treat a traveler as a trespasser. *International &c. R. Co. v. Brooks*, (Tex. Civ. App.) 54 S. W. Rep. 1056.

See, also, *Jelinski v. Belt R. Co.*, 86 Ill. App. 535; *Tubbs v. Michigan &c. R. Co.*, 107 Mich. 108.

3. ALONG HIGHWAYS.

Street along which defendant's track was laid had never been abandoned, but was still frequently used. Pedestrians were not trespassers. *St. Louis &c. R. Co. v. Neeley*, 63 Ark. 636; s. c., 37 L. R. A. 616.

See, also, *Mahuke v. New Orleans &c. R. Co.*, 104 La. 411.

Nor were they in crossing elsewhere than at the intersection of cross streets. *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1.

See, also, *Baltimore &c. R. Co. v. Cumberland*, 176 U. S. 232; aff'g s. c., 12 App. D. C. 598; *Toledo &c. R. Co. v. Chisholm*, 83 Fed. Rep. 652.

(c). DUTY AND DEGREE OF CARE TO TRESPASSERS

1. IN GENERAL.

As against a mere trespasser on the track, company is not bound to use the most modern appliances. Evidence that a certain improved brake, in general use, would have prevented the injury to the passenger, was not admissible. *McKenna v. N. Y. &c. R. Co.*, 8 Daly, 304.

Johnson v. Boston &c. R. Co., 125 Mass. 75.

The right of way of a railroad company is the exclusive property of the company, upon which no unauthorized person has a right to be for any purpose, and it is a serious question whether the company can be charged with negligence in injuring a person found upon its right of way, unless such negligence was wanton or willful. A company is not required to exercise a high degree of care toward the public upon the company's own grounds, even within a city. *Lake Erie & W. R. Co. v. Zoffinger*, 10 Ill. App. 252.

Citing *I. C. R. Co. v. Hetherington*, 83 Ill. 510; *I. C. R. Co. v. Godfrey*, 71 id. 500; *I. C. R. Co. v. Hammer*, 72 id. 347.

Trespasser in an old freight house was injured by a portion thereof disturbed by a sudden storm. No liability. *Lary v. Chicago &c. R. Co.*, 78 Ind. 323.

Trespasser on a railway track may not recover for injury through the company's negligence, unless it be willful. *Terre Haute &c. R. Co. v. Graham*, 95 Ind. 286.

Palmer v. C. &c. R. Co., 112 Ind. 250; *Gregory v. Chicago &c. R. Co.*, id. 385; *Grethen v. Chicago &c. R. Co.*, 22 Fed. Rep. 609; *McClaren v. Ind. &c. R. Co.*, 83 Ind. 319.

So, where one was killed by the explosion of a torpedo which he picked up. *Carter v. Columbia &c. R. Co.*, 19 S. C. 20.

A person who is injured while crossing railroad tracks at a place not a highway, and where no inducement is held out to him to cross by the

company, cannot maintain an action against the corporation for such injury. *Wright v. Boston & Maine R. Co.*, 129 Mass. 440.

Citing *Johnson v. Boston &c. R. Co.*, 125 Mass. 75, 79.

Plaintiff, a trespasser, or at most a bare licensee, fell over an unguarded semaphore wire in crossing defendant's tracks. No recovery. *Clark v. Michigan C. R. Co.*, 113 Mich. 24.

If engineer uses his best judgment, the defendant will not be liable. *Bell v. Hannibal &c. R. Co.*, 72 Mo. 50.

Great skill is required to prevent injury to one on track. *Frick v. St. Louis &c. R. Co.*, 75 Mo. 595.

The character of a trespasser does not so deprive him of recognition as to permit a railroad company to unnecessarily injury him. *Jackson v. Kansas City &c. R. Co.*, 157 Mo. 621; *Grady v. Georgia &c. R. Co.*, 112 Ga. 668; *St. Louis &c. R. Co. v. Bennett*, 69 Fed. Rep. 525.

Trespasser cannot recover where the collision was the result of mere carelessness only. *Feedback v. Missouri &c. R. Co.*, 167 Mo. 206; *Union Stock-Yards &c. Co. v. Goodman*, 91 Ill. App. 426; *Lando v. Chicago &c. R. Co.*, 81 Minn. 279; *Chicago &c. R. Co. v. Kansas City &c. R. Co.*, 18 Mo. App. 245.; *Baltimore &c. R. Co. v. Cox*, 66 Oh. St. 276.

Even though the collision is the result of gross carelessness. *Singleton v. Felton*, 101 Fed. Rep. 526.

Louisville &c. R. Co., (Ky.) 56 S. W. Rep. 657.

Crossing safe for travelers is safe for trespassers. *Raper v. Wilmington &c. R. Co.*, 126 N. C. 563.

Where contributory negligence on the part of a trespasser is shown, defendant need only show that it was not willful. *Chicago &c. R. Co. v. Kansas City &c. R. Co.*, 78 Mo. App. 245.

The hands at a mine to which defendant ran a track were accustomed to walk to and from work on the track, but on the occasion in question the engineer was looking back for a signal and did not see plaintiff. Being a trespasser, there was no obligation to look out for him. *Egan v. Montana C. R. Co.*, 24 Mont. 569.

Though the hands of a smelter to which defendant ran its track were in the habit of riding to and from work on defendant's cars, the latter was not liable to one riding on the footboard of the engine where his presence was not known, as in such case he was only to be accorded the rights of a trespasser. *Atchison &c. R. Co. v. Mendoza*, 60 S. W. Rep. 327; s. c., 62 id. 418.

Where deceased was himself negligent in walking between the tracks he cannot recover in the absence of proof that defendants actually knew his danger in time to have avoided it. *Texas &c. R. Co. v. Breadow*, 90 Tex. 26.

See, also, *Payne v. Columbus &c. R. Co.*, 7 Oh. N. P. 327.

2. NO DUTY ARISES TILL ACTUALLY DISCOVERED.

Duty to a trespasser only arises after discovering his danger. *Haley v. Kansas City &c. R. Co.*, 113 Ala. 640; *Alabama &c. R. Co. v. Moorers*, 116 Ala. 642; *Hambright v. Western &c. R. Co.*, 112 Ga. 36; *Grady v. Georgia &c. R. Co.*, id. 668; *Louisville &c. R. Co. v. Wade*, (Ky.) 36 S. W. Rep. 125; *Egan v. Montana &c. R. Co.*, 24 Mont. 569; *St. Louis &c. R. Co. v. Bennett*, 69 Fed. Rep. 525; *Smith v. Houston*, 17 Tex. Civ. App. 502.

Not the moment he is seen. *Southern R. Co. v. Bush*, 122 Ala. 470.

Engineer had seen deceased one-fourth to one-half a mile ahead, but did not use care to see that he left the track. No recovery was allowed, however, as his immediate danger was not actually discovered in time to prevent injury. *Texas &c. R. Co. v. Staggs*, 90 Tex. 458; aff'g s. c., 37 S. W. Rep. 609.

Knowledge that a boy was in a slowly moving train, was not knowledge of his falling and peril of being run over. *Missouri &c. R. Co. v. Halton*, (Tex.) 65 S. W. Rep. 625.

Duty does not arise until he is discovered and in such a position as to give rise to a reasonable belief that stopping will be necessary to avoid injury. *Cleveland &c. R. Co. v. Tartt*, 99 Fed. Rep. 369.

After discovery, the railroad owes the same care to a trespasser on the track as to others. *Seaboard &c. R. Co. v. Joyner*, 92 Va. 354.

3. RIGHT TO PRESUME THAT TRAIN WILL BE AVOIDED.

Engineer may presume that a person on or near the track will avoid danger. *Houston &c. R. Co. v. Smith*, 52 Tex. 178.

Mobile &c. R. Co. v. Stroud, 64 Miss. 784.

Rule applies to a person lying at an apparently safe distance from the track. *McKenna v. N. Y. C. &c. R. Co.*, 8 Daly, 304.

McKenna v. N. Y. C. &c. R. Co., 9 Daly, 262.

Same principle, *Richmond &c. R. Co. v. Anderson*, 31 Gratt. (Va.) 812.

Where deceased could have seen the train without difficulty. *Birmingham &c. R. Co. v. Bowers*, 110 Ala. 328.

In the absence of knowledge that one on the track is deficient in his faculties. *Florida &c. R. Co. v. Williams*, 37 Fla. 406.

Jackson v. Kansas City &c. R. Co., 157 Mo. App. 621; *Cincinnati &c. R. Co. v. Murphy*, 17 Oh. C. C. 223; *Ludden v. Columbus &c. R. Co.*, 7 Oh. N. P. 106; *Gulf &c. R. Co. v. Hill*, (Tex. Civ. App.) 58 S. W. Rep. 255; *Gunn v. Ohio &c. R. Co.*, 42 W. Va. 676.

The rule does not apply on a high trestle. *Pierce v. Walters*, 164 Ill. 560; aff'g s. c., 63 Ill. App. 562; *Callway v. Spurgeon*, 63 Ill. App. 571.

But see *Little v. Carolina &c. R. Co.*, 118 N. C. 1072.

The rule applies in the absence of signs that the party will not avoid the danger. *Meacham v. Louisville &c. R. Co.*, (Ky.) 45 S. W. Rep. 363; *Ward v. Illinois C. R. Co.*, (Ky.) 56 S. W. Rep. 807.

Being bound to stop only after discovering that he is unaware of the danger. *Louisville &c. R. Co. v. Taafe*, (Ky.) 50 S. W. Rep. 850.

But he must be warned upon discovery to give rise to the right to make such assumption. *Illinois Cent. R. Co. v. Hocker*, (Ky.) 55 S. W. Rep. 438; *Houston &c. R. Co. v. Harvin*, (Tex. Civ. App.) 54 S. W. Rep. 629.

Engineer need not presume that the fact that the party does not arise at once upon his giving the signal is due to a condition of disability, but may continue where the latter still has time to remove. *Hebert v. Louisiana &c. R. Co.*, 104 La. 483.

See, also, *Smalley v. Southern R. Co.*, 57 S. C. 243.

So, an engineer may assume that the party in stepping to one side is going to get off pursuant to the warning. *Starboard v. Detroit &c. R. Co.*, 122 Mich. 23.

The rule is not applicable to small children. *Riley v. Missouri &c. R. Co.*, 68 Mo. App. 652.

See, also, *Ludden v. Columbus &c. R. Co.*, 7 Oh. N. P. 106; *G. C. R. Co. v. Hewitt*, 67 Tex. 473; *Gunn v. Ohio River R. Co.*, 42 W. Va. 676; otherwise as to a boy of nineteen, *Rangely v. Southern R. Co.*, 95 Va. 715.

The rule applies to trespassing railroads. *Chicago &c. R. Co. v. Kansas City &c. R. Co.*, 78 Mo. App. 245.

It applies where it is not apparent that the party will come within reach of danger. *Cincinnati &c. R. Co. v. Lally*, 14 Oh. C. C. 333; *Fisk v. Chicago &c. R. Co.*, 111 Iowa, 392; *Markham v. Raleigh &c. R. Co.*, 119 N. C. 715.

But where he is discovered and it reasonably appears that he is not aware of the train's approach, the train must be stopped if possible. *St. Louis &c. R. Co. v. Bishop*, 14 Tex. Civ. App. 504.

See, also, *Gulf &c. R. Co. v. Hill*, (Tex. Civ. App.) 58 S. W. Rep. 255.

But seeing a trespasser on the track is not enough, the appearances must raise a reasonable suspicion that he will not leave in time. *Texas &c. R. Co. v. Roberts*, 14 Tex. Civ. App. 532.

In the absence of statute an engineer is not bound to anticipate the presence of trespassers. *Felton v. Aubrey*, 74 Fed. Rep. 350.

4. WHEN DUTY ARISES AFTER HE IS SEEN.

Trespasser, to avoid a train, let himself down under a trestle, and not being able to regain the track he fell. Engineer, on discovering the danger, should have stopped or checked his train. *Cook v. Central R. Co.*, 67 Ala. 533.

The inference of wantonness or intentional injury is not warranted simply because deceased was seen. *Burson v. Louisville &c. R. Co.*, 116 Ala. 198; *Alabama &c. R. Co. v. Burgess*, 114 Ala. 587.

From opinion.—"To constitute wantonness or wilfulness on the part of the servants, in their omissions to use proper preventive effort after discovery of the peril, they must have been conscious, at the time, that they were omitting to use the means at hand which the circumstances reasonably required to avert the injury."

Company not liable where engineer did all he could to avoid injury after discovering the danger. *Alabama &c. R. Co. v. Moorer*, 116 Ala. 642.

But not "all means" within company's power, but such efforts as an ordinarily prudent person would use under such circumstances. *Austin &c. R. Co. v. McSween*, (Tex. Civ. App.) 32 S. W. Rep. 376; *Texas &c. R. Co. v. McCarty*, 35 id. 675; *Texas &c. R. Co. v. Phillips*, 37 id. 620.

Consistent with defendant's own safety. *Riley v. Missouri P. R. Co.*, 68 Mo. App. 652; *Houston &c. R. Co. v. Wallace*, 21 Tex. Civ. App. 394; *Louisville &c. R. Co. v. Morley*, 86 Fed. Rep. 240; *Texas &c. R. Co. v. Harly*, 94 id. 303.

"All practical means" as to a person discovered asleep under a car. *Garza v. Texas &c. R. Co.*, (Tex. Civ. App.) 41 S. W. Rep. 172.

Company, liable where it failed to use ordinary care to avoid injury after discovering the danger. *Kansas &c. R. Co. v. Fitzhugh*, 61 Ark. 341.

See, also, *Pierce v. Walters*, 164 Ill. 560; aff'g s. c., 63 Ill. App. 562; *Goodrich v. Burlington &c. R. Co.*, 103 Iowa, 412; *Purcell v. Chicago &c. R. Co.*, 109 Iowa, 628; *Louisville &c. R. Co. v. Keimery*, (Ky.) 66 S. W. Rep. 20; *Galveston &c. R. Co. v. Zantlinger*, (Tex. Civ. App.) 40 S. W. Rep. 677; s. c. aff'd, 53 id. 379; *Houston &c. R. Co. v. Harvin*, (Tex. Civ. App.) 54 S. W. Rep. 629; *Cahill v. Chicago &c. R. Co.*, 74 Fed. Rep. 285; *Seaboard &c. R. Co., v. Joyner*, 92 Va. 394; *Louisiana &c. R. Co. v. McDonald*, (Tex. Civ. App.) 52 S. W. Rep. 649; *Sullivan v. St. Louis &c. R. Co.*, (Tex. Civ. App.) 36 S. W. Rep. 1020.

But company is not liable for failure to discover deceased where he was himself negligent in not avoiding the danger. *St. Louis &c. R. Co. v. Ross*, 61 Ark. 617.

Company not liable where injury could not have been avoided after discovering danger. *Martin v. Georgia R. &c. Co.*, 95 Ga. 361; *Evans v. Pittsburg &c. R. Co.*, 142 Ind. 264; *Sinclair v. Chicago &c. R. Co.*, 133 Mo. 233.

Defendant's servant in charge of the shifting of its cars saw deceased, a boy of eight, playing in the cars and said nothing, and its trainmen operating them saw or could have seen his danger in time to avoid injury.

Negligence was for the jury. *Tully v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 537.

Duty after discovering a trespasser's danger, is to exercise every effort to avoid injury. *Callaway v. Walters*, 63 Ill. App. 562; s. c. aff'd, 164 Ill. 560.

One who places himself upon a railway even in violation of statute, does not forfeit all right to have the company's agents regard his personal security or life, or exempt it from liability for injury, if, by the exercise of proper precautions on its part, the casualty could have been avoided. If a person appears upon a railroad track in a helpless condition, and the engineer and his assistants *discover* him in time to stop the train before reaching him, but recklessly, or even incautiously, neglect to do so, the company would be liable in damages, in proportion to its own default, and that of the other party. *Savannah, Fla. & West. R. Co. v. Stewart*, 71 Ga. 427.

Distinguishing *Central R. Co. v. Brinson*, 70 Ga. 207.

That the deceased voluntarily went into a position of danger to rescue a child does not lessen the duty of the engineer. *Pierce v. Walters*, 164 Ill. 560; aff'g s. c., 63 Ill. App. 562.

An engineer was not chargeable with knowledge that deceased could not walk 100 feet back, off a track, at the rate of $1\frac{1}{4}$ miles an hour, before the engine reached him, 2000 feet away, running at 25 miles an hour. *Ullrich v. Cleveland &c. R. Co.*, 151 Ind. 358.

Contributory negligence no defense to a charge of willfulness. *Lake Erie &c. R. Co. v. Brafford*, 15 Ind. App. 655.

Engineer was negligent where he saw a child of two dangerously near the track, in time to have avoided injury by the immediate use of all the appliances at his command. *Union P. R. Co. v. Ure*, 56 Kan. 473.

See, also, *Matthews v. Chicago &c. R. Co.*, 63 Mo. App. 569.

So, where he failed to stop after discovering the trespasser when he had time to do so. *Lexington &c. R. Co. v. Hoffman*, (Ky.) 32 S. W. Rep. 611; *Lamb v. Wilmington &c. R. Co.*, 122 N. C. 862.

Constituting "willful negligence." *Coleman v. Kentucky C. R. Co.*, (Ky.) 33 S. W. Rep. 945.

See, also, *Pittsburg &c. R. Co. v. Kelly*, 12 Oh. C. C. 341.

Negligence of engineer was for the jury where, while running at 50 miles per hour he makes no effort to stop on seeing a person on the track, until within 100 yards of him. *Louisville &c. R. Co. v. Tinkham*, (Ky.) 44 S. W. Rep. 439.

Where the engineer waits until he is almost upon plaintiff before giving danger signals, he cannot wait to see whether they are heeded, but

must at once use all the means at hand, consistent with the safety of the train to secure the safety of the plaintiff. *Chamberlain v. Missouri P. R. Co.*, 133 Mo. 587.

If engineer, on seeing the boy who had caught his foot between a rail and guard, could have prevented injury to him by reasonable prudence, the company would be liable. *Burnett v. Burlington &c. R. Co.*, 16 Neb. 332.

Thompson v. Missouri &c. R. Co. 11 Tex. Civ. App. 307.

So, where train failed to give any signal upon seeing a person approaching a trestle when three-fourths of mile away, allowing him to go upon it, and not giving any signals until within 200 or 250 yards thereof. The train could have been stopped with entire safety to itself in time to have avoided injury. *McLamb v. Wilmington &c. R. Co.*, 122 N. C. 862.

Defendant was liable for the blowing of a whistle purposely to frighten horses watering near the track. *Brendle v. Spencer*, 125 N. C. 474.

Engineer should stop for a person who has become, without his fault, insensible on the track and is in full view. *H. &c. R. Co. v. Sympkins*, 54 Tex. 615.

International &c. R. Co. v. Smith, 62 Tex. 252.

Engineer with knowledge of danger, held liable for failing to give warning or make effort to avoid injury. *Texas &c. R. Co. v. Breadaw*, (Tex. Civ. App.) 35 S. W. Rep. 490.

See, also, *Texas &c. R. Co. v. Brown*, 14 Tex. Civ. App. 697; *International &c. R. Co. v. Tabor*, 12 Tex. Civ. App. 283.

Failure to stop at the brakeman's signal not excused because he did not know the cause therefor. *Garza v. Texas &c. R. Co.*, (Tex. Civ. App.) 41 S. W. Rep. 172.

See, also, *Pittsburg &c. R. Co. v. Kelly*, 12 Oh. C. C. 341.

Increasing speed with knowledge that a small child has his hand on the brake-rod, is reckless and wanton negligence irrespective of how he got there. *McVoy v. Oakes*, 91 Wis. 214.

5. WHEN COMPANY DOES NOT HAVE TO KEEP A LOOKOUT.

Railroad company owes trespassers no duty of constant lookout for them. *St. Louis &c. R. Co. v. Warren*, 65 Ark. 619; *St. Louis &c. R. Co. v. Ross*, 61 Ark. 617.

See, also, *Pierce v. Walters*, 164 Ill. 560; aff'g s. c., 63 Ill. App. 562; *Ill. &c. R. Co. v. Frelka*, 9 Ill. App. 605; *Eastern &c. R. Co. v. Powell*, (Ky.) 33 S. W. Rep. 629; *Embry v. Louisville &c. R. Co.*, (Ky.) 36 id. 1123; *Louisville &c. R. Co. v. Vittitoe*, (Ky.) 41 id. 269; *Camden &c. R. Co. v. Young*, 60 N. J. L. 193; *Sheehan v. St. Paul &c. R. Co.*, 76 Fed. Rep. 201.

Though defendant's failure to discover plaintiff was owing to its own neglect. *Herbert v. Southern Pac. R. Co.*, 121 Cal. 227; *Dull v. Cleveland &c. R. Co.*, 21 Ind. App. 571; *Blankenship v. Galveston &c. R. Co.*, 15 Tex. Civ. App 82; *Texas &c. R. Co. v. Staggs*, 90 Tex. 458; *Louisville &c. R. Co. v. Creighton*, (Ky.) 50 S. W. Rep. 227.

And when its train hands are engaged in their usual duties and do not know of deceased's presence, defendant is not liable. *Baltimore &c. R. Co. v. Dietz*, 61 Ill. App. 161.

A traveler deposited his sack upon the westerly rail of defendant's track, sat down outside the track between two ties, six or eight inches from the westerly rail, his head towards the track, his elbows on his sack, his head on his hand, and "dropped off into a sleep." He felt the influence of liquor he had been drinking. The train ran over him. The track was level and straight for a long distance, so that an object on it no larger than a man's hat could be seen for four or five hundred yards. Defendant owed plaintiff no duty, except that of exercising due diligence to avoid injuring him, after discovering him. The duty to watch the track pertained to a passenger but not to the plaintiff. *Denman v. St. Paul R. Co.*, 26 Minn. 357.

Engineer seeing something on the track supposed it was a coat until it was too late to stop. No recovery. *New York &c. R. Co. v. Kelly*, 93 Fed. Rep. 745; *Tucker v. Norfolk &c. R. Co.*, 92 Va. 549; *Norfolk &c. R. Co. v. Dunnaway*, 93 Va. 29.

Company is not liable merely if he could have been discovered, but only where he actually had been. *Smith v. Houston &c. R. Co.*, 17 Tex. Civ. App. 502.

Handley v. Missouri Pac. R. Co., 61 Kan. 237; *Felton v. Aubrey*, 74 Fed. Rep. 350; *Texas &c. R. Co. v. Staggs*, 90 Tex. 458; aff'g s. c., 37 S. W. Rep. 609.

6. WHEN IT MUST KEEP A LOOKOUT.

A head light should be used powerful enough to show objects on the track in time to stop while running at average speed. *Ala. &c. R. Co. v. Jones*, 71 Ala. 487.

See, also, *Lloyd v. Albemarle &c. R. Co.*, 118 N. C. 1010.

While not being bound to keep a special lookout, defendant is liable where a brakeman on a detached car would have discovered the danger had he observed his ordinary duty of looking out for obstructions in general. *Louisville &c. R. Co. v. Thornton*, 117 Ala. 274.

Though defendant is bound by statute to keep a lookout, contributory negligence is a defense. *St. Louis &c. R. Co. v. Leathers*, 62 Ark. 235;

St. Louis &c. R. Co. v. Dingham, 62 Ark. 245; St. Louis &c. R. Co. v. Taylor, 64 Ark. 364.

See, also, Texas &c. R. Co. v. Staggs, (Tex. Civ. App.) 37 S. W. Rep. 609; s. c. aff'd, 90 Tex. 458.

Culpable ignorance of deceased's danger was no excuse. *Mitchell v. Boston &c. R. Co.*, 68 N. H. 96.

Engineer should use ordinary care and caution to discover one on the track and to prevent injury to him. *East Tenn. &c. R. Co. v. Fain*, 12 Lea, (Tenn.) 35.

Same principle, *Kean v. Baltimore &c. R. Co.*, 61 Md. 154; *Battishill v. Humphreys*, 64 Mich. 514; *Dahlstrom v. St. Louis &c. R. Co.*, 96 Mo. 99; *State v. Baltimore &c. R. Co.*, 69 Md. 339; *Dunkman v. Wabash &c. R. Co.*, 95 Mo. 232; *Keyser v. Chicago &c. R. Co.*, 66 Mich. 390.

Pickett v. Wilmington &c. R. Co., 117 N. C. 616; s. c., 30 L. R. A. 257; *Pharr v. Southern R. Co.*, 119 N. C. 751; *Arrowood v. South Carolina &c. R. Co.*, 126 N. C. 629; *Gunn v. Ohio River R. Co.*, 42 W. Va. 675; s. c., 36 L. R. A. 571.

If the engineer should have seen a person on the track in time to avoid him, a recovery may be had. *East Tenn. &c. R. Co. v. Humphreys*, 12 Lea, (Tenn.) 200.

Or could reasonably have known of the danger in time. *Scoville v. Hannibal &c. R. Co.*, 81 Mo. 434.

Yarnall v. St. Louis &c. R. Co., 72 Mo. 575; *Fulp v. Roanoke &c. R. Co.*, 120 N. C. 525.

Statutory lookout not required in switching cars in a private yard. *Southern R. Co. v. Pugh*, 95 Tenn. 419.

See, also, *Towles v. Southern R. Co.*, 103 Fed. Rep. 405.

Failure to keep watch of a child of two on a porch 50 feet away while stopping at a switch or to look under the cars after starting again 15 or 20 minutes later did not permit recovery. *Central Texas &c. R. Co. v. Douglass*, (Tex. Civ. App.) 36 S. W. Rep. 120; s. c. aff'd, 37 S. W. Rep. 1132.

Otherwise where engineer failed to discover a child lying on the track too young to look out for itself, where it could have been seen at 150 to 200 yards and the train stopped within 300 feet. *St. Louis &c. R. Co. of Texas v. Shifflet*, (Tex. Civ. App.) 56 S. W. Rep. 697.

Lookout need not be constant. *St. Louis &c. R. Co. v. Bishop*, 14 Tex. Civ. App. 504.

The statutory exemption on account of the impracticability of keeping a lookout is not available in face of actual knowledge of danger. *Towles v. Southern R. Co.*, 103 Fed. Rep. 405.

It is not necessary that an engineer should know of a trespasser's presence as long as he has sufficient notice to put him upon his guard. *Tucker v. Norfolk &c. R. Co.*, 92 Va. 549.

Defendant was not liable where the engineer kept a lookout, but owing to an obstruction, failed to see deceased in time to avoid him. *Wickham v. Chicago &c. R. Co.*, 95 Wis. 23.

7. AND SIGNAL.

Railroad's common law duty is to signal at all points of known or apprehended danger. Statutory signals are confined to crossing. *Florida &c. R. Co. v. Foxworth*, 41 Fla. 14.

The statutory signals for crossing do not apply elsewhere. *Martin v. Georgia &c. Co.*, 95 Ga. 361.

See, also, *St. Louis &c. R. Co. v. Bishop*, 14 Tex. Civ. App. 504.

There is no duty to warn trespassers of a train's approach. *Savannah &c. R. Co. v. Chaney*, 101 Ga. 420.

Upon discovering a trespasser on the track he should be signaled to, after which the engineer may presume that he will leave the track. *Illinois C. R. Co. v. Hocker*, (Ky.) 55 S. W. Rep. 438.

Provided the engineer does not wait until the train is almost upon him before giving the signal. *Chamberlain v. Missouri &c. R. Co.*, 133 Mo. 587.

Trespass was a defense to accident through defendant's failure to run without signals or light. *Irving v. Minneapolis &c. R. Co.*, 71 Minn. 9.

The usual danger signal which can be heard for two or three miles is sufficient warning and in time where the deceased could have walked 25 or 20 feet thereafter before being struck. *Sinclair v. Chicago &c. R. Co.*, 133 Mo. 233.

Whether a train whistled as it approached a bridge was immaterial where plaintiff testified that she saw it coming as she entered it. *Skipton v. St. Joseph &c. R. Co.*, 82 Mo. App. 134.

Deceased's negligence in walking in the same direction as a train without looking for it though the track is clear for 150 yards prevented recovery notwithstanding defendant violated an ordinance as to speed and bell; where the latter though it could have, did not in fact see him. *Neal v. North Carolina Cent. R. Co.*, 126 N. C. 634; s. c., 49 L. R. A. 684.

See, also, *Schmitt v. Missouri Pac. R. Co.*, 160 Mo. 43.

The statutory requirement in Tennessee for the giving of signals and the maintenance of lookouts applies to station or depot grounds. *Mobile &c. R. Co. v. House*, 96 Tenn. 552.

See, also, *Texas &c. R. Co. v. Brown*, 11 Tex. Civ. App. 503. (Ordinance, as to railroad yards.)

Failure to give statutory signal did not permit recovery where on account of other noises deceased could not have heard it. *Johnson v. Rio Grande W. R. Co.*, 19 Utah, 77.

8. ESPECIALLY WHERE IT IS A CUSTOMARY WAY.

Failure to keep a lookout becomes willful where it is known that a plank on a car is placed so as to project over a path in constant use by the public. *Haley v. Kansas City &c. R. Co.*, 113 Ala. 640.

See, also, *Chicago &c. R. Co. v. O'Neil*, 172 Ill. 527.

Gross negligence or wantonness only charges a railroad company in regard to persons who are accustomed to cross its tracks through sufferance. *Weldon v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 1.

Duty to keep a lookout arises if from the locality or surroundings there is reason to believe that persons though trespassers will be on the track. *Crawford v. Southern R. Co.*, 106 Ga. 870.

Defendant's switch track was laid in a place open and commonly used by the public. Switching a car swiftly along it without light or attendance gave recovery. *Chicago &c. R. Co. v. O'Neil*, 172 Ill. 527; aff'g s. c., 64 Ill. App. 623.

A railroad need not warn off boys accustomed to play on its tracks at crossings. *Le Beau v. Pittsburg &c. R. Co.*, 69 Ill. App. 557.

Wanton injury at a place in common use as a crossing gives recovery. *O'Connor v. Illinois C. R. Co.*, 77 Ill. App. 22.

Fireman may attend to his duty of stoking, though it prevents his keeping a lookout while passing through a city street. *Louisville &c. R. Co. v. Creighton*, (Ky.) 50 S. W. Rep. 227.

Duty to keep a lookout along its tracks, arises in cities where persons are likely to trespass. *Chesapeake &c. R. Co. v. Perkins*, (Ky.) 47 S. W. Rep. 259.

See, also, *Louisville &c. R. Co. v. McCombs*, (Ky.) 54 S. W. Rep. 179.

Rule not applicable to one not using the path in the customary way. *Cleveland &c. R. Co. v. Marsh*, 63 Oh. St. 236; s. c., 52 L. R. A. 142.

Evidence of customary use is inadmissible where the defendant did not know thereof and had posted a notice warning people to keep off. *Smalley v. Southern R. Co.*, 57 S. C. 243.

Stepping into the frog of a switch in a yard, held not to show negligence *per se*, where the path had been in customary use for years. *Lee v. International &c. R. Co.*, 89 Texas 583.

But knowledge of such use did not make it incumbent upon defendant to block such frogs. *International &c. R. Co. v. Lee*, (Tex. Civ. App.) 34 S. W. Rep. 160.

A greater degree of watchfulness is imposed where defendant's tracks are continuously used than elsewhere. *St. Louis &c. R. Co. v. Shifflet*, (Tex. Civ. App.) 56 S. W. Rep. 697; *Arrowwood v. South Carolina &c. R. Co.*, 126 N. C. 629.

Duty arises wherever the defendant knows of the customary use of its tracks. *Texas &c. R. Co. v. Barrett*, (Tex. Civ. App.) 57 S. W. Rep. 602.

See, also, *Inter. &c. R. Co. v. Mitchell*, (Tex. Civ. App.) 60 S. W. Rep. 996; *Gunn v. Felton*, (Ky.) 57 S. W. Rep. 15; *Shifflet v. St. Louis &c. R. Co.*, 18 Tex. Civ. App. 57; *Houston &c. R. Co. v. Harvin*, (Tex. Civ. App.) 54 S. W. Rep. 629; *Cahill v. Chicago &c. R. Co.*, 74 Fed. Rep. 285; *Young v. Clark*, 16 Utah, 42; *Blankenship v. Chesapeake &c. R. Co.*, 94 Va. 449; *Lindsey v. Canadian P. R. Co.*, 68 Vt. 556.

So, where defendant kicked its cars on parallel tracks, at the same time so as to pass around out of sight and on a down grade, across a path known to be in frequent use by the public, it was held grossly negligent. *Roth v. Union Depot Co.*, 13 Wash. 525; s. c., 31 L. R. A. 855.

But a company is not bound to the same care along its own right of way as it would were it running along a public street. *McVey v. Chesapeake &c. R. Co.*, 46 W. Va. 111.

9. UNNECESSARY FORCE MUST NOT BE USED IN EXPELLING.

That plaintiff is a trespasser does not justify defendant in ejecting him in such a way as to cause him injury. *Barrett v. New York &c. R. Co.*, 45 App. Div. 225; *Ansteth v. Buffalo R. Co.*, 9 Misc. 419; *Jackson v. St. Louis &c. R. Co.*, 52 La. Ann. 1706; *Dorsey v. Kansas City &c. R. Co.*, 104 La. 478; s. c., 52 L. R. A. 92; *Rowell v. Boston &c. R. Co.*, 68 N. H. 358; *Cincinnati &c. R. Co. v. Boyer*, 18 Oh. C. C. 327; *Texas &c. R. Co. v. Black*, (Tex. Civ. App.) 57 S. W. Rep. 330; *Southern Pacific R. Co. v. Bender*, (Tex. Civ. App.) 57 S. W. Rep. 574; *Galveston &c. R. Co. v. Lester*, (Tex. Civ. App.) 59 S. W. Rep. 946.

So, the fact that he had boarded the train while moving, contrary to statute, does not justify his ejection while it was moving. *Johnson v. Chicago &c. R. Co.*, 116 Iowa, 639.

Ejection of trespassers is not necessarily within the scope of a brakeman's duty so as to charge the company with his acts. *Chicago &c. R. Co. v. Ketchum*, 99 Ill. App. 660; *Illinois Cent. R. Co. v. West*, (Ky.) 60 S. W. Rep. 290; *Illinois C. R. Co. v. McManus*, (Ky.) 67 S. W. Rep. 1000; *Krueger v. Chicago &c. R. Co.*, 94 Mo. App. 458; *Galveston &c. R. Co. v. Zantlinger*, (Tex.) 53 S. W. Rep. 379; s. c., 47 L. R. A. 282; aff'g s. c., 49 S. W. Rep. 677.

It was for the jury to say whether a trespasser was forcibly ejected for

personal gratification or extortion or for the purpose of preventing his riding at the expense of the company. *Banion v. Missouri &c. R. Co.*, (Kan.) 69 Pac. Rep. 353.

It was error to instruct that plaintiff could not recover unless he was still holding to the train, where it appeared that the act of brakeman pushing him against the train after leaving, was a part of a continuous course of action within the scope of his authority. *Elliot v. Louisville &c. R. Co.*, (Ky.) 52 S. W. Rep. 833.

Deceased and another were found injured at a place between stations but where the train had occasion to stop. Ejection with unlawful violence was not allowed to be inferred from the fact that they were stealing a ride and that trainmen were authorized to eject them. *Morris v. Louisville &c. R. Co.*, (Ky.) 61 S. W. Rep. 41.

No recovery was allowed where deceased had stepped behind a detached caboose on which he expected to get the privilege of a ride, when it was suddenly struck by cars making a flying switch. *Dyche v. Vicksburg &c. R. Co.*, 79 Miss. 361.

No negligence was shown because trainmen had seen a badly intoxicated man about the train while it was taking on water and no one noticed whether or not he got on. (He jumped off before anyone could restrain him). *Cummingham v. Fort Worth &c. R. Co.*, (Tex. Civ. App.) 66 S. W. Rep. 467.

Brakeman having reasonable grounds to believe that one stealing a ride was skilled in jumping, was justified in commanding him to alight while the train was moving at about four or five miles per hour. *Bolin v. Chicago &c. R. Co.*, 108 Wis. 333.

See, also, *Krueger v. Chicago &c. R. Co.*, 84 Mo. App. 358; *Bolin v. Chicago &c. R. Co.*, 108 Wis. 333.

10. DUTY AND DEGREE OF CARE AS TO CHILDREN.

Where the trespasser is an infant, such care toward it is required as his indiscretion may require. (Though the company is not an insurer). *Tully v. Philadelphia &c. R. Co.*, (Del. Super.) 50 Atl. Rep. 95.

More than ordinary care is required to avoid injury to a child after discovering it. *Frick v. St. Louis &c. R. Co.*, 75 Mo. 595.

See *Townley v. Chicago &c. R. Co.*, 53 Wis. 626.

The only duty owing to a child trying to steal a ride is not to injure him recklessly or wilfully. *Steele v. Pittsburg &c. R. Co.*, 4 Oh. Dec. 350.

The requirement to protect children against dangerous machinery attracting them, such as turntables, &c., does not include trains. *Steele v. Pittsburg &c. R. Co.*, 4 Oh. Dec. 350.

Where the party stealing a ride is a child the railroad is held to greater care than adults in not compelling him to get off while the train is moving rapidly. *Enright v. Pittsburg Junction R. Co.*, 198 Pa. St. 166.

See, also, *Jackson v. St. Louis &c. R. Co.*, 52 La. Ann. 1706.

But conscious failure to use reasonable care after discovering a child on the track does not amount to willfulness. *Alabama &c. R. Co. v. Burgess*, 116 Ala. 509.

Though a child is a trespasser on a car, defendant must remove him, to prevent injury, as soon as he is discovered. *Levin v. Second Ave. T. Co.*, 201 Pa. St. 58.

Defendant has no defense where the child is incapable of comprehending the danger of its position. *Thompson v. Missouri &c. R. Co.*, 11 Tex. Civ. App. 307; *St. Louis &c. R. Co. v. Shifflet*, 94 Tex. 131.

Intentional willfulness is not essential where defendant might by the exercise of reasonable care have discovered the child and avoided injury. *Baltimore &c. R. Co. v. Hellenenthal*, 88 Fed. Rep. 116.

Railroad's duty to a child, held not to extend to endangering the safety of the train, especially where the avoidance of injury to the child is only a possibility. *Texas &c. R. Co. v. Harby*, 94 Fed. Rep. 303.

11. WHEN COMPANY IS LIABLE.

Unless it be shown that the injury resulted from the negligence of the plaintiff, the defendant is not liable.

The plaintiff, about seventeen months old, crawled under a gate in its mother's house and went upon the railroad track at the crossing, and was struck by a train and injured. There was no evidence that if signals had been given the mother's attention would have been called in time to save her child, and no recovery was allowed. *Chrystal v. T. & B. R. R. Co.*, 124 N. Y. 519, rev'g 52 Hun, 55, and judg't for pl'ff.

S. C., 105 N. Y. 164.

Defendant was not liable as to a boy of over seven running along a path six feet from the track. A rope which he trailed, in some way got caught on the passing train. *Cross v. Southern R. Co.*, 109 Ga. 170.

Railroad is liable for the death of a child where it is seen in time to avoid injury. *Johnson v. Atchison &c. R. Co.*, 56 Kan. 263.

See, also, *Eply v. Lehigh Valley R. Co.*, 3 Pa. Super. Ct. 509.

But not where it does not discover that the child was anything capable of injury until it was too late. *Missouri &c. R. Co. v. Prewitt*, 59 Kan. 734.

See, also, *Vanderpool v. Lexington &c. R. Co.*, (Ky.) 46 S. W. Rep. 699.

Child was killed at an unfenced district in the outskirts of the city

where trains ran at an excessive speed. Defendant liable. *Erb v. Morasch*, 8 Kan. App. 61; s. c., 60 Kan. 251.

See, also, *Lindsay v. Canadian &c. R. Co.*, 68 Vt. 556.

But see *Baltimore &c. R. Co. v. Bradford*, 20 Ind. App. 348; *Friend v. Chicago &c. R. Co.*, 104 Wis. 663.

Railroad was liable for failure to exercise ordinary care in keeping a lookout along the track where deceased was an infant too young to appreciate its danger. *Cincinnati &c. R. Co. v. Dickerson*, (Ky.) 44 S. W. Rep. 99.

Whether the trainman saw the child on the track was a question for the jury. *Jamison v. Ill. &c. R. Co.*, 63 Miss. 33.

Motorman, held negligent in frightening off a boy stealing a ride, too young to be regarded as a trespasser, instead of taking him in or stopping to put him off. *Levin v. Second Ave. T. Co.*, 194 Pa. St. 156.

Defendant was not liable where a boy who with others had been warned not to jump on and off the cars, jumped off onto a gravel heap and fell under the wheels. *House v. Blum*, (Tex. Civ. App.) 56 S. W. Rep. 82.

Where children may reasonably be apprehended to be about a train, care must be exercised to keep them out of danger. *St. Louis &c. R. Co. v. Abermathy*, (Tex. Civ. App.) 68 S. W. Rep. 539.

12. SPEED OF TRAINS.

That an engineer did his best after seeing his signal was unheeded, held no defense in view of his inability to stop in time on account of excessive speed. *Chicago &c. R. Co. v. Smith*, 77 Ill. App. 492; s. c. aff'd, 180 Ill. 453.

See, also, *Felton v. Aubrey*, 74 Fed. Rep. 350.

An ordinance speed of six miles is not unreasonably extended to the outskirts of the city where the track there is not fenced in. *Erb v. Morasch*, 8 Kan. App. 61; s. c., 60 Kan. App. 251.

And elsewhere than at crossings. *Northern &c. R. Co. v. Herchiskel*, 74 Fed. Rep. 460.

And within defendant's yards. *Jackson v. Kansas City &c. R. Co.*, 157 Mo. 621.

Charge that running a train at a speed in excess of that allowed by ordinance was negligence, held proper. *Kansas City &c. R. Co. v. Herman*, (Kan. App.) 62 Pac. Rep. 543.

Defendant is liable for excessive speed through a city, where it is to be apprehended that persons may trespass. *Louisville &c. R. Co. v. McCombs*, (Ky.) 54 S. W. Rep. 179.

See, also, *Missouri &c. R. Co. v. Hansen*, 48 Neb. 232.

Trespassing boy known to be in a position of danger was held entitled to protection against the dangerous speed at which the forward part of train, broken in two, was backing to meet the latter. *Pettit v. Great Northern R. Co.*, 62 Minn. 530.

If the company, running at an unlawful rate of speed, injures one unlawfully on track, the latter may recover. *Vicksburg &c. R. Co. v. McGowan*, 62 Miss. 682.

Violation of statute as to speed through cities is available to trespassers free from contributory negligence, provided that is the proximate cause of injury. *Alabama &c. R. Co. v. Carter*, 77 Miss. 511.

See, also, *Chicago &c. R. Co. v. Kansas City &c. R. Co.*, 78 Mo. App. 245.

Violation of an ordinance as to speed, held negligence *per se*, as to a trespasser in defendant's yards. *Jackson v. Kansas City &c. R. Co.*, 157 Mo. 621; *Houston &c. R. Co. v. Powell*, (Tex. Civ. App.) 41 S. W. Rep. 695; *Missouri &c. R. Co. v. Cardena*, (Tex. Civ. App.) 54 S. W. Rep. 312.

But see *Ward v. Illinois &c. R. Co.*, (Ky.) 56 S. W. Rep. 807.

(d). DUTY AND DEGREE OF CARE BY TRESPASSERS.

1. DEGREE OF CARE IN GENERAL.

No recovery can be had notwithstanding the statutory requirement of a lookout on trains where pedestrians make no reasonable effort themselves to be on their guard. *St. Louis &c. R. Co. v. Dingman*, 62 Ark. 245.

But such a lookout as would be necessary to discover a car pushed in front of an engine without lights or signal need not be kept. *Stanley v. Durham &c. R. Co.*, 120 N. C. 514.

Pedestrian required to be *sure* he could stand on the usual walk on a trestle safely while a train was passing. *Provost v. Yazoo &c. R. Co.*, 52 La. Ann. 1894.

Trespasser must keep a highly vigilant lookout; he is still negligent where he simply stops, looks and listens. *Culp v. Delaware &c. R. Co.*, 9 Kulp, (Pa.) 174.

Johnson v. Rio Grande &c. R. Co., 19 Utah, 77.

2. WHEN COMPANY IS NOT LIABLE.

Contributory negligence barred recovery:

Deceased who must have known that trains were constantly passing and repassing, stepped off one track to avoid a train thereon, through a train standing on the next, to a third, where he was struck, by a train which was within plain sight until he started through the train on such adjoining track. *Ryan v. New York &c. R. Co.*, 17 App. Div. 221.

Plaintiff left a place of safety and without cause or necessity went in front of cars, liable to be moved. *Lugerman v. New York &c. R. Co.*, 53 App. Div. 283.

Deceased without attempting to listen stood upon the track in the dark, talking. *St. Louis &c. R. Co. v. Martin*, 61 Ark. 549.

A person overtaken by a train on a trestle did not recover. *Tennenbrock v. S. P. &c. R. Co.*, 59 Cal. 269.

A person walked the track in front of a locomotive that he knew would soon start. No liability. *Western R. Co. v. Bloomingdale*, 74 Ga. 604.
Hoover v. Texas &c. R. Co., 61 Tex. 503.

Deceased stepped back on the track after an engine passed without looking to see whether or not detached cars might not be following. *Martin v. Georgia &c. Co.*, 95 Ga. 361.

See, also, *Gulf &c. R. Co. v. Wilkins*, (Tex. Civ. App.) 32 S. W. Rep. 351; *Smith v. Houston &c. R. Co.*, 17 Tex. Civ. App. 502.

Deceased, knowing that trains were constantly passing, crossed the tracks at night to leave a letter at a mail car on the farther track. He was killed by one train while avoiding another. *Briscoe v. Southern R. Co.*, 103 Ga. 224.

Deceased, though deaf, went upon the track at a time when he must have known a train was coming, entirely heedless of his own safety. *McIver v. Georgia*, 108 Ga. 306.

But see *Houston &c. R. Co. v. Harvin*, (Tex. Civ. App.) 54 S. W. Rep. 629.

Plaintiff seeing an engine coming toward him on one track, stepped in a space between it and another without looking behind to see if a train was coming on the latter. *Southern R. Co. v. Barfield*, 112 Ga. 181.

Negligence of a trespasser in attempting to cross between cars, elsewhere than at a crossing, prevents recovery though they start suddenly and without warning. *Hall v. Cleveland &c. R. Co.*, 15 Ind. App. 496.

Plaintiff failed to make a proper use of his senses to prevent injury, where he stood on one track waiting for a train on another to pass, without looking to see one approaching on his own. *Jacobs v. Ohio &c. R. Co.*, (Ky.) 45 S. W. Rep. 509.

;; See, also, *Louisville &c. R. Co. v. Taafe*, (Ky.) 50 S. W. Rep. 850.

Death was caused by the dangers incident to the use of a cinder path between the tracks which deceased unnecessarily selected. *Settoon v. Texas &c. R. Co.*, 48 La. Ann. 807.

Plaintiff went late at night where no one would be supposed to find him and failed to heed an engine in plain sight and hearing. *McNulty v. New Orleans City &c. R. Co.*, 52 La. Ann. 1034.

A person walking a railway track near a crossing in the night time,

was struck by an unlighted car pushed in front of an engine which sounded neither bell or whistle. Contributory negligence was for the jury. *Scoville v. Hannibal &c. R. Co.*, 81 Mo. 434.

Trespasser obeyed danger signal by walking off obliquely instead of turning off directly. *Sinclair v. Chicago &c. R. Co.*, 133 Mo. 233.

Deceased voluntarily assumed a position of danger merely to save property. *McManamee v. Missouri P. R. Co.*, 135 Mo. 440.

Deceased stood where, though he was beyond reach of being struck by an engine he was not beyond reach of its suction. *Graney v. St. Louis &c. R. Co.*, 140 Mo. 89; s. c., 38 L. R. A. 633; s. c., 38 S. W. Rep. 969.

Deceased, on discovering the train turned in toward the track instead of further away from it. *Matthews v. Atlantic &c. R. Co.*, 117 N. C. 640.

See, also, *Kreis v. Missouri &c. R. Co.* 148 Mo. 321.

Plaintiff notwithstanding notification to the contrary, went upon the trestle 100 yards long and 50 feet high. *Little v. Carolina &c. R. Co.*, 119 N. C. 771.

Deceased stepped on the track without looking. The failure to have a light on the tender being immaterial as he could have seen it coming without it. *Cincinnati &c. R. Co. v. Lally*, 14 Oh. C. C. 333.

One was in the caboose of freight train without knowledge of those in charge, and had paid no fare. *Haase v. Oregon &c. R. Co.*, 19 Ore. 354.

Deceased relied on the assumption that an approaching car was not on his track. *Texas &c. R. Co. v. Breadow*, (Tex. Civ. App.) 35 S. W. Rep. 490.

Deceased laid down on a track while so weak and weary that he was liable to fall asleep. *Blankenship v. Galveston &c. R. Co.*, 15 Tex. Civ. App. 82.

See, also, *Parish v. Western &c. R. Co.*, 102 Ga. 285; s. c., 40 L. R. A. 364.

Deceased in working near the track failed to heed warnings from others as to keeping a lookout for the signal of the train. *Johnson v. Rio Grande &c. R. Co.*, 19 Utah, 77.

Deceased walked upon a track knowing there was a safe and convenient path near it, when sight and hearing were both obstructed. *Southern R. Co. v. Bruce*, 97 Va. 92.

Plaintiff stood near a track with his arm and shoulder projecting so as to be struck by a passing train. *Brennan v. Delaware &c. R. Co.*, 83 Fed. Rep. 124.

That the party was a trespasser on defendant's premises is alone sufficient to establish contributory negligence which will preclude recovery in the absence of proof of gross or wanton negligence. *Payne v. Columbus &c. R. Co.*, 7 Oh. N. P. 327; *Baltimore &c. R. Co. v. Railroad Co.*, 3 Oh.

S. & C. P. Dec. 687; *Huff v. Chesapeake &c. R. Co.*, 48 W. Va. 432; *Texas &c. R. Co. v. Breadow*, 90 Tex. 26; *Morgan v. Wabash R. Co.*, 159 Mo. App. 262; *Chicago &c. R. Co. v. Kansas City &c. R. Co.*, 78 Mo. App. 245.

Alleged contributory negligence did not bar recovery:

Deceased, ordered to deliver a package, to a train standing on the track, before crossing to it, looked both ways for approaching trains, and the train which struck him on his return not only violated the company's rules in going at full speed past the station at which another train was standing but arrived seven minutes ahead of the time at which it might be anticipated. *Barkley v. New York &c. R. Co.*, 35 App. Div. 228.

Plaintiff stepped aside, to permit a train to pass, far enough to avoid any reasonable chance of accident. He was struck by an iron pin thrown from the train. *Cleveland &c. R. Co. v. Berry*, 152 Ind. 607.

Plaintiff failed to restrain her husband who was old and feeble in mind, when though disposed to wander he was not disposed to go near danger. In this case he went away during her necessary absence. *Jackson v. Kansas City &c. R. Co.*, 157 Mo. 621.

Deceased seeing a train about 110 yards away, stepped on the track to walk along it a short distance. It was proceeding in excess of the ordinary speed and without the statutory signals. *Missouri &c. R. Co. v. Cardena*, (Tex. Civ. App.) 54 S. W. Rep. 312.

3. CHILDREN AND DEFECTIVE PEOPLE.

Whether a person of twenty years was a boy or man is immaterial on the question of contributory negligence. *Western &c. R. Co. v. Holsonback*, 112 Ga. 82.

The jury should be instructed that plaintiff, being a deaf mute, greater care was required of his remaining senses. *Louisville &c. R. Co. v. McCombs*, (Ky.) 54 S. W. Rep. 179.

Though a boy of nine or ten is aware of the danger, he is not chargeable with the same degree of judgment as a man. *Anderson v. Union Terminal R. Co.*, 2 Mo. App. Rep. 688.

Boy of eleven or twelve unable to comprehend the danger of boarding a moving train, held not chargeable with contributory negligence. *Missouri &c. R. Co. v. Tonahill*, (Tex. Civ. App.) 54 S. W. Rep. 419.

The same degree of care for his safety is not exacted of a child as of a grown person. *Roth v. Union Depot Co.*, 13 Wash. 525; s. c., 31 L. R. A. 855.

4. WHEN COMPANY IS NOT LIABLE.

Contributory negligence barred recovery:

Boy ten years old injured while attempting to board a train in motion. *Chicago &c. R. Co. v. Lammert*, 12 Ill. App. 408.

Same principle, *Bishop v. Union &c. R. Co.*, 14 R. I. 314; *Woodbridge v. Del. &c. R. Co.*, 105 Pa. St. 460.

Boy experienced in getting off and on moving trains, held to have taken the risk of getting off at a brakeman's command. He either jumped and fell or was jerked off by a cattle chute. *Chicago & A. Co. v. Graham*, 84 Ill. App. 480.

Boy of seven and one-half understood the danger incident to his act in lying down to sleep with his leg over a rail. *Krenzer v. Pittsburg &c. R. Co.*, 151 Ind. 587; s. c., id. 592.

See, also, *Roseberry v. Newport News &c. R. Co.*, (Ky.) 39 S. W. Rep. 407; *Garza v. Texas &c. R. Co.*, (Tex. Civ. App.) 41 Fed. Rep. 172.

Child old enough to comprehend the danger went on the track where trains are constantly passing without looking or listening. *Dull v. Cleveland &c. R. Co.*, 21 Ind. App. 571.

Death of a youth of seventeen was caused by his own careless jumping on and off the front platform of defendant's street car. *Taylor v. South. &c. R. Co.*, 14 Ky. L. R. 355.

It was for the jury to say whether plaintiff, a deaf mute, should be denied recovery by the fact that he crawled under a train, between crossings and went on to the main track, where, he was apt to mistake the light of an approaching train for one standing still, when taken in connection with the fact that the former train was proceeding at excessive speed. *Louisville &c. R. Co. v. McCombs*, (Ky.) 54 S. W. Rep. 179.

A boy of eleven heedlessly tried to catch hold of a train going 20 to 25 miles an hour. *Payne v. Chicago &c. R. Co.*, 136 Mo. 562.

A bright boy assumed that a train was going at less than ordinance rate where it was plain that it was going at more than such rate. *Graney v. St. Louis &c. R. Co.*, 157 Mo. 666; s. c., 50 L. R. A. 153.

While driver, also acting as conductor, was on rear platform of car, a child attempting to enter the front platform was injured. *Hestonville P. R. Co. v. Connell*, 88 Pa. St. 520.

Boys playing on car were ordered off and one seven years old fell and was run over. *Cauley v. Pittsburg R. Co.*, 98 Pa. St. 498.

A boy of 16 walking along a customary way by a track suddenly approached by a train jumped, without necessity, and fell against a switch stand. *Texas &c. R. Co. v. Walker*, (Tex. Civ. App.) 49 S. W. Rep. 642.

Boy got on a coal train to go through a tunnel and was thrown off and

between the cars by a sudden jolt of the same. *Mitchell v. N. Y. &c. R. Co.*, 146 U. S. 513.

Boy of eight years climbed on engine which was stopped with a jerk and the boy lost his hold and was injured. *Miles v. A. &c. R. Co.*, 4 Hugh (U. S.) 172.

Alleged contributory negligence did not bar recovery:

An ordinarily bright boy of 10 is not negligent in being about a train contrary to a warning of danger where he had not been informed how it may occur. *St. Louis &c. R. Co. v. Abermathy*, (Tex. Civ. App.) 68 S. W. Rep. 539.

When the question was for the jury:

A mother was not *per se* chargeable with negligence imputable to a child under five, where she sent it in charge of a brother of 15 across the street, but it escaped from him unawares. The motorman was 150 feet away when it started to cross and was in plain sight of him all the while, while her back was partly turned toward the car. *Ehrman v. Nassau Electric R. Co.*, 23 App. Div. 21.

Plaintiff was a bright girl of 6 and familiar with the running of trains. It could not be said as a matter of law that she could not have availed herself of a signal by an approaching train had it been given, or that she was as matter of law contributorily negligent where she started to cross the track without looking when it was but two feet ten inches from the sidewalk, the train was coming noiselessly behind her, and when warned, she, instead of proceeding, attempted to retrace her steps. *Finn v. Delaware &c. R. Co.*, 42 App. Div. 524.

Parents of a child of two years and ten months are not *per se* negligent in failing to keep a constant watch of it, though they live near the track. *Atchison &c. R. Co. v. McFarland*, 2 Kan. App. 662.

See, also, *Davidson v. Pittsburg &c. R. Co.*, 41 W. Va., 407; *Lindsay v. Canadian P. R. Co.*, 68 Vt. 556.

Where a train did not signal its approach, a child of five should not be held negligent *per se* in running in front of it. *Fickler v. Cleveland &c. R. Co.*, 6 Oh. N. P. 36.

But see *Fecker v. Cleveland &c. R. Co.*, 7 Oh. N. P. 600.

(e). CUSTOMARY PLACES.

Negligence and contributory negligence was for the jury where plaintiff and others had used defendant's tracks as a road to and from work, with the latter's knowledge, but without its expressed consent. When plaintiff last looked, the cars were standing, and he did not look again

for 150 feet. He was struck while the engine was making a flying switch which was prohibited except in case of necessity. *Arizona &c. R. Co. v. Nevitt*, (Ariz.) 68 Pac. Rep. 500.

See, also, *Egan v. Montana C. R. Co.*, 24 Mont. 569; *Atchison &c. R. Co. v. Mendoza*, 60 S. W. Rep. 327; s. c., 62 id. 418.

A railroad need not warn off boys accustomed to play on its tracks at crossings. *Le Beau v. Pittsburg &c. R. Co.*, 69 Ill. App. 557.

A person was killed on trestle work over which people were accustomed to cross. No liability. *Mason v. Mo. &c. R. Co.*, 27 Kas. 83.

Railroad had established a custom for stopping a train before reaching a station at which another was stopping. A mail and express agent was not *per se* negligent in relying thereon. *Tubbs v. Michigan C. R. Co.*, 107 Mich. 108.

Boy of fourteen not allowed to recover where he testified that it was the habit of a train to stop at a switch, unless it went on the main track, and noticing that it did not stop he relied (without looking to see) on its continuing on the main track. *Illinois C. R. Co. v. Crockert*, 78 Miss. 407.

A person accustomed to walk home on the track was injured. No liability. *O'Donnell v. Mo. &c. R. Co.*, 7 Mo. App. 190.

Bouwmeester v. G. R. &c. R. Co., 67 Mich. 87.

The customary use of a meeting track as a transfer track was no defense to the placing of transfer cars thereon after notification to keep such track clear. *Chicago &c. R. Co. v. Kansas City &c. R. Co.*, 78 Mo. App. 245.

Defendant failed to notify engineer of a danger of meeting persons at a pathway across its track. Plaintiff recovered. *Mitchell v. Boston &c. R. Co.*, 68 N. H. 96.

That defendant permitted people to pass along its track, did not make it negligent because a child picked up a torpedo, necessarily used in its business, and exploded it. *Hughes v. Boston &c. R. Co.*, 71 N. H. 279.

Greater care is due to one who is on a track by consent, than to one who is there without it. *Boggers v. Southern R. Co.*, 64 S. C. 104.

Numerous persons, though chiefly employ  s, were customarily permitted to stand about defendant's yard office. A person going there on business was held entitled to rely on the use of care in running trains past it. *Connell v. Southern R. Co.*, 91 Fed. Rep. 466.

(f). PLACES ADJOINING THE RAILROAD.

A resident in the vicinity of a city street through which a railroad runs has the right to rely on the observance of the ordinance speed by a train. *Missouri, P. R. Co. v. Chick*, 6 Kan. App. 480.

So where plaintiff was on a mule near the track which was frightened through the excessive speed of a train. *Prewitt v. Missouri &c. R. Co.*, 134 Mo. 615.

(g). WHO IS A LICENSEE.

Road had been opened along defendant's right of way. Public were not trespassers in accepting the implied invitation to use it. It was held that the act need not be willful to permit recovery. *Liekens v. Staten Island &c. R. Co.*, 64 App. Div. 327.

One who is on company's work train, as a mere licensee, is not entitled to the same degree of care as a passenger. *McCauley v. Tenn. &c. R. Co.*, 93 Ala. 356.

Spaces left between cars elsewhere than at a crossing for the company's own convenience, held not to amount to an invitation to cross. *Weldon v. Philadelphia &c. R. Co.*, 2 Penn. (Del.) 1.

Illinois C. R. Co. v. James, 67 Ill. App. 649; *Furey v. New York &c. R. Co.*, 67 N. J. L. 270.

Safe passage had been provided for employes' children who were permitted to come into the yards to fetch dinners. While there a boy ran under a car after a ball thrown by another in play. No recovery. *Savannah &c. R. Co. v. Waller*, 97 Ga. 164; s. c., 34 L. R. A. 459.

Plaintiff was injured while loading stock. Defendant not allowed to interpose a contract for their transportation permitting him to ride in the caboose at his own risk. *Illinois C. R. Co. v. Anderson*, 184 Ill. 294; s. c., 81 Ill. App. 137.

Acquiescence in the customary use of the track raises a status beyond that of a mere trespasser. *Chicago &c. R. Co. v. O'Neill*, 64 Ill. App. 623.

See, also, *Seymour v. Central Vt. R. Co.*, 69 Vt. 555.

But see *Tully v. Philadelphia &c. R. Co.*, 2 Penn., (Del.) 537; *Wabash R. R. Co. v. Jones*, 163 Ill. 167.

Railroad was to furnish switching and side track facilities to one employed to build a stone walk for it. The fact that his contract excluded transportation for his workmen did not make it wrongful for one of them to be on the car, preparing the stone for unloading while it was being switched. *Illinois C. R. Co. v. McCowan*, 70 Ill. App. 345.

Employe of a car cleaning company was a mere licensee. *O'Day v. Chicago &c. R. Co.*, 97 Ill. App. 632.

Plaintiff was engaged in loading defendant's car alongside a platform on his employer's premises. Relationship was one demanding the exercise of care. *Lake Erie &c. R. Co. v. Gaughan*, 26 Ind. App. 1.

See, also, *Missouri &c. R. Co. v. Holman*, 15 Tex. Civ. App. 16.

The mere use of a path across the tracks did not amount to a license where proper approaches to the depot were furnished and the path was not recognized by maintaining approaches, to it. *Heiss v. Chicago &c. R. Co.*, 103 Iowa, 590.

See, also, *Devoe v. New York &c. R. Co.*, (N. J. L.) 43 Atl. Rep. 899.

A license being only inferable from facts tantamount to actual consent without invitation. *Thomas v. Chicago &c. R. Co.*, 103 Iowa, 649; s. c., 39 L. R. A. 399.

One assisting an employé, himself without authority, was entitled to no rights beyond those of a mere trespasser. *Eastern &c. R. Co. v. Powell*, (Ky.) 33 S. W. Rep. 629.

Defendant's telegraph operator went on the track to stop a train failing to comply with his signal. Contention that he was a trespasser in so doing, held untenable. *Illinois C. R. Co. v. Mahan*, (Ky.) 34 S. W. Rep. 16.

See, also, *Chicago &c. R. Co. v. Kelley*, 182 Ill. 267; aff'g s. c., 80 Ill. App. 675.

A boy of 17 on the train only through an employé's invitation held at most a licensee if not a mere trespasser. *Louisville &c. R. Co. v. Thornton*, (Ky.) 58 S. W. Rep. 796.

Person going to depot to leave freight is more than a licensee. *Ward v. Maine C. R. Co.*, 96 Me. 136.

Invitation to come into yards to look for cars held only to apply in case of proper entrance, and entrance otherwise to constitute him a trespasser. *Grunst v. Chicago &c. R. Co.*, 109 Mich. 342.

See, also, *Chicago &c. R. Co. v. Kansas City &c. R. Co.*, 78 Mo. App. 245.

Sufferance in the use of the track as a passageway by hands of a mine, to which the track ran, did not give them the character of licensees. *Egan v. Montana C. R. Co.*, 24 Mont. 569.

But see *Cahill v. Chicago &c. R. Co.*, 74 Fed. Rep. 285.

A sign forbidding as trespassers all persons except employés held not to exclude the latter while off duty. *International &c. R. Co. v. Brooks*, (Tex. Civ. App.) 54 S. W. Rep. 1056.

The customary use sufficient to imply a license or invitation must be long continued and habitual. *Felton v. Aubrey*, 74 Fed. Rep. 350.

See, also, *Young v. Clark*, 16 Utah, 42.

Where it appeared that a lumber company had been accustomed to put a tramway across the track for its own convenience and had gone upon the track to remove it upon the approach of a train, but without the railroad's knowledge, the court held that the circumstances did not invest the employés of the lumber company with the character of licensees. *St.*

Louis &c. R. Co. v. Bennett, 69 Fed. Rep. 525, 530; *St. Louis &c. R. Co. v. Miles*, 69 id. 530; *St. Louis &c. R. Co. v. Hicks*, 69 id. 531.

But it appearing on a retrial that the practice of the lumber company was not only well known to all the employés of the railroad company but was done under circumstances virtually amounting to an agreement that their employés were not to be regarded as trespassers, recovery was allowed. *St. Louis &c. R. Co. v. Miles*, 79 Fed. Rep. 257.

Defendant company used the tracks of another company under a trackage agreement with it. A person lawfully upon the tracks as to one was held not a trespasser as to the other. *Connell v. Southern R. Co.*, 91 Fed. Rep. 466.

See *Norfolk &c. R. Co. v. Wood*, 99 Va. 156.

(h). DUTY AND DEGREE OF CARE TO LICENSEES.

Even assuming that the principle that one who goes upon another's premises as a licensee does so at his own risk is true, it does not exclude recovery for injury due to the collapse of a station house, upon one alleged to be lawfully on the premises, when defendant fails to ask for any instruction as to the purpose for which he was there, and the jury is properly instructed on the subject of his contributory negligence. *Godfrey v. New York &c. R. Co.*, 161 N. Y. 565; aff'g s. c., 31 App. Div. 634.

Railroad had customarily set the brake on cars, delivered to the employés of its contractor engaged to load them, to keep them in position. The latter having gotten to relying on the custom the railroad was bound to continue it to protect them from danger necessarily arising from negligence in failing to do so. *O'Leary v. Erie R. Co.*, 169 N. Y. 289; rev'g s. c., 51 App. Div. 25.

It was immaterial whether deceased was an employé or one coming to get employment. *Wells v. Brooklyn Heights R. Co.*, 34 Misc. 44.

A railroad company was held not liable for furnishing a car with a defective brake where it did not know that an employé of the coal company to which it was furnished, had the right to use it. *Broslin v. Kansas City &c. R. Co.*, 114 Ala. 398.

See, also, *San Antonio &c. R. Co. v. Dixon*, 17 Tex. Civ. App. 320.

Railroad need not stop and order off an employé, off duty, riding in a dangerous place for his own convenience, whether he be regarded as a trespasser or mere licensee. *Lemasters v. Southern Pac. Co.*, 131 Cal. 105.

Company recognized a path by keeping it planked for years, and knew that it was the only practical access to a company's shops, and was

crowded at the hours of beginning and of quitting work. Held to the exercise of reasonable care. *Pomponio v. New York &c. R. Co.*, 66 Conn. 528; s. c., 32 L. R. A. 530.

Company failing to exercise ordinary care to discover the defective condition of a car, held liable to the servant of one to whom such car was furnished. *Savannah &c. R. Co. v. Booth*, 98 Ga. 20.

See, also, *Teal v. American Mining Co.*, 84 Minn. 320; *Ryan v. N. Y. &c. R. Co.*, 115 Fed. Rep. 197.

Same principle applies in favor of employes of a connecting carrier. *Pennsylvania R. Co. v. Snyder*, 55 Oh. St. 342.

But, the duty is fulfilled where the car leaves defendant's possession in a reasonably safe condition. *Olson v. Pennsylvania &c. Fuel Co.*, 77 Minn. 528.

Otherwise, however, where the defective car belonged to another company, and defendant only switched it into the yards of the plaintiff's master. *Atchison &c. R. Co. v. Bump*, 60 Ill. App. 444.

Licensees take the premises as they find them. Defendant had permitted the use of a path, but had in using the track allowed it to become blocked by a car. Plaintiff in attempting to go around, fell into a pit. It was unconcealed; but owing to the darkness he could not see it. No recovery. *Lingenfelter v. Baltimore &c. R. Co.*, 154 Ind. 49.

Railroad delivering goods elsewhere than at a station held to the same degree of care there as at a station. *St. Louis &c. R. Co. v. Ridge*, 20 Ind App. 547.

Permission to use the track as a foot path by license or invitation imposes the duty of exercising ordinary care. *Thomas v. Chicago &c. R. Co.*, 103 Iowa, 649; s. c., 39 L. R. A. 399.

See, also, *Fleming v. Louisville &c. R. Co.*, 166 Tenn. 374; *Smith v. Pittsburg &c. R. Co.*, 90 Fed. Rep. 783; *Connell v. Southern R. Co.*, 91 Fed. Rep. 466; *Tutt v. Illinois C. R. Co.*, 104 Fed. Rep. 741.

Such permission held to raise the duty of keeping a lookout. *Thompson v. Northern P. R. Co.*, 93 Fed. Rep. 384.

An employé of a shipper on defendant's platform attending to his stock recovered for being struck by a mail bag thrown from a passing train. *Williams v. Louisville &c. R. Co.*, 98 Ky. 247; s. c., id. 252.

See, also, *Shaw v. Chicago &c. R. Co.*, 123 Mich. 629; s. c., 49 L. R. A. 308; *McGrath v. Eastern R. Co.*, 74 Minn. 363.

An engineer must on approaching a station keep an ordinary lookout. *Louisville &c. R. Co. v. Taafe*, (Ky.) 50 S. W. Rep. 850.

See *Gulf &c. R. Co. v. Bollin*, (Ind. Terr.) 51 S. W. Rep. 1085.

Company's negligence in running in cars without warning upon the

premises of a wharf owner upon his notification that cars were wanted, was for the jury. *Baltimore &c. R. Co. v. Charvat*, 94 Md. 569.

See, also, *Jakobski v. Grand Rapids &c. R. Co.*, 106 Mich. 440.

Where another company's tracks are in the same yard, no notice is due its employé, of the location of defendant's ash pit. *Holmes v. Pennsylvania R. Co.*, 13 Oh. C. C. 397.

But the employés of another railroad using its track under a traffic arrangement have been held entitled to reasonable freedom from danger incident to the accumulation of crude oil along its tracks. *Cincinnati &c. R. Co. v. Cross*, 15 Oh. C. C. 398.

By permitting children to be in a space between its tracks, a railroad was held to have undertaken the duty of giving warning upon approaching it. *Ficker v. Cleveland &c. R. Co.*, 6 Oh. N. P. 36.

So, defendant was negligent *per se* in permitting a child of 6 or 7 to ride on a carload of loose earth liable to slide and throw him off. *Burke v. Ellis*, 105 Tenn. 702.

A railroad owes to an employé of a shipper of coal using its cars the protection due to any other licensee. *Weatherford &c. R. Co. v. Duncan*, 88 Tex. 611.

See, also, *St. Louis &c. R. Co. v. Fenlaw*, (Tex. Civ. App.) 36 S. W. Rep. 295; *Gulf &c. R. Co. v. Bryant*, (Tex. Civ. App.) 66 S. W. Rep. 804; *Smith v. Southern R. Co.*, 129 N. C. 374.

Contention that railroad should have required licensees who are permitted to run hand cars on its tracks, to light them, held untenable. *Texas Transp. Co. v. Shelton*, 12 Tex. Civ. App. 651.

The care due relates only to the operation of cars, not the condition of the premises. *Houston &c. R. Co. v. Sglinski*, 19 Tex. Civ. App. 107.

Although there is no express license, notice of the customary use raises the duty of using reasonable care to avoid injury. *Garner v. Trumbull*, 94 Fed. Rep. 321.

Being on a path as a licensee, held not to justify recovery where those employed by the owner to remove rock which in fact supported the path, did not know that its removal left it in a dangerous condition. *Norfolk &c. R. Co. v. De Board*, 91 Va. 700; s. c., 20 L. R. A. 825.

Plaintiff claimed to have been lawfully on defendant's platform when injured. It was held that he had not thereby shown himself in pursuit of business with it, and so did not show that he was entitled to any more care than that due to a mere licensee. *Norfolk &c. R. Co. v. Wood*, 99 Va. 156.

(i). WHEN COMPANY IS LIABLE.

Defendant maintained a ditch along the southerly side of its tracks at a crossing. The sidewalk connecting the bridge was guarded with a fence, but the sidewalk and fencing stopped a short distance beyond, beyond which there was no defined path across the tracks. So that a person coming from the opposite direction across the tracks on a dark night, by missing the sidewalk, might fall into the ditch adjoining the highway. The maintenance of such a condition for 21 years was held to charge defendant with negligence. *Thompson v. New York &c. R. Co.*, 41 App. Div. 78.

Negligence not to be inferred from the mere fact that a lump of coal fell off a passing locomotive tender. *Anderson v. Union &c. R. Co.*, 8 Colo. App. 521.

See, also, *Clardy v. Southern R. Co.*, 112 Ga. 37; *St. Louis &c. R. Co. v. Ridge*, 20 Ind. App. 547; *Cedarson v. Oregon &c. R. Co.*, 38 Or. 343.

Violation of speed ordinance as negligence *per se*, gave recovery to licensee. *Barfield v. Southern R. Co.*, 108 Ga. 744.

A railroad, though in the habit of using one track, was not held liable for changing to the other, without notice to a car inspector of another road. *Hoy v. Terminal R. Asso.*, 65 Ill. App. 349.

Licensee not allowed to complain where the yard wherein he went to load stock was not necessarily dangerous. *Atchison &c. R. Co. v. Whitbeck*, 57 Kan. 729.

Where hallooing is in time to enable one to avoid danger, failure to whistle did not make defendant liable. Plaintiff had knowledge of the train's approach anyway, having seen its headlight. *Skipton v. St. Joseph &c. R. Co.*, 82 Mo. App. 134.

See, also, *Camden &c. R. Co. v. Young*, 60 N. J. L. 193.

Where an improperly secured car was impelled by a switch into plaintiff's lumber yard killing a person thereon, question of negligence was for the jury. *Penn. R. Co. v. Kirk*, 90 Pa. St. 15.

Failure to keep in a reasonably safe condition, an only passage way to freight yards, held negligence. *Curtis v. De Coursey*, 176 Pa. St. 446.

Consignee unloading cars on a side track not allowed recovery where his car was collided with by another switched thereon, owing to the latter's defective brake, which defendant did not know of. *St. Louis &c. R. Co. v. Fenlaw*, (Tex. Civ. App.) 36 S. W. Rep. 295.

See, also, *Shvagzdys v. Pittsburg &c. R. Co.*, 31 Pittsb. L. J. 136.

But recovery was allowed where the defendant's local agent knew of the employé's presence in the car before ordering an engine coupled to it. *Missouri &c. R. Co. v. Holman*, 15 Tex. Civ. App. 16.

See, also, *Illinois &c. R. Co. v. Aland*, 192 Ill. 37; aff'g s. c., 94 Ill. App. 428; *Smith v. Southern R. Co.*, 129 N. C. 374.

So, where plaintiff backed his wagon down the main track to get at a car, out of which he was getting his goods, but defendant could have seen him in plenty of time to prevent the backing of a train down upon him. *Houston &c. R. Co. v. Rippetor*, (Tex. Civ. App.) 64 S. W. Rep. 1016.

See, also, *Bell v. Southern R. Co.*, (Miss.) 30 South. Rep. 821.

(j). DUTY AND DEGREE OF CARE BY LICENSEES.

An employé of a contractor engaged to repair a bridge, was held not bound to assume that a negligent practice would be continued. *Hasie v. Alabama &c. R. Co.*, 78 Miss. 413.

Licensee must use care in proportion to the risk he assumes in using the premises. *Southern R. Co. v. Bruce*, 97 Va. 92.

Employés of a coal company, required in placing cars in position for loading to go between them where they are concealed from view of the switching crew of the railroad, held bound to give warning of their presence. *Montague v. Chicago &c. R. Co.*, 82 Fed. Rep. 787.

(k). WHEN COMPANY IS NOT LIABLE.

Contributory negligence held to be a defense:

The duties of an employé of one company, under an agreement with another for the use of one track of the latter, took him upon another track of the latter. He was negligent in remaining thereon longer than his duties required him to. *Goodall v. New York &c. R. Co.*, 89 Hun, 559.

Where, notwithstanding the fact that freight cars obstructed his view, he could have seen past them in time to avoid injury had he looked. *White v. New York &c. R. Co.*, 68 App. Div. 561.

A fireman, off duty, violated the rules of the company against riding on the footboards of switch engines. *Lemasters v. Southern Pac. Co.*, 131 Cal. 105.

An employé of a consignee assumed a position of danger on a car, which he started on a down grade. *Southern R. Co. v. Morrison*, 105 Ga. 543.

Consignee remained on a platform which he knew projected over a roadway where trains ran, with his back to an approaching train. *Chicago &c. R. Co. v. Reichert*, 69 Ill. App. 91.

Deceased attempted to deliver a message to a train hand elsewhere than where it was customary and safe to do so. *Chicago &c. R. Co. v. Argo*, 82 Ill. App. 667.

Consignee backed his wagon against a car so that it must necessarily be overturned if the car started, which it was liable to do at any time. *Hadley v. Lake Erie &c. R. Co.*, 21 Ind. App. 675.

See, also, *Mabbott v. Illinois C. R. Co.*, 116 Iowa, 490; *Lando v. Chicago &c. R. Co.*, 81 Minn. 279.

Negligence of a shipper's employé in improperly loading lumber on a car and with defective stakes, however, did not prevent recovery where it did not contribute to the injury. *Pollard v. Maine C. R. Co.*, 87 Me. 51.

A person volunteering his services for a company, walked down a track against warning. *Barstow v. Old Colony R. Co.*, 143 Mass. 535.

Plaintiff had a right to walk between defendant's track to reach its station, but crossed the track without looking for trains. *Cole v. New York &c. R. Co.*, 174 Mass. 537.

See, also, *Stacklie v. St. Paul &c. R. Co.*, 73 Minn. 37.

Employé of a shipper placed a block under a loaded car to stop it, knowing that its brake would not work. *Sheltrawn v. Michigan C. R. Co.*, 128 Mich. 669.

See, also, *Baltimore &c. R. Co. v. Charvat*, 94 Md. 569.

Pedestrian saw a train approaching in the distance, but went upon a trestle 80 yards long without looking again for it. *Mobile &c. R. Co. v. Roberts*, (Miss.) 23 South. Rep. 393.

Plaintiff attempted to go between the cars where the train switched against them was in plain sight at the time. *Murdock v. Yazoo &c. R. Co.*, (Miss.) 29 South. Rep. 25.

Notwithstanding a bridge was provided with a walk about 3½ feet wide beyond the lines of an approaching train, deceased walked unnecessarily close to the track. *Skipton v. St. Joseph &c. R. Co.*, 82 Mo. App. 134.

Plaintiff did not step off the track on being warned, but stood there while looking in the wrong direction. *White v. Atchison &c. R. Co.*, 84 Mo. App. 411.

Assumption that safe cars furnished held not warranted in view of knowledge of frequent omissions in that respect. *Sykes v. St. Louis &c. R. Co.*, 88 Mo. App. 193.

Shipper of milk held not negligent in walking along a platform by a moving train to complete loading milk cans. *Ayres v. Boston &c. R. Co.*, 68 N. H. 208.

Plaintiff engaged by consignees to unload a car remained on it after notification that it was about to be moved. *Houston &c. R. Co. v. Kimbell*, (Tex. Civ. App.) 43 S. W. Rep. 1049.

Employé of a shipper saw an engine standing 200 feet away and stepped on the track to tie up an animal just loaded without looking again to see if it had started. *Nolan v. Milwaukee &c. R. Co.*, 91 Wis. 16.

Employé of shipper placed a skid within reach of a passing train. *Sheridan v. Bigelow*, 93 Wis. 426.

Plaintiff held not contributorily negligent per se at least:

An employé of a packing house near by, crossed on the tracks where others commonly crossed, though by going half a block he could cross over them. *Pittsburg &c. R. Co. v. Callaghan*, 157 Ill. 406.

In going between tracks to deliver a dinner, notwithstanding the fact that he might have used a safe walk by the side of the track. *East St. Louis &c. R. Co. v. Reames*, 173 Ill. 582; aff'g s. c., 75 Ill. App. 28.

Plaintiff remained in a car adjusting the load while it was being moved. *Hopkins v. Boyd*, 18 Ind. App. 63.

Car inspector stepped on the track of another company without looking, while engaged about his business. *International &c. R. Co. v. Eason*, (Tex. Civ. App.) 35 S. W. Rep. 208.

Defendant created an appearance of imminent peril by running a car in on a side track where plaintiff was loading a car. In the emergency, he jumped from the car, instead of remaining on it. *Gulf &c. R. Co. v. Bryant*, (Tex. Civ. App.) 66 S. W. Rep. 804.

Deceased walked on the track for 45 feet to 60 feet without looking back after a portion of a train had passed which he did not know was divided into two sections. *Hayes v. Northern P. R. Co.*, 74 Fed. Rep. 279.

Plaintiff went upon an embankment on a highway to inspect cars standing on the track beside it. *Toledo &c. R. Co. v. Chisholm*, 83 Fed. Rep. 652.

PROFESSIONAL PERSONS.

I. LAWYERS.

- (a) Degree of skill and care required.
- (b) When liable.
- (c) Not liable for neglect unless injury is shown to have resulted therefrom.
- (d) Question is for court.
- (e) Liable for negligence of his agents, partners, &c.
- (f) Liability for void or malicious proceedings.
- (g) Termination of the relation.
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- (i) Limitation of action.

II. PHYSICIANS AND SURGEONS.

- (a) Care and skill required.
- (b) When liable.
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- (d) Skill, how proven.
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- (h) Consent to operation.
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- (j) Form of action.
- (k) Limitation and abatement of action.
- (l) Who is a medical practitioner.

I. Lawyers.

DEGREE OF CARE REQUIRED.—A lawyer, whether acting gratuitously or for compensation, impliedly undertakes to employ such a reasonable degree of care, diligence, skill and learning, as is ordinarily possessed and employed by his profession in the locality of his residence, and the same should bear a reasonable relation to the importance and intricacy of the business undertaken by him. If, however, a lawyer specially hold himself out as competent to do business unusual in the practice of the local profession, he should at least bestow upon it the ability ordinarily employed by competent lawyers under similar circumstances.

Practice.—An attorney must be presumed to be familiar with the settled or well-known law and rules regulating *practice*, in actions which he undertakes to bring or conduct, and ignorance of such practice is inexcusable.

Counselors.—A lawyer may not be charged with liability on account of an incorrect opinion or course adopted or pursued by him, unless the

propriety of an opposite course or opinion has been finally settled by the decision of the courts of the jurisdiction, or in the absence of such decision, unless the propriety of such opposite course or opinion would be approved beyond reasonable doubt by all lawyers of ordinary capacity, skill and prudence. This would render a counselor liable for damages resulting only from gross negligence or from gross ignorance.

A lawyer is not liable for alleged negligence in conducting business entrusted to him, unless it appear that damages resulted therefrom, nor is he liable if it appear that the conduct of the business in the manner claimed to have been obligatory upon him, or according to instructions given him, would not have averted the injury; but a court may not, in an action against a lawyer for injury from his negligence, assume to decide, except in a plain case, that courts or juries would, had opportunity been given, have decided adversely to the client.

QUESTION IS FOR THE COURT.—Where the facts are undisputed.

AGENCY.—A lawyer is liable for the negligence of his partner or of his clerk, acting within the scope of his employment, and so a lawyer or mercantile agency receiving debts "for collection," is liable for the negligence of a lawyer or other person to whom the business is remitted, and for failure of such person to duly pay over sums collected.

VOID, IRREGULAR OR MALICIOUS PROCEEDINGS.—A lawyer who causes void or irregular process to be issued, which occasions loss or injury to a party against whom it is enforced, is liable for the damages thereby occasioned. But where the process is void, the liability attaches when the wrong is committed, and no preliminary proceeding is necessary to vacate or set it aside, as a condition to the maintenance of an action; but as to process that a court has general jurisdiction to award, but which is irregular, it must be regularly vacated before liability can arise. *Fisher v. Langbein*, 103 N. Y. 84, 89. But if an attorney have full knowledge that an action is groundless, and that his client is acting illegally and maliciously, he is liable to the opposite party.

(a). DEGREE OF SKILL AND CARE REQUIRED.

In an action for divorce, failure of plaintiff's attorneys to conform to well known rules of practice, by reason of which judgment was subsequently opened, was held to be negligence, and moneys paid them for such services by the plaintiff could be recovered. *Von Wallhoffen v. Newcombe*, 10 Hun, 236.

From opinion.—"Every person who enters a learned profession, undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that, at all events, you shall win your case; nor does he undertake to use the highest possible degree of skill; but he undertakes to bring a fair, reasonable and competent degree of skill," *Lanpher v. Phipos*, 8 Carr & Payne, 475; *Hancke v. Hooper*, 7 id. 84; *Shilcock v. Passman*, id. 289; *Pitt v. Yalden*, 4 Burr. 2060. The law requires that every attorney and counselor shall possess and use adequate skill and learning, and that he shall employ them in every case, according to the importance and intricacy of the case; and if a cause miscarries in consequence of culpable neglect or gross ignorance of an

attorney, he can recover no compensation for any services which he has rendered but which were useless to his client by reason of his neglect or ignorance. *Gleason v. Clark*, 9 Cow, 57; *Hopping v. Quinn*, 12 Wend. 517.

An attorney must be presumed to be familiar with the law and rules regulating the practice in actions which he undertakes to bring. This part of the business of the practice of law pertains especially to the duties of an attorney. It is, substantially, merely clerical or mechanical in its character; and ignorance of the law and rules of practice, on the part of attorneys, or negligence in conforming to them in obtaining judgments, are altogether inexcusable. Such ignorance and negligence subject an attorney to actions for injuries which their clients may sustain.

Another rule prevails for acts done in their relation of counselors, when called upon to give advice upon questions of law. In such cases the liability only arises for gross ignorance or negligence; and in performing the duties of counsel the attorney is not liable for errors in judgment upon points of new occurrence, or those of nice and doubtful construction. *Godefroy v. Dalton*, 6 Bing. 468.

It was held in *Galpin v. Page*, 18 Wall. (U. S.) 350, that the law imputes knowledge to an attorney, of defects in legal proceedings for the sale of property taken under his direction. In *Kemp v. Burt*, 4 Barn. & Ald. 424, it was held to be actionable negligence to lay the venue in the wrong county. In *Williams v. Gibbs*, 5 Ad. & El. 208, it was held that to bring an action in a court which had no jurisdiction subjected the attorney to liability.

In *Smedes v. Elmendorf*, 3 Johns. 185, it was held that delay in bringing an action until too late, so that the claim was lost, would render the attorney liable."

An attorney who received two notes for collection, and sued upon them on the last day of grace, is guilty of such negligence as precludes him from recovering in an action brought by him against his former client for such services. *Hopping v. Quinn*, 12 Wend. 517.

Executors of *Smedes v. Elmendorf*, 3 Johns. 185.

There is no implied agreement whereby an attorney guarantees the success of his proceedings, the soundness of his opinions, or their ultimate maintenance by the court of last resort. *Lanpher v. Phipos*, 8 Car. & P. R. 475; *Bowman v. Tailman*, 27 How. Pr. (N. Y.) 212.

See, also, *Hill v. Featherstonhaugh*, 7 Bing. R. 769; *Duncan v. Blundell*, 3 Stark. R. 6; *Hopping v. Quinn*, 12 Wend. R. 517.

From opinion.—"He only undertakes to avoid errors which no member of his profession, of ordinary prudence, diligence or skill, would commit. *Montrion v. Jeffreys*, Ky. & Mo. R. 317; s. c., 2 Car. & P. Rep. 113.

It is not enough that doubts may be raised of the soundness of his opinions or correctness of his course, unless they are accompanied by the absence of all reasonable doubts of the propriety of an opposite course or opinion in the mind of every member of his profession, of ordinary skill, sagacity and prudence, caused by a decisiveness of reason and authority in its favor. *Kemp v. Burt*, 4 Barn. & Ad. R. 424."

Disregard by an attorney of a well known rule of practice renders him accountable for losses caused thereby; so, when the right to sue in one name is clearly established, and an attorney brings suit in name of one

who has no right to sue, he is liable for negligence. *Goodman v. Walker*, 30 Ala. 482.

As to gratuitous services, see "Physicians and Surgeons" (*post*, p. 2183).

An attorney is liable for the want of such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise. *Shearman & Redfield on Negligence*; *Wilson v. Russ*, 20 Me. 421; *Goodman v. Walker*, 30 Ala. (N. S.) 482; *Cox v. Sullivan*, 7 Ga. 144. Negligence cannot be proved by the opinion of another attorney. *Gambert v. Hart*, 44 Cal. 542.

In this last case it was said that English judges have decided that an attorney would be liable only for gross negligence, *crassa negligentia*, or for gross ignorance. *Bakie v. Chandless*, 3 Camp. 17; *Purvass v. Landell*, 12 Clark & F. 91; *Godefroy v. Dalton*, 6 Bing. 468.

An attorney is bound to the highest honor and integrity—to the utmost good faith; yet, if in the exercise of a diligence beyond the powers and obligations of his trust, he realize a fund upon a judgment in his own favor, out of his client's debtor, he is not bound to apply it to his client's claim.

An attorney is bound to reasonable skill and diligence, and is liable for ordinary neglect; and the skill required has reference to the character of the business undertaken.

The client is not bound to any diligence unless so stipulated.

The damages only extend to the amount of the debt actually lost by the attorney's negligence. 2 Greenl. Ev., sec. 146; *Dearborn v. Dearborn*, 15 Mass. 316; *Crooker v. Hutchinson*, 3 Chipm. 117; *Huntington v. Rummill*, 3 Day, 390. *Cox v. Sullivan*, 7 Ga. 144.

Citing 2 Greenl. Ev., sec. 144; *Story on Bail*, secs. 431, 432, 433; *Buer v. Rightly*, 4 B. & A. 202; *Ireson v. Pearman*, 3 B. & C. 799; *Hart v. Frame*, 3 Jur. 547; 6 Cl. & Fin. 192; *Lanpher v. Phipos*, 8 C. & P. 475; 4 Burrow, 2061; 1 Wheat. Selw. 170; 4 Peters, 172; 2 Watts & Serg. 103; 15 Mass. 316.

An attorney is bound to exercise reasonable care, skill and diligence. *O'Barr v. Alexander*, 37 Ga. 195.

An attorney who assumes to exercise the duties of his office in behalf of another for hire and reward, must be held to employ in his undertaking a reasonable degree of care and skill. The attorney was employed to collect a judgment and was so dilatory that the proceedings instituted by him therefore were dismissed for want of prosecution, and he was liable therefor. He left the matter almost entirely to his clerk. *Stevens v. Walker*, 55 Ill. 151.

An attorney must use reasonable diligence to effect the collection of debts placed in his hands. *Singer v. Steele*, 125 Ill. 426.

By assuming to be a lawyer a person undertakes the care belonging

to that profession; the utmost good faith and fair dealing toward his client. *Miller v. Whelan*, 158 Ill. 544.

An attorney is not liable for a mistake respecting the subject concerning which persons of the profession of reasonable skill and knowledge differ as to law, until it has been judicially determined, nor if he may be mistaken in a point of law concerning which all informed lawyers entertain a reasonable doubt. *Citizens' &c. Ass'n v. Friedley*, 123 Ind. 143.

Error of judgment as to the law was excused, upon proof that the care and diligence ordinarily possessed by attorneys was used. *Humboldt Bldg. Ass'n Co. v. Ducker*, (Ky.) 64 S. W. Rep. 671.

An attorney must execute his professional business with a reasonable degree of care, skill and dispatch, and if the client be injured by the gross fault, negligence or ignorance of the attorney, the attorney is liable; but if the latter act with good faith, to the best of his skill, and with an ordinary degree of attention, he is not responsible for the loss of demands left with him for collection. *Wilson v. Russ*, 20 Me. 421.

Unless he expressly stipulated therefor, an attorney is bound only to ordinary care and diligence. *Babbitt v. Bumpus*, 73 Mich. 331.

An attorney is not liable if he acts honestly and to the best of his ability. *Lynch v. Commonwealth*, 16 Sergeant & Rawles, (Pa.) 367.

The rule of liability of conveyancers for errors of judgment is the same as lawyers and physicians; conveyancer relying on the opinion of legal counsel, represented that land was free from incumbrance, whereas there was a judgment by default existing against the vendor. The conveyancer was not liable for negligence. *Watson v. Muirhead*, 57 Pa. St. 161.

An attorney is responsible for ordinary care and skill.

Attorney died twelve days before return day of an execution where real estate had been attached by the original writ, without having levied the attachment, and the attachment, not being subsequently levied, was lost. The attorney was not liable. The presumption is that the attorney followed the instructions of his client, unless in case of such gross negligence, a violation may be inferred. *Holmes v. Peck*, 1 R. I. 242.

Reasonable diligence and skill is the degree of care required. *Gaar v. Hughes*, (Tenn.) 35 S. W. Rep. 1092.

Decisions of courts of equal authority must be reasonably harmonious to establish the liability of an attorney for non-observance of the rules laid down by them. An attorney undertakes to use his best judgment to follow the well-known lines of practice, when the way is plain to the generality of the profession. *Ahlhauser v. Butler*, 57 Fed. Rep. 121.

Honest error of a fairly competent attorney, acting to the best of his

skill and with reasonable care, was excused. *Malone v. Gerth*, 100 Wis. 166.

(b). WHEN LIABLE.

Attorney was employed to search a title. He certified it as good. The release of a certain mortgage released "all the said mortgaged lands and property described in said mortgage except the lands, premises and property hereinafter mentioned and described which are not released or intended to be released by this indenture and which land and premises and property not released or intended to be released by this indenture are described as follows, viz.: All that piece, &c." *i. e.*, instrument described by metes and bounds, not the premises released as is usual, but that which was retained. He was negligent in failing to see that the premises were not in fact released as he had certified. *Byrnes v. Palmer*, 18 App. Div. 1.

Attorneys represented to their client that the mortgage which they had obtained for him was a first lien on the premises; whereas there were other and prior liens which they failed to discover. They were liable for the sum necessary to be paid to secure their removal. *Fay v. McGuire*, 20 App. Div. 569; s. c. aff'd, 162 N. Y. 644.

Plaintiff drew up a complaint for defendant in an action prosecuted on contingent basis. It was dismissed as not stating a cause of action whereby defendant was made to pay \$175 cost which he sought to counterclaim against plaintiff's suit for his services. The mere fact that the complaint was dismissed did not show negligence or unskillfulness in its drawing. An attorney does not guarantee the sufficiency of his pleadings where he has exercised the skill possessed by ordinary lawyers in general. *Kissan v. Bremerman*, 44 App. Div. 588.

Attorney failed to plead the statute of frauds as a defense in an action on an oral agreement not to be performed within a year, being of opinion that the statute was provable under a general denial. There was considerable doubt on the point amongst the members of the profession, and the point was not settled until his own case was decided in the court of appeals. That he was wrong in his conclusions did not establish his negligence. He had made merely an error of judgment. *Patterson v. Powell*, 31 Misc. 250; rev'g s. c., *id.* 20; s. c. aff'd, 58 App. Div. 618.

Attorneys failed to appeal from an appraiser's decision, where there was a decision on appeal in a similar case by virtue of which his decision would have been reversed. Recovery permitted. *Childs v. Comstock*, 69 App. Div. 160.

Attorney was negligent where he failed to discover a first mortgage

on property and advise his client that he could not invest a second; whereby the client lost his loan and interest. *Gardner v. Wood*, 37 Misc. 93.

Waiver of default and judgment by attorney, without consultation with client, and subsequent failure of opposite party before payment is recovered, are not enough in themselves to fix negligence on the attorney. *Clussman v. Merkel*, 3 Bosw. 402.

An attorney is liable for failure to sue a note as instructed, whereby the same is barred by the statute of limitations and uncollectible. *Fox v. Jones*, 26 Fla. 276.

To charge an attorney, on a demand placed in his hands for collection, the declaration must either allege that he received the money, or that the debt was good, that a reasonable time had elapsed and that it had not been collected and paid over, or that the claim had been lost by neglect, or want of professional skill. *Nisbet v. Lawson*, 1 Ga. 275.

Intended legatee omitted from will by lawyer's negligence, did not recover. *Buckley v. Gray*, 110 Cal. 339.

Attorney held not responsible for property which was levied upon as the judgment debtors' upon a valid judgment. *Corbin v. Bores*, 29 Chicago L. N. 205.

Attorney whose suit for divorce was dismissed for want of prosecution told his client she was legally divorced, whereupon she remarried. Attorney was liable for damages upon a subsequent indictment for bigamy. *Hill v. Montgomery*, 84 Ill. App. 300; aff'g s. c., 56 N. E. Rep. 320.

An attorney commenced an action on a replevin bond; after two years he suffered it to be dismissed; four years thereafter he commenced an action on a lost bond (bond found in his office after his death); two years thereafter dismissed it as to all solvent defendants, who had under oath denied the execution of the bond, and took judgment against the others, whereby the plaintiff lost his claim. The facts were sufficient to sustain a finding of negligence. *Walpole's Adm'r v. Carlisle*, 32 Ind. 415.

Where, upon the advice of his attorney, the client unnecessarily relinquished claims for reimbursement for money paid by him as surety, the attorney was liable for the damages. *Cochrane v. Little*, 71 Md. 323.

Attorney, engaged to examine title only, his employer attending to the closing of the loan in general, was not liable for failing to bring the search down to date. *Watson v. Calvert Bldg &c. Asso*, 91 Md. 25.

By change of a printed form, the word "hundred" theretofore contained in it, had been for a year omitted and an attorney wrote in the blank "twelve" instead of "twelve hundred," whereby the debt was lost. At the same time he made another writ in which he wrote in the word

"hundred." The evidence of his negligence was sufficient to sustain the verdict against him. It was his duty to read over the writ to verify it. *Varnum v. Martin*, 15 Pick. 440.

Agreement that the record should show that the court ordered a party's release from arrest held not negligence where that was the disposition of the case by the judge whom all parties assumed had jurisdiction. *Keith v. Marcus*, 181 Mass. 377.

Claimant need not show that the statute, allowed to run against an action through neglect, would not have been waived. *Drury v. Butler*, 171 Mass. 171.

Attorney fraudulently represented notes and mortgages to be valid and induced client to take assignments thereof and sue upon them. Was liable to the client for the cost and expenses of such suits. *Struckmeyer v. Lamb*, 64 Minn. 57.

An attorney to secure the payment of his own lien in foreclosure proceedings made an offer, to procure a resale, which he did not fulfill on the resale. He was liable to a client having a lien of equal priority for the difference between the sum he bid and that he promised to. *Olson v. Lamb*, 56 Neb. 104.

Attorney was not negligent in interpreting a message directing attachment for "even hundred ninety dollars" as meaning, \$190. Original read "Seven hundred and ninety dollars." *Western U. Teleg. Co. v. Beals*, 56 Neb. 415.

Reliance on an attorney's opinion as to the probable solvency of an estate whereby client neglected to take the necessary steps to secure a preference, held not a ground for recovery. *Remping v. Wharton*, 56 Neb. 536.

An attorney, whose office has been broken open and papers stolen therefrom, without negligence on his part, is not liable for the loss. *Hill v. Barney*, 18 N. H. 607.

Client, led to place a mortgage in reliance upon attorney's failure to discover a lien may recover for his loss caused thereby. *Lewall v. Groman*, 180 Pa. St. 532.

See, also, *Currey v. Butcher*, 37 Or. 380.

Attorney employed to look for judgments against "John Cauley" was not negligent in failing to discover one indexed "John Cawley or Cauley." *Barr v. Iams*, 29 Pitts. L. J. N. S. (Pa.) 365.

Negligence consisted in an attorney's omission to notice that the affidavit on a writ for arrest filled out by him conformed to the statute, whereby a judgment was obtained against his client for the wrongful arrest thereunder. He was not liable for such part of the damages as represented punishment for the client's instituting the original suit maliciously. *Forrow v. Arnold*, 22 R. I. 305.

Attorneys were not liable for a mistaken judgment reached after careful investigation, based on disputed propositions of law. *Hill v. Mynatt*, (Tenn.) 59 S. W. Rep. 163.

If the mistake is honest and the question is in doubt he is not liable. *Gaar v. Hughes*, (Tenn.) 35 S. W. Rep. 1092.

Contract sued on was not for a definite term. Attorney excused for misconceiving the cause of action. *Eberhardt v. Harkless*, 115 Fed. Rep. 816.

As to what failures do not constitute such unfaithfulness as to warrant an attorney's discharge without being paid the reasonable value of his services, see *Payette v. Willis*, 23 Wash. 299.

A solicitor is liable for failure to obey directions to re-adjust a judgment whereby damages result to the client. *Hett v. Pun Pong*, 18 Can. S. C. 290.

(c). NOT LIABLE FOR NEGLIGENCE UNLESS INJURY IS SHOWN TO HAVE RESULTED THEREFROM.

To charge an attorney with negligence in failing to set up a defense, based upon certain facts, communicated to him by his client, he must show by evidence the existence of such facts and that they *were susceptible of proof at the trial by the exercise of proper diligence on the part of his attorney*. *Hastings v. Halleck*, 13 Cal. 204.

See, however, *Gambert v. Hart*, 44 Cal. 542.

Failure to take an appeal is not negligence on the part of an attorney *if such appeal could not have been maintained*. *Hays v. Ewing*, 70 Cal. 127.

Burden is on attorney representing at the same time an opposing interest, to show that his client's interest was in no way neglected. *Vanasse v. Reid*, 111 Wis. 303.

(d). WHEN QUESTION IS FOR COURT.

When the facts are ascertained, the question of an attorney's want of skill, or negligence, is for the court. *Bowman v. Tallman*, 27 How. Pr. (N. Y.) 375. The error of an attorney in filing an uncertified record whereby a review is prevented by an appellate court, shows want of ordinary care, and it cannot be determined as a matter of law in an action against the attorney, that the appellate court would not have decided the case favorably to the injured client. *Gambert v. Hart*, 44 Cal. 542.

See *Hastings v. Halleck*, 13 Cal. 204.

(e). LIABLE FOR NEGLIGENCE OF HIS AGENTS, PARTNERS, &C.

Attorneys prosecuting an action through the intervention of their clerk, were defrauded by the latter. Their honesty in paying the money did not discharge them of responsibility to their client. *In re McGuinness*, 69 App. Div. 606.

An attorney's duty does not cease upon the recovery of a judgment on a claim put in his hands for collection, but he should collect the money thereon. Where two attorneys, who are partners, are retained, the client is entitled to the services of both, although the partnership be dissolved before the termination of the business and both are liable for money received by one on the collection after the dissolution. *Smyth v. Harvie*, 31 Ill. 62.

When an attorney employs another to prosecute a claim placed in his hands for collection, he is liable to his client for the negligence of the latter, although he be a competent lawyer. *Walker v. Stevens*, 79 Ill. 193.

Where three attorneys undertook a defense of the interests of a client in a number of cases, to their best judgment and ability, all are not required to attend in court upon every step of the proceeding. *Philips v. Edsall*, 127 Ill. 535.

An attorney is liable for the acts of his clerk, within the general scope of his authority. *Shattuck v. Bill*, 142 Mass. 56.

Attorneys and agents for collection, unless otherwise stipulated, are liable for the acts of their sub-agents. *Simpson v. Waldbey*, 63 Mich. 439.

Weyerhouser v. Dunn, 100 N. Y. 150; 41 Hun, 117.

By giving a receipt "for collection" of acceptances, a mercantile agency undertook themselves to collect, not merely to remit for collection to some responsible attorney, and were liable for nonpayment of the sum collected by one of their agents. *Bradstreet v. Everson*, 72 Pa. St. 135.

Citing *Riddle v. Hoffman's Ex'r*, 3 Penn. R. 224; *Cox v. Livingston*, 2 W. & S. 103; *Krausa v. Dorrance*, 10 Barr. 462; *Rhines v. Evans*, 16 P. F. Smith, 192; *Lewis v. Peck*, 10 Ala. 142; *Pollard v. Rowland*, 2 Blackford, (Ind.) 22; *Cummins v. McLain*, 2 Pike, (Ark.) 402; *Wilkinson v. Griswold*, 12 Smedes & Mar. 669.

Where partners are retained, their obligation is not terminated by the dissolution of the firm or any act on their part. *Tomlinson v. Polsley*, 31 W. Va. 108.

A firm of solicitors is liable for a breach of trust of one of the firm in a proper investment of funds. *Blyth v. Fladgate*, 1 Chan. 337.

(f). LIABILITY FOR VOID OR MALICIOUS PROCEEDINGS.

Void or irregular process. An attorney is liable for damage to the party against whom it is enforced. *Fischer v. Langbein*, 103 N. Y. 84, 89.

See cases there cited.

An attorney is not liable to owner of property illegally attached at his instance, and under the direction of his client. *Dawson v. Buford*, 70 Iowa, 127.

Citing *Lyon v. Tevis*, 8 Iowa, 79; *Paton v. Lancaster*, 38 id. 494; *Hardy v. Keeler*, 56 Ill. 152; *Cook v. Hopper*, 23 Mich. 511; *Burnap v. Marsh*, 13 Ill. 535; *Schalk v. Kingsley*, 42 N. J. Law, 32; *Hunter v. Burtis*, 10 Wend. 358; *Ford v. Williams*, 13 N. Y. 577; s. c., 24 id 359.

An attorney, unless he has full knowledge that an action is groundless and that his client is acting illegally and maliciously, is not liable to the opposite party. *Techt v. Chouteau*, 91 Mo. 138.

An attorney is liable for malicious prosecution, where he begins a criminal prosecution upon an understanding of his client that the charge against the accused is untrue. *Staley v. Turner*, 21 Mo. App. 244.

(g). TERMINATION OF THE RELATION.

Where an attorney's conduct has been improper the court may grant a substitution of attorneys without making it depend upon the payment of his fees. *Barkley v. New York &c. R. Co.*, 35 App. Div. 167.

An attorney had represented both a husband and his wife. As her representative he negotiated for the purchase of a judgment against her husband. The relationship terminated on her death so that he represented the husband alone after that and his act in thus purchasing the judgment was void and could be taken advantage of by his creditors. *Van Campen v. Bruns*, 54 App. Div. 86.

Substitution may be ordered for lack of a valid excuse for lack of prosecution. *Whiteman v. Siebert*, 27 Misc. 814.

Where attorneys employed under a special contract to prosecute a suit abandon it before its termination, they are thereby deprived of any claims under the contract, and must be left to recover such fees and compensation as they are reasonably entitled to on the basis of a *quantum meruit*, and they lose their lien on the proceeds of suit. *Morgan v. Roberts*, 38 Ill. 65.

Consent of court and client held necessary to permit withdrawal of an attorney from his case. *Hiscox v. Fels*, 86 Ill. App. 216.

An attorney may withdraw from the services of one who does not pay him. *State v. Halstead*, 73 Iowa, 376.

Attorneys, after notice to their client to which they understood he assented, withdrew from an action and were not liable to him therefor. *Thompson v. Dickinson*, (Mass.) 34 N. E. Rep. 262.

The death of a client does not revoke the attorney's authority to proceed under contract for exclusively contingent compensation. *Price v. Haeberle*, 25 Mo. App. 201.

An attorney, intending to absent himself during the term of court, should provide against the possibility of his case being reached before his return. *Lincoln v. Staley*, 32 Neb. 63.

Court would not grant an order of substitution of attorneys on assignment of the cause of action without compensating them where it appeared that such assignment was probably made to defraud them. *Sandberg v. Victor Gold &c. Co.*, 18 Utah, 66.

See, also, *In re Regan*, 58 App. Div. 1.

Though parties compromise, judgment should be rendered to protect the attorney's lien. *Illinois C. R. Co. v. Wells*, 104 Tenn. 706.

Where agency is coupled with an interest by transference of an interest in the recovery, it cannot be terminated, in the absence of fraud. *Gulf &c. R. Co. v. Miller*, 21 Tex. Civ. App. 609.

(h). CONTRIBUTORY NEGLIGENCE.

Where the client himself, a lawyer, makes an examination of the authorities and acquiesced in the attorney's action, he cannot be allowed to complain. *Carr v. Glover*, 70 Mo. App. 242.

(i). LIMITATION OF ACTION.

By the California Code of Civil Procedure, sec. 339, an action against an attorney for neglect of duty is barred after two years after the neglect occurred. *Hays v. Ewing*, 70 Cal. 127.

Statute of limitations begins to run against a claim for money collected by an attorney from the time the attorney first became liable, and in the case of a note put into his hands for collection, from a reasonable time afterwards for beginning proceedings. In absence of peremptory directions an attorney is allowed a reasonable discretion, and this depends upon circumstances and is for the jury.

Where the duty is immediate, the right of action arises and statute begins to run from the attorney's receipt of the money.

But for neglect in not commencing proceeding, brought against an attorney seven years and five months after note was placed in his hands for collection, was, as matter of law, barred. *Rhines v. Evans*, 66 Pa. St. 192.

Citing and reviewing *Livingston v. Cox*, 6 Barr. 360; *Morrison v. Mullin*, 10 Casey, 17; *McDowell v. Potter*, 8 Barr. 189.

Recovery for negligence, arising through a breach of contract and not tort, statute of limitations runs not from the time of discovery of the injury but from the breach of the contract. *Gould v. Palmer*, 96 Ga. 798.

II. Physicians and Surgeons.

DEGREE OF SKILL AND CARE REQUIRED.—In the absence of a special contract otherwise providing, a physician and surgeon, whether acting gratuitously or otherwise, is required to possess and use reasonable care and skill, and the same is measured by the degree of skill possessed, and skill and care exercised by the average of his profession in the locality of his residence, regard being had to the advanced state of the profession at the time. It has been held that it is a material issue, whether a surgeon is skillful in his profession, as well as whether he applied his skill in the particular case. *Carpenter v. Blake*, 50 N. Y. 696; 60 Barb. 488; *Mayo v. Wright*, 63 Mich. 32. But mere possession of skill is not sufficient, unless due care be taken to exercise it in the case in hand.

SKILL, HOW TESTED.—The skillfulness of a physician should be tested by the recognized rules and doctrines of his own and not those of other schools. It has been held, however, that clairvoyant physicians are adjudged by the skill required of a physician of good standing in the community. Where a physician departs from the settled course of practice, it may be a question for a jury whether this would not constitute negligence.

SKILL, HOW PROVEN.—It has been held that skill cannot be established or disproved by showing a general professional reputation, but this does not accord with the holding in *Carpenter v. Blake*, 50 N. Y. 696.

Termination of employment.—A physician engaged to attend a patient, cannot in absence of agreement, terminate the relation so long as such attention is needful, without reason, or without sufficient notice to enable the party to procure other medical attendant.

CONTRIBUTORY NEGLIGENCE.—It is held that an aggravation of an injury by the act or omission of the patient, may diminish the damages, but will not defeat an action for damages for injury from a physician's negligence, if the jury can distinguish the effects of the different causes, but if the plaintiff's condition arises from the concurring negligence of the physician, and the negligent or willful act or omission of the patient, there are numerous decisions that recovery cannot be had, and the latter holdings harmonize with the usual doctrine of contributory negligence.

PARTNERS.—Where a firm of physicians are acting under a contract, the action must be brought against all the members of the firm for the alleged negligence of one partner.

Instructions to patient.—It may be the duty of a physician to give a patient, or his attendants, instructions as to the management or conduct of the patient in the absence of the physician.

(a). CARE AND SKILL REQUIRED.

In an action against a surgeon for malpractice, the question as to whether or not he is skillful in his profession is one of the material issues. If he has not competent skill, he is censurable for holding himself out as possessing it, and is strictly accountable for the consequences of his acts; and having adopted a process which was not successful, to the exclusion of one that might, and probably would have proved so, he is not entitled to the benefits which would inure to the skillful surgeon from an error of judgment, or mistake in the appliances and means at command of the expert.

Accordingly, held (Church, Ch. J., Peckham and Grover, JJ., dissenting), that a charge to the jury that it was immaterial whether the defendant was or was not reputed to be, or was or was not a skillful surgeon, was error. *Carpenter v. Blake*, 50 N. Y. 696; rev'g 60 Barb. 488.

It is not necessary, in order to sustain an action for malpractice against a surgeon, that there should be proof of gross culpability on his part; having engaged in the performance of services requiring skill and care, he is liable for a want of the requisite skill, or for an omission to exercise proper care.

Plaintiff dislocated her elbow joint, defendant was called in as a surgeon and attempted to reduce the dislocation, but, as plaintiff's evidence tended to show, either through negligence or want of skill, he did not succeed; also, after the operation was performed, he omitted to give the arm the requisite support to keep the joint in place, and to prevent relaxation, if the dislocation was in fact, reduced, and omitted to give necessary instructions to the attendants, although instructions were asked for. In consequence, either of the dislocation not having been properly reduced, or of a subsequent relaxation, plaintiff became permanently crippled. Held, that the evidence was sufficient to justify a submission of the case to the jury, and to sustain a verdict for plaintiff. *Carpenter v. Blake*, 75 N. Y. 12, aff'g 10 Hun, 696, and judg't for pl'ff.

Action against the defendant for alleged negligence of one of his physicians whereby poison was negligently communicated by a brush to the plaintiff's eye while under treatment was brought and several questions of evidence were considered. *Doyle v. N. Y. Eye & Ear Infirmary*, 80 N. Y. 631, aff'g judg't for def't.

A physician, while exercising care, skill and knowledge is not responsible for mere errors in judgment, but he is chargeable with knowledge of the probable consequences of an injury or of neglect in its treatment. The liability of a physician for negligence or malpractice is not discharged, because, after the liability incurred, the patient disobeyed

orders and so aggravated the injury; but this goes in mitigation of damages. A negligent person on account of an accident, was taken to the almshouse and treated by the physician employed and paid by the public. Such person could maintain an action against the physician for malpractice. If the physician's services be rendered gratuitously yet he must exercise ordinary care, skill and diligence. *DuBoise v. Decker*, 130 N. Y. 325; aff'g judg't for pl'ff.

McCandless v. McWha, 22 Penn. St. 261-269; *McNevins v. Same*, 40 Ill. 209; *Gladwell v. Steggall*, 88 Bing., (N. Y.) 733.

From opinion.—"In the case of *McCandless v. McWha*, 22 Pa. St. 261-272, Lewis, J., in delivering the opinion of the court, says: 'Patient is bound to submit to such treatment as his surgeon prescribes, provided the treatment be such as a surgeon of ordinary skill would adopt or sanction; but if it be painful, injurious and unskillful, he is not bound to peril his health and perhaps his life by submission to it.'"

GRATUITOUS SERVICE.—See *McNevins v. Lowe*, 40 Ill. R. 209; *Becker v. Janinski*, 27 Alb. N. C. 45; *Stephens v. White*, 2 Wash., (Va.) 203. But see *Robertson v. Flemming*, 41 Macq. H. L. Cas. 177.

It was said by Lord Loughborough, in *Shields v. Blackburne*, 1 Hen. Bl. 158, that "if a man gratuitously undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

The same doctrine is advanced by Parke, B., in *Wilson v. Brett*, 11 Mees & Wells, 113. He says: "In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." *Nolton v. Western R. Corp.*, 15 N. Y. 449; aff'g judg't for pl'ff.

The rule of liability applicable to a druggist in cases of this character (furnishing calomel for quinine) is the same as that which governs the liability of professional persons whose work requires special knowledge or skill, and a person is not legally responsible for any unintentional consequential injury resulting from a lawful act when the failure to exercise due and proper care cannot be imputed to him, and the burden of proving such lack of care, when the act is lawful, is upon the plaintiff. *Allen v. S. S. Co.*, 132 N. Y. 91, rev'g judg't for pl'ff.

Citing *Brown v. Marshall*, 47 Mich. 576; *Thomas v. Winchester*, 6 N. Y. 397; *Beckwith v. Oatman*, 43 Hun, 265; *Losee v. Buchanan*, 51 N. Y. 476-488; *Carpenter v. Blake*, 75 id. 12; *Morris v. Platt*, 32 Conn. 75; *Simonds v. Henry*, 39 Me. 155; *Fleet v. Hollenkemp*, 13 Mon., (Ky.) 219.

In order to maintain an action against a physician or surgeon, for injury from any unskillfulness or negligence, it is not necessary to prove gross culpability, but proof of failure to exercise proper care or proof of any neglect in discharging the duty assumed is sufficient. *Link v. Sheldon*, 136 N. Y. 1, aff'g judg't for pl'ff.

Plaintiff had his patella broken. Defendant's father put the leg in a

splint, bandaged it up and sent him home. Defendant did not call until a few days thereafter, upon request of plaintiff. He then pronounced it a rupture of the ligaments and so taking no precaution to secure the re-knitting of the broken bones, as the swelling began to go down (which he at first gave no treatment for) he pronounced the injury to be getting better and permitted plaintiff to use it. It was not until the following spring that defendant made an examination and admitted that the bones were broken and telling the plaintiff that the "leg was not worth a damn," and "he would have to go into something else than farming." Defendant was not as a matter of law free from negligence. *Pike v. Housinger*, 155 N. Y. 201; rev'g s. c., 84 Hun, 607.

From opinion.—"A physician and surgeon, by taking charge of a case, impliedly represents that he possesses, and the law places upon him the duty of possessing, that reasonable degree of learning and skill that is ordinarily possessed by physicians and surgeons in the locality where he practices, and which is ordinarily regarded by those conversant with the employment as necessary to qualify him to engage in the business of practicing medicine and surgery. Upon consenting to treat a patient, it becomes his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning to accomplish the purpose for which he was employed. He is under the further obligation to use his best judgment in exercising his skill and applying his knowledge. The law holds him liable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to exercise reasonable care, or the failure to use his best judgment. The rule in relation to learning and skill does not require a surgeon to possess that extraordinary learning and skill which belong only to a few men of rare endowments, but such as is possessed by the average member of the medical profession in good standing. Still, he is bound to keep abreast of the times, and a departure from approved methods in general use, if it injures the patient will render him liable, however good his intentions may have been. The rule of reasonable care and diligence does not require the exercise of the highest possible degree of care, and to render a physician and surgeon liable, it is not enough that there has been a less degree of care than some other medical man might have shown, or less than even he himself might have bestowed, but there must be a want of ordinary and reasonable care, leading to a bad result. This includes not only the diagnosis and treatment, but also the giving of proper instructions to his patient in relation to conduct, exercise and the use of an injured limb. The rule requiring him to use his best judgment does not hold him liable for a mere error of judgment, provided he does what he thinks is best after careful examination. His implied engagement with his patient does not guarantee a good result, but he promises by implication to use the skill and learning of the average physician, to exercise reasonable care and to exert his best judgment in the effort to bring about a good result. *Carpenter v. Blake*, 75 N. Y. 12; s. c., 10 Hun, 358; 50 N. Y. 696, 60 Barb. 488; *Link v. Sheldon*, 136 N. Y. 1; *Patten v. Wiggin*, 51 Me. 594; *Hitchcock v. Burgett*, 38 Mich. 501; *Smothers v. Hanks*, 34 Iowa, 286; *McCandless v. McWha*, 22 Pa. St. 261; 14 Am. & Eng. Ency. of Law, 76."

Where, in an action brought to recover damages for the false imprison-

ment of an alleged sane person, the complaint charged that the physicians, by whom a certificate as to his insanity was signed, made such certificate "without proper and ordinary care and prudence, and without due examination, inquiry and proof into the fact whether the plaintiff was sane or insane," and a trial is had upon a demurrer interposed to the complaint by the physicians, they will be held liable to the plaintiff for the damages resulting from the false imprisonment, admitted by the demurrer to have been caused by such want of ordinary care and prudence on their part. *Ayers v. Russell et al.*, 50 Hun, 282.

Demurrer to complaint sustained as to certain defendants and overruled as to others.

In an action against a physician or surgeon for malpractice, the plaintiff must show either want of ordinary skill or failure to exercise the same on the part of the defendant or some negligence in the care or attention given to the plaintiff's case; but there need not be the highest order of talent and skill to be found in the profession, nor is the practitioner an insurer, nor is he bound to restore a fractured limb in all cases as to its normal condition and usefulness. *Winner v. Lathrop*, 67 Hun, 511, rev'g judg't for pl'ff.

Citing *Carpenter v. Blake*, 10 Hun, 358; *Wells v. World's Dispensary Medical Ass'n*, 9 N. Y. St. Rep. 459.

A veterinary surgeon must possess and exercise a reasonable degree of learning and skill and use reasonable and ordinary care (*Hatham v. Richmond*, 48 Vt. 557), and where he prescribed for one malady, while the horse was suffering from another, he failed in his duty; having undertaken the cure of a sick horse he left it in a critical condition and never called again, although promising to do so early the next morning. *Boom v. Reed*, 69 Hun, 426, aff'g judg't for def't.

Citing *Williams v. Hilman*, 71 Me. 211; *Ballou v. Prescott*, 64 id. 306.

An optician, in undertaking to make a pair of glasses from a prescription assumes the exercise of the skill and care adequate and necessary for a competent and proper completion of the work, and if he fails in such duty he is liable for the injuries resulting from his negligence. *Price v. Ga Nun et al.*, 11 Misc. 74. (New York Superior Court.)

In the absence of special statutes, the law does not exclusively recognize any particular system of medicine or class of medical practitioners. Medicine is a progressive rather than an exact science and in determining the legal significance of the word "physician" or "doctor," when used in a contract, the term must be held to mean any person who makes it his regular business to practice medicine. *Corsi v. Maretzek*, 4 E. D. Smith (N. Y.) 1.

The law implies, in an undertaking on the part of a physician or sur-

geon, that he has ordinary skill, and that he will execute the business intrusted to him with ordinary skill and care. A defense of malpractice may be pleaded by a general denial. *Bellinger v. Craigen*, 31 Barb. 534. (Broken limb.)

(1) Did the defendant use the means which experience has shown to be proper and necessary to justify a surgeon in assuming that he had restored the bones to their proper place? For jury.

(2) Was it negligent for a surgeon to fail to discover a protuberance at the elbow joint, plainly to be seen, which was evidence that the broken bones were not in their place? For jury.

(3) Was it negligence to fail to use a sling after the operation, when medical witness differed as to the necessity? For jury.

(4) If writers on the subject, or practical surgeons, prescribe a mode of reducing dislocations and of treating the joint thereafter, a surgeon fails to conform to such treatment at his peril.

(5) After replacing bones after a dislocation, and putting same on pillow in a certain position, &c., it would seem proper, if not necessary, to inform the patient or attendants that the position should be maintained and the danger of disturbance disclosed.

(6) Consent of patient that physician should give up attendance, to shield himself from negligence, obtained by fraud or misrepresentations, does not relieve.

(7) It is error to instruct the jury that it is not material whether the defendant was or was not skillful in his profession.

(8) Surgeon is liable for want of skill, and negligence in exercising it.

(9) When the charge is of neglect it is immaterial how high a surgeon's standing may be, if he does not bring to the treatment of the injury the ordinary amount of skill possessed by those in the same profession.

(10) Standing alone, a charge is incorrect, that it was impossible to show that a surgeon possessed the skill required, except by showing what skill he applied in the treatment of the particular case.

(11) Possession of skill may be shown by testimony of members of the same profession who can speak from personal knowledge of his practice, but when the question is whether such skill was applied, the mere possession of the requisite skill would be no defense.

(12) Charge that a surgeon is required to exercise that reasonable degree of skill possessed by the average of his profession is correct. *Carpenter v. Blake*, 60 Barb. 488. (Broken limb.)

See same case, 50 N. Y. 696; 75 N. Y. 12, *ante*, p. 2183.

The physician must use ordinary care and skill. *Graves v. Sautway*, 6 N. Y. Supp. 892.

Billinger v. Craigen, 31 Barb. 534; *Smith v. Dummond*, 6 N. Y. Supp. 242; *Ayers v. Russell*, 3 id. 338.

Similar holdings in *O'Harra v. Wells*, (Neb.) 15 N. W. Rep. 722; *Langford v. Jones*, (Ore.) 22 Pac. Rep. 1064; *Barney v. Pinkham*, (Ore.) 45 N. W. R. 694. (Veterinary surgeon.)

Where a swelling was so great that the fracture of the bone could not be discovered at the time of the physician's call, and on the second visit he was directed not to call again unless sent for, and notified the patient that the injury needed no further attention, he was not negligent. *Gedney v. Kingsley*, 41 N. Y. St. Rep. 794; 16 N. Y. Supp. 792.

Failure of a surgeon to accomplish the desired result does not render him liable. He is only responsible for reasonable skill and attention. *Rowe v. Lent*, 42 N. Y. St. Rep. 483; 17 N. Y. Supp. 131.

That high degree of skill ordinarily used, is sufficient. The highest degree of skill is not exacted. *McDonald v. Harris*, 131 Ala. 359.

A surgeon is not liable for errors of judgment in a case in which there are reasonable causes of doubt and difference of opinion. *Burnham v. Jackson*, 1 Col. App. 237.

A physician must use ordinary diligence, care and skill. *London v. Humphrey*, 9 Conn. 209.

Citing *Slater v. Baker*, 2 Wils. 359; *Seare v. Prentice*, 8 East. 353; *Summer v. Utley*, 7 Conn. 263.

Reasonable skill and care. *Akridge v. Noble*, 114 Ga. 949.

A physician must exercise a reasonable amount of skill; not the highest order of qualification, but such as is ordinarily possessed by the profession, and he must not only possess but exercise it.

If the services are gratuitously performed he is only liable for gross negligence. *Ritchey v. West*, 23 Ill. 329.

Reasonable and not the highest degree of care and skill required; and if he assumes charge he must use this skill, whether he receives fees or not. *McNevins v. Lowe*, 40 Ill. 209.

Where he uses the skill of an ordinary physician he can recover for his services, though he has not succeeded in curing. *Yunker v. Marshall*, 65 Ill. App. 667.

A physician is liable for neglect in application of skill as well as for damage for want of it. Story on Bailments, 431; *Conner v. Winton*, 8 Ind. 315; 3 Shars. Blacks. p. 122 and note, and p. 169. *Long v. Morris*, 14 Ind. 595.

A physician must possess and use the average skill and care of the members of his profession practicing in the locality. *Brekmeel v. Hosler*, (Ind. App.) 37 N. E. Rep. 580.

Griswold v. Hutchison, 47 Neb. 727; *Van Skike v. Potter*, 63 id. 28.

And where he is a specialist, as possessed by that branch of the profession. *Baker v. Hancock*, (Ind. App.) 63 N. E. Rep. 323; s. c., 64 N. E. Rep. 38; *Teeney v. Spaulding*, 89 Me. 111.

A physician must have ordinary skill and diligence—the average of that possessed by the profession as a body, and not of the thoroughly educated only; having regard to the improvements and advanced state of the profession at the time of the treatment. *Smothers v. Hanks*, 34 Iowa, 287.

Reviewing and criticising *McCandless v. McWha*, 22 Penn. St. 261; s. c., 25 id. 95.

The law implies an undertaking on the part of every medical practitioner that he will use ordinary degree of care and skill, and will hold him liable for gross carelessness or unskillfulness. *Bowman v. Woods*, 1 Green (Iowa), 441.

The degree of care required is that ordinarily possessed by other members of his profession practicing in similar localities. *Deinbauld v. Thompson*, 109 Iowa, 199. Not necessarily in that particular locality. *Whitesell v. Hall*, 101 Iowa, 629; s. c., 39 L. R. A. 830.

A physician or surgeon does not warrant a cure unless he specially contracts to do so; but impliedly contracts that he possesses that reasonable degree of care and skill ordinarily possessed by his profession; that he will use reasonable and ordinary care and diligence and his best judgment in case of doubt; is not responsible for a want of success unless it is shown to result from a want of ordinary skill, or ordinary care and diligence; nor is he responsible for errors of judgment in matters of reasonable doubt; 7 Fost. 460; 28 Me. 97; *Simonds v. Henry*, 39 Me. 155, but he must in general apply correctly what is settled in his profession. *Tefft v. Wilcox*, 6 Kas. 33.

See *Branner v. Stormont*, 9 Kas. 51.

That the result is “as good as is usually obtained in like cases” is not sufficient. *Bark v. Foster*, (Ky.) 69 S. W. Rep. 1096.

Physician is not liable where he has followed the established practice and was not grossly negligent. *Stern v. Lannig*, 106 La. 738.

Ordinary care is required. *Patten v. Wiggin*, 51 Me. 594.

Failure of a physician to discover a serious rupture of the perinæum, after repeated examinations, constitutes negligence. *Lewis v. Dwinell*, 84 Me. 497.

It is no excuse that examination was for information concerning another's fitness for marriage and not for medical treatment. *Harriot v. Plimpton*, 166 Mass. 585.

It was for the jury to determine whether a physician was justified in using appliances adopted by him to support a dislocated bone, rather

than the splints in common use. Where there is no evidence of general incompetency, recovery can only be had for failure to exercise skill and care. *Mayo v. Wright*, 63 Mich. 32.

An oculist may be liable for failure to exercise a degree of skill belonging to good surgeons of that specialty. *McMurdock v. Kimberlin*, 23 Mo. App. 523.

A physician undertakes to exercise reasonable skill and care only. *Sanderson v. Holland*, 39 Mo. App. 233.

A physician must use such reasonable skill and judgment and diligence as is ordinarily possessed and employed by his profession. *Vanhooser v. Berghoff*, 90 Mo. 487.

A surgeon must exercise the care, knowledge and skill ordinarily possessed by the profession. *Hewitt v. Eisenbart*, 36 Neb. 794.

Unless a physician exercised the skill commonly belonging to his profession, he cannot recover compensation for his services. *Ely v. Wilber*, 49 N. J. L. 685.

Physicians must use the skill and diligence possessed by the profession as a body, and not by the thoroughly educated. *Peck v. Hutchinson*, 88 Iowa, 320.

A surgeon, in the absence of special agreement, impliedly agrees no further than that he will indemnify his patient against any injurious consequences resulting from his want of a proper degree of skill, care and diligence in the execution of his employment. *Craig v. Chambers*, 17 Oh. St. 254.

Hanke v. Hooper, 7 Car. & P. 81; *Lanphier v. Phipos*, 8 id. 475.

A physician and surgeon by holding himself out as such does not become charged with the exercise of the highest degree of skill and which the most accomplished of his profession have acquired nor guarantee a cure, but must possess at least the average skill exercised by physicians generally. *Tish v. Welker*, 7 Oh. N. P. 472; s. c., 5 Oh. S. & C. P. Dec. 725; *Eislein v. Palmer*, 9 Oh. C. P. Dec. 252.

That is, in good standing in the community in which he resides. *Eislein v. Palmer*, 5 Oh. N. P. 325, 7 Oh. Dec. 365.

Unless the want of ordinary care and skill is shown the case cannot go to the jury. *Havens v. Hardesty*, 18 Oh. C. C. 891.

A physician, who applied all the tests known to medical science, to determine whether a particular condition existed, and had good reason to believe that it did not exist, was not liable for failure to discover such existence. *Langford v. Jones*, 18 Ore. 307.

A physician must possess and employ such reasonable skill and diligence as is ordinarily exercised in his profession, regard being had to the advanced state of the profession at the time.

Error to charge that defendant was bound to bring to his aid the skill necessary for a surgeon to set the leg so as to make it straight and of equal length with the other, when healed, &c. *McCandless v. McWha*, 22 Pa. St. 261. (Broken leg.)

A physician must use adequate care and skill. *Reber v. Herring*, 115 Pa. St. 599.

Plaintiff broke his arm, and by the improper manner of dressing the arm and subsequent negligence of the defendant, the plaintiff must necessarily have a defective arm, irrespective of the negligence of those in charge of him.

There is an implied obligation on a man holding himself out to the community as a surgeon and practicing that profession, that he should possess the ordinary skill in surgery of the profession generally. *Wilmot v. Howard*, 39 Vt. 447.

Physicians and surgeons must exercise ordinary skill—such skill as physicians and surgeons in the same general neighborhood, in the same general line of practice, ordinarily exercised in such cases. *Hathorn v. Richmond*, 48 Vt. 555.

A physician must use such care and skill and diligence as physicians in the same general practice ordinarily have and exercise.

Failure to cure does not raise a presumption of lack of proper care and skill. *Lawson v. Conaway*, 37 W. Va. 159.

A physician and surgeon must apply such skill as is ordinarily possessed and used by physicians and surgeons in the vicinity or locality in which he resides, having regard to the advanced state of practice at the time. *Gates v. Fleischer*, 67 Wis. 504.

Departure from approved methods in general use renders physician liable though the operation was performed with good intentions. *Allen v. Voje*, 114 Wis. 1.

Gratuitous services.—The same skill and care is required of a physician serving gratuitously or for compensation. *Becker v. Janinski*, 27 Abb. N. C. 45.

See *ante*, p. 2184.

(b). WHEN LIABLE.

Patient shrieked upon the physician's attempting to use instruments for an operation unnecessarily. Quitting the case at midnight, when another physician could not be obtained for an hour was held negligence. *Lathrope v. Flood*, (Cal.) 63 Pac. Rep. 1007.

Physician, called for a case of fever, promised to send oculist for eye treatment. Was not liable for forgetting to do so. *Jones v. Vroom*, 8 Colo. App. 143.

Fitness of cellar as a place for an operation held admissible on the question of the reasonableness of the charge therefor. *Sayles v. Fitzgerald*, 72 Conn. 391.

Surgical skill and proper subsequent treatment are for the jury in action for malpractice. *Wabash R. Co. v. Kelley*, 153 Ind. 119.

Physician guilty of malpractice, not allowed recovery for services. *Abbott v. Mayfield*, 8 Kan. App. 387.

It was for the jury to say whether physician was negligent, where after a broken ankle was reset, the foot was crooked and the joint stiff. *Hickerson v. Neely*, (Ky.) 54 S. W. Rep. 842.

Physician cannot be held for mere negligence in issuing a certificate as to need of treatment in a hospital for dipsomaniacs and inebriates. *Neven v. Boland*, 177 Mass. 11.

Operating on the wrong leg against advice before the return of party sent to ascertain the right one, held to present a question for the jury. *Sullivan v. McGraw*, 118 Mich. 39.

Physician held liable for failing to remove a part of the placenta from one who has suffered miscarriage, causing blood poisoning. *Moratzky v. Wirth*, 67 Minn. 46.

Physician should give notice that one's illness is incurable, instead of continuing the treatment. *Logan v. Field*, 75 Mo. App. 594.

It was for the jury to say whether it was negligent to wire a fractured knee cap together with silver wire. *Van Skike v. Potter*, 53 Neb. 28.

Physician knowing the danger, was negligent in directing that another's wounds be dressed by one liable to be infected. *Edwards v. Lamb*, 69 N. H. 599.

In performing an operation a needle broke and was lost in the person. Another physician discovered it in removing cicatricial tissue. The first was not liable as it had become encysted and harmless and could not have produced such tissue. *Eislein v. Palmer*, 5 Oh. N. P. 325.

Negligent treatment was for the jury, where it appeared that the limb had subsequently to be amputated. *Appeal of Hawkins*, 13 York Leg. Reg. 199.

Physician had given precautionary prescriptions and had received no call for a week. He was not negligent in absenting himself for a short time upon providing a competent substitute. *Ewing v. Goode*, 78 Fed. Rep. 442.

(c). SKILLFULNESS IS TESTED BY DOCTRINES OF HIS OWN SCHOOL.

Physicians and surgeons offering themselves to the public as practitioners impliedly promise thereby that they possess the requisite knowledge and skill to enable them to treat such cases as they undertake with reasonable success; but they are not required to possess the highest, or even the average skill, knowledge and experience, but only such as will enable them to treat the case understandingly and safely. *McCandless v. McWha*, 22 Penn. 261; *Simonds v. Henry*, 39 Me. 155. They must use their best skill and judgment in determining the nature of the malady, and best mode of treating it, and in all respects do their best to secure a perfect restoration. If the settled practice of law of the profession allow but one course of treatment in the case, then any departure from it might properly be regarded as the result of want of knowledge, skill, experience or attention. *Carpenter v. Blake*, 60 Barb. 488.

See 2 *Espinasse's N. P.* 601.

The skillfulness of a physician is to be tested by the general doctrines of his own and not those of other schools. *Force v. Gregory*, 63 Conn. 167.

Where he does not profess to be a physician, nor to practice as such, and is merely asked his advice as a friend or neighbor, he does not incur any professional responsibility. *Ritchey v. West*, 23 Ill. 385, is to be so understood. *McNevins v. Lowe*, 40 Ill. 209.

A physician is expected to practice according to his professed and avowed system. Evidence to prove that defendant's treatment was according to the botanic system of practice and medicine which he professed and was known to follow, is admissible. *Bowman v. Woods*, 1 Greene (Iowa), 441.

The physician undertakes his duty according to the recognized law and rules of his particular school. *Patten v. Wiggin*, 51 Me. 594.

Physician is entitled to have his treatment tested by the rules and principles of his own school. *Martin v. Courtney*, 75 Minn. 255.

As practiced by others of ordinary skill in the vicinity. *Wurderman v. Barnes*, 92 Wis. 206.

One holding himself out as a healer of diseases, unless he exercise reasonable skill, is liable for the damages proximately resulting therefrom. A clairvoyant physician is liable for failure to exercise the skill of a physician in good standing in the community, and is not adjudged by the ordinary skill and knowledge of clairvoyants, and takes the risk of clairvoyant diagnosis and remedies. *Wilson v. Harrington*, 72 Wis. 591.

(d). SKILL, HOW PROVEN.

Skill and learning cannot be proved by general reputation in the community of profession; the manner of discharging his duty in the particular case involved furnishes the test. *Bute v. Pottes* (Cal.) 18 Pac. Rep. 329. But, as bearing on his skill, it is proper to show that he was extensively engaged in farming, *Hess v. Lowery*, (Ind.) 23 N. E. Rep. 156, and evidence of defendant's skill was improperly excluded, when similar evidence had been received respecting another witness upon whose evidence expert testimony had been founded.

Burden is on plaintiff to show negligence. *Georgia Northern R. Co. v. Ingram*, 114 Ga. 639; *Challis v. Lake*, 71 N. H. 90.

Lack of skill cannot be established or disproved by showing a general professional reputation. *Holtzman v. Hoy*, 118 Ill. 534.

One partner is not affected by the opinion of another partner, as to the propriety of the former's treatment, expressed after the employment was ended. *Boor v. Lowery*, 103 Ind. 468.

Standard medical books are admissible in evidence of the author's opinion upon questions of medical skill and practice involved in the trial. *Bowman v. Woods*, 1 Greene (Iowa), 441.

Physician was not chargeable upon the opinion of another physician admitted to be a matter of judgment. *Pepke v. Grace Hospital*, (Mich.) 90 N. W. Rep. 278.

(e). TERMINATION OF EMPLOYMENT.

A physician, engaging to attend a patient without limitation of time, cannot terminate his visits so long as they are necessary, except with the patient's consent, unless he give such notice that the patient may employ another physician. *Becker v. Janinski*, 27 Abb. N. C. 45.

A physician is liable for leaving a tight bandage upon a broken arm six weeks without removal, causing formation of ulcers and gangrene. *Mitchell v. Hindman*, 47 Ill. App. 431, aff'd, 150 Ill. 538.

A physician who leaves a patient at a critical stage of the disease, without reason, or sufficient notice to enable the party to procure another medical attendant, is guilty of a culpable dereliction of duty. *Barbour v. Martin*, 62 Me. 536.

The care and skill which a professional man guarantees to his employer are elements of the contract into which he enters by accepting a proffered engagement. So, continuing attention to the undertaking, so long as attention is required, in the absence of stipulation to the contrary, is equally an inference of law. Where a physician responds to

a call the effect is an engagement to attend to the case so long as necessary, unless he gives notice to the contrary or be discharged. He must use ordinary care and skill in determining when the case may be safely and properly discontinued. *Ballou v. Prescott*, 64 Me. 305.

Negligence extended throughout the period of treatment so that the cause of action did not accrue, until the relationship was ended. *Tucker v. Tellette*, 22 Oh. C. C. 664.

But the negligent act itself constituting a breach of duty in a malpractice case, and not the knowledge thereof, that fixes the date from which the statute runs. *Fronce v. Nichols*, 22 Oh. C. C. 539.

Where a surgeon in setting a limb was negligent in the tightness of the bandage, he was not relieved therefrom by the negligence of his successor in not discovering the error and correcting it, although this might affect the amount of damages. *Hathorn v. Richmond*, 48 Vt. 555.

A physician's employment continues during the sickness unless ended by the assent of the parties, or by an express dismissal. *Lawson v. Conaway*, 37 W. Va. 159.

(f). CONTRIBUTORY NEGLIGENCE.

Aggravation of an injury by the patient may diminish the damages, but will not defeat an action for malpractice. *De Boise v. Decker*, 130 N. Y. 325.

A patient cannot recover for the consequences of maltreatment that have been aggravated by his own neglect. *Becker v. Janinski*, 27 Abb. N. C. 45.

Physician cannot be charged with failure where the patient refused to submit to his operation. *Littlejohn v. Arbogast*, 95 Ill. App. 605.

If a patient was guilty of negligence contributing to his injury, the same is a defense to an action for damages resulting from the negligence of the physician. *Lower v. Franks*, 115 Ind. 334.

Reber v. Herring, 115 Penn. St. 599.

Where the plaintiff contributed to the injury by disobeying the instructions and in taking her arm from the sling and in refusing to allow the surgeon to exercise it to prevent stiffening, she is precluded from recovering for the alleged charge of maltreatment against the physician. *Young v. Mason*, (Ind. App.) 35 N. E. Rep. 521.

Patient was not negligent in relying on the assurances of success without attempting to verify it. *Schoonover v. Holden*, (Iowa) 87 N. W. Rep. 737.

A patient cannot recover, either in contract or in tort, for injuries consequent upon unskillful or negligent treatment by his physician, if

his own negligence directly contributed to them to an extent which cannot be determined and separated. *Hibbard v. Thompson*, 109 Mass. 288.

It is only when the contributory negligence of the patient directly contributed to the injury charged to the negligence of a physician, that an action for such negligence is defeated. *Davis v. Spicer*, 27 Mo. App. 279.

If the patient neglects to obey the reasonable instructions of the surgeon and thereby contributes to the injury charged against the physician, he cannot recover for such injury. *Geiselman v. Scott*, 25 Oh. St. 86.

See, also, to the same effect, *Robinson v. Gary*, 28 Oh. St. 241.

Patient should conform to the necessary prescription if it be such as a physician of ordinary skill and care would adopt or sanction, and if he will not, or by reason of pain cannot, the physician is not responsible. *McCandless v. McWha*, 22 Pa. St. 261.

Any aggravation of the ailment caused by the neglect of the defendant by negligence of those in charge may affect the damages. *Wilmot v. Howard*, 39 Vt. 447.

The note to this case cites, on the degree of care, *Nelson v. Harrington*, (Wis.) 4 N. W. Rep. 228.

Natural temperament, physical weakness, or predisposition to disease is no defense to an action for malpractice. *Mullin v. Flanders*, 73 Vt. 95.

Although a person's condition is caused partly by malpractice and partly by other causes, yet the jury must distinguish the effects of the different causes. *Gates v. Fleischer*, 67 Wis. 504.

(g). PARTNERS.

Patient knowing his physician, who has given his services gratuitously, is going away, cannot charge him with the acts of another who takes the case. *Keller v. Lewis*, 65 Ark. 578.

Where a firm of physicians were acting under a contract, the action must be brought against all the members of the firm for the alleged negligence of one of them. *Whittaker v. Collins*, 34 Minn. 999.

Physician sent another unconnected with him in business to fulfill a call he has promised to make. The latter was not held to be the former's servant or agent. *Myers v. Holborn*, 58 N. J. L. 193.

A surgeon and his assistant held jointly and severally liable for the negligence of the latter. *Tish v. Welker*, 7 Oh. N. P. 472, 5 Oh. S. & C. P. Dec. 725.

(h). CONSENT TO OPERATION.

A husband's consent to an operation upon his wife is not required, her own consent having been obtained. *State v. Housekeeper*, 7 Md. 163.

(i). INSTRUCTIONS TO PATIENT—WHEN NECESSARY.

After a physician has set a broken leg he should give proper instructions for the care to be taken of it, and in default thereof he is liable for the resulting injury. *Beck v. German Klinik*, 17 Iowa, 696.

See *ante*, p. 2387.

A surgeon must give his patient who has a broken limb all necessary and proper instructions as to what care and attention the patient should give his broken limb in the absence of the surgeon, and the condition to be observed in the use of the limb before it is entirely healed. The patient on the other hand must follow out all reasonable directions and requirements of the surgeon relating to the treatment or care of the injured limb or he is precluded from complaining of the surgeon's negligence. *Tish v. Welker*, 7 Oh. N. P. 472; 5 Oh. S. & C. P. Dec. 725.

Physician held to be under no obligation to tell a patient so long as he remains her physician that a needle had been broken off and a part left in her body. *Eislein v. Palmer*, 9 Oh. C. P. Dec. 252.

(j). FORM OF ACTION.

Where a physician is employed without any express special contract, an action of assumpsit or case may be brought to recover for unnecessary or improper treatment. *Kuhn v. Brownfield*, 34 W. Va. 252.

(k). LIMITATION AND ABATEMENT OF ACTION.

At common law, a suit against a physician for malpractice, sounding in tort, did not survive the person injured.

Where malpractice results in death, action lies in behalf of the husband for loss of service from its commission to its result; and if the right of action grow out of a breach of contract for skillful treatment, it is a chose in action and survives wife's death. *Long v. Morrison*, 14 Ind. 595.

Statutory bar unless a notice of the time and place of injury is served within a year, held a waivable statute of limitation, and not a condition precedent to suit. *Meisenheimer v. Kellogg*, 106 Wis. 30.

(l). WHO IS A MEDICAL PRACTITIONER.

Druggist is liable as a physician in giving treatment where he is believed to be such. *Matther v. Wooley*, 69 Ill. App. 654.

The treatment of the so-called Christian scientist, whether for a fee or as a gratuity, is not an act of duty so as to take it out of the statute making it unlawful to practice medicine without a certificate or diploma. *State v. Buswell*, (Neb.) 24 L. R. A. 68; 51 N. W. 728. See *Parks v.*

State, (Ind.) 64 N. E. 862; also *People v. Gordon*, 96 Ill. App. 456; rev'd 194 Ill. 560.

An empiric, under act of 1868, (S. & S. 523) is liable to a civil action for malpractice, notwithstanding it is made a penal offense for such person to practice medicine in any of its departments. *Union M. L. &c. Co. v. McMillen*, 24 Oh. St. 67. Where defendant is declared against as a physician, proof that he held himself out as "a cancer doctor," and as having skill and experience in the treatment and care of cancers supports the allegation.

Proof that the defendant accepted employment sustains averment that he was employed "at his special instance and request." *Musser's Executor v. Chase*, 29 Oh. St. 577.

RELEASE.

Joint and Several Wrong-doers.

Persons engaged in the commission of a wrong are joint and several, as distinguished from joint, wrong-doers. Hence, whatever the rule may be as to persons jointly liable, the mere *release* of one wrong-doer does not release the others; but if one wrong-doer make satisfaction for the wrong, all are released. It is not the release of the one that effects the release of all, but the satisfaction of the demand, for the claimant can have but one payment for his injury. The proof of such satisfaction may be by a technical instrument of release under seal, or by any other evidence showing that full payment has been made and accepted in settlement of damages for the injury. If a release under seal exist, it is conclusive evidence of the fact that satisfaction has been made, and is not open to any defense save that it was not fairly made upon a due consideration, for it is a satisfaction in law which is equal to a satisfaction in fact. It is immaterial that it in terms stipulates that it shall not operate to relieve any wrong-doer save the one named as a party to it. Such a provision is repugnant to the nature of the instrument, and is void. It seems, however, that such a stipulation, reserving a claim against those not in terms discharged, may be good as to persons joining the instrument and agreeing to still remain liable. It has been suggested that in such case the original cause of action would be extinguished, and that any action would be upon the agreement.

If there be no technical release under seal, the fact of satisfaction is a matter of proof in the usual manner. If the facts are undisputed or the inference proper to be drawn from the evidence undoubted, the question of the legal effect of the evidence is for the court, but it would be the province of the jury to determine any question of fact; and if the inferences to be drawn from the fact be uncertain, the matter should be submitted to the jury.

If it appear by the undisputed facts, or by the finding of the jury, there being no release under seal, that payment was made on account of an injury, but not in entire satisfaction thereof, it operates as a discharge of the wrong-doers only *pro tanto*: or to the extent that it liquidates the damages due; and it must be considered and applied in reduction of damages in any suit against any of the wrong-doers.

If, in consideration of such payment of a sum in partial satisfaction of the claim, the claimant release any wrong-doer or promise not to sue him, such agreement is binding, and in a suit against such wrong-doer *alone*, may be pleaded in bar, and if the wrong-doer in any action be compelled to make other payment at the suit of the wrong-doer for the same wrong, it may be recovered in an action for that purpose against the claimant.

If the injured person bring separate actions against two wrong-doers, and upon the trial of one be defeated on the merits, the judgment entered thereon is a bar to the other action.

Where "F.," one of two common carriers jointly charged by the plaintiffs with negligence, agreed with the plaintiffs by simple contract in

writing, that if the latter would release "T.," the other carrier, it should not affect or impair any liability which he, "F.," might have incurred, or was subject to, and thereupon "T." was released accordingly, "F.'s" agreement, not being under seal, did not qualify the release, so as to prevent its operating the discharge of both "F." and "T." from the original cause of action; and the plaintiff's remedy was confined to the substituted agreement of "F."

A release of one of several wrong-doers or contractors, in general discharges all. Otherwise, *semble*, where all are parties to the release, and those not in terms discharged, covenant in it to remain liable.

Whether, in case of the release of a joint debtor thus qualified, the remedy of the creditor is not confined to the new obligation arising out of the deed, *quære*. *Bronson v. Fitzhugh*, 1 Hill, 185.

From opinion.—"The deed may, however, be so qualified, that the release of one will not have the effect of discharging all. When it relates to joint debtors, all of whom are parties to the deed, and the one who is not in terms released, agrees that he will still remain liable for the debt, that will qualify what would otherwise be the legal effect of the instrument, and it will only operate to discharge the debtor who is in terms released. *Rogers v. Hosack*, 18 Wend. 319. But still there may be a question—at least in a court of law—in relation to the form of the remedy. Where there is a *novation*, or the substitution of a new debt for an old one, the original debt is extinguished, and the remedy of the creditor is on the new contract. 1 Poth. on Obl. (Evans) 339."

A party receiving an injury from the wrongful acts of others, is entitled to but one satisfaction, and an accord and satisfaction by, or a release or other discharge by the voluntary act of the party injured, of one of two or more joint tort feasers, is a discharge of all, but an attorney-at-law, as such merely, cannot settle a suit and give a release concluding his client in relation to the subject in litigation, although it is within his authority to discontinue the action. *Barrett v. Third Ave. R. Co.*, 45 N. Y. 628.

Citing *Knickerbocker v. Hawes*, 8 Cow. 111; *Livingston v. Bishop*, 1 John. R. 290; *Ruble v. Turner*, 2 Hen. & Munf. 38.

If, after a recovery and satisfaction for one slanderous utterance or libelous publication, the same defamatory matter is uttered or published again by the wrong-doer, this is a new injury and another cause of action, and there may be another recovery and satisfaction from him.

So if, after a recovery against two jointly, one of them repeats the wrong, there may be another recovery; and a satisfaction of the former recovery is not a satisfaction of the latter.

Where, after a recovery against one person for libel, an action is brought against other persons for the same libelous publication, and also for another, the two libels being set forth in different counts in the com-

plaint, and a general verdict is rendered for plaintiff on all the counts, a satisfaction of the first judgment is a satisfaction of so much of the second as was for the same libel, and defendants are entitled to relief therefrom; but it is not a satisfaction for that part of the second recovery which was for the other libel. *Woods v. Pangburn*, 75 N. Y. 495.

Where the release is not under seal it must be shown that it was intended to operate as a full satisfaction. *Line v. Nelson*, 38 N. J. L. 358; *Ellis v. Esson*, 50 Wis. 138; *Turner v. Hitchcock*, 20 Iowa, 331.

And where there is a conflict of evidence as to the agreement, the question is one of fact for the jury. *Ellis v. Esson*, 50 Wis. 138; *Eastman v. Grant*, 34 Vt. 490.

And if it appear or be found that the payment was intended as a partial satisfaction by one wrong-doer, it *pro tanto*, but no further, discharges the other tort-feasors. *Chamberlin v. Murphy*, 41 Vt. 118; *Snow v. Chandler*, 10 N. H. 92; *McCrillis v. Hawes*, 38 Me. 566.

It is proper to be shown, and should be taken into consideration by the jury in determining damages; and it may be shown under a general denial. *Knapp v. Roach*, 94 N. Y. 329.

Citing *Daniels v. Hallenbeck*, 19 Wend. 409; *Bush v. Prosser*, 11 N. Y. 347; *Wilmarth v. Babcock*, 2 Hill, 194.

Separate actions were brought against "L." and "St. J." for the same trespass. Plaintiff recovered judgment in each, both of which were appealed to the general term and to the court of appeals, upon each of which appeals undertakings were given to stay proceedings upon the judgment appealed from, and all of the judgments having been affirmed, separate actions were brought and recoveries had upon each of the undertakings. One of the sureties for "St. J." paid nearly the full amount of the judgments against him, upon the plaintiff's agreement to release him, he agreeing that such payment should not affect plaintiff's right against all the other parties, and also assigning to plaintiff his claims against his principal and his co-surety, by reason of such payment. Held, that upon payment of a sum which, in addition to that paid by said surety, would satisfy the damages, and would pay the costs in all the actions, "L." and his sureties were entitled to be released from the judgments against them, and that the co-surety with one so paying was entitled to be released from one-half of the judgment against him.

Also held, that an action in equity was proper to obtain such relief. *Lord v. Tiffany*, 98 N. Y. 412.

Citing *Livingston v. Bishop*, 1 Johns. 129; *Creed v. Hartman*, 29 N. Y. 591.

A claim for damages for death by negligence cannot be barred or released by payment to a person before his appointment as administrator, but if the money was used for burial expenses of the deceased it may

be credited by the jury in estimating damages. *Stuber v. McEntee*, 142 N. Y. 200, rev'g judg't of nonsuit.

A release under seal is conclusive evidence of satisfaction of the wrong, *Ellis v. Esson*, 50 Wis. 138; although by the terms of the release to one tort-feasor the claim is in terms expressly reserved against the others, yet the release operates in behalf of the other tort-feasors. After the joinder of issue, in an action brought against three defendants to recover damage for an injury caused by their negligence, the plaintiff entered into an unsealed written agreement with one of them, whereby, in consideration of certain money paid by him, the plaintiff stipulated to discontinue the action as to him and release him from all claims of every kind which the plaintiff had against him, but provided expressly that the stipulation should in no wise affect the other two defendants, and that the plaintiff should retain all his claims against them, as if the stipulation had not been made.

The discharge of the defendant under this agreement operated to release the other two from all liability, and they should be allowed to serve a supplemental answer setting forth the foregoing facts. *Mitchell v. Allen & Porter*, 25 Hun, 543.

Citing *Gunther v. Lee*, 45 Md. 60; *Ruble v. Turner*, 2 Hen. & Munf. 38; and not following *Matthews v. Chicopee Co.*, 3 Rob. 711; *Price v. Barker*, 1 Jurist., (N. S.) 775; to same effect, *Ellis v. Pitzer*, 2 Ohio, 89.

Several owners of water privileges joined in raising the height of a dam, whereby a quarry belonging to the plaintiff was flooded. The plaintiff settled his claim with some of the wrong-doers, and gave to one of them a release, under seal, from claims arising from the raising of the dam. The instrument provided that it was understood that it was not to apply to or to affect any person interested in the dam, except the one named, and reserved and excepted all claims the plaintiff had against any and all the said persons. He thereby released all the wrong-doers. *Delong v. Curtis & Wait*, 35 Hun, 94.

The defendants paid the father of the plaintiff, a minor lacking some three months of being of age, the sum of \$100, and thereafter the plaintiff signed a paper releasing the defendants from all claims for injury to the plaintiff; this did not bar an action by the plaintiff. *Palmer v. Conant*, 58 Hun, 333.

Citing *Green v. Green*, 69 N. Y. 553.

An engineer, injured in a collision, sued his employer and recovered, and also recovered a separate judgment against another company whose negligence contributed to the injury. His employer settled the judgment against it and took an assignment thereof, and also a release, whereupon the other company moved to cancel such judgment, which was ordered.

Although the recovery in each action was for distinct acts of negligence, yet the injury and loss were, as to the plaintiff, single, his damage having resulted from the combined negligence of both. *Gross v. Penn., Poughkeepsie & Boston R. Co.*, 65 Hun, 191.

Citing *Woods v. Pangburn*, 75 N. Y. 495; *Webster v. H. R. Co.*, 38 id. 260; *Barrett v. Third Ave. R. Co.*, 45 id. 628.

A judgment in favor of a railway company on the ground of the contributory negligence of the plaintiff, which had obstructed a highway which a turnpike company, not a joint wrong-doer, was bound to maintain for a personal injury caused thereby, is a bar to an action brought by the same plaintiff against the turnpike company for the same cause. *Featherston v. Prest. &c. Newburgh &c. R. R. Co.*, 71 Hun, 109.

Citing *Herman on Estoppels*, 169; *Castle v. Noyes*, 14 N. Y. 329.

Upon the trial of an action for personal injuries sustained through the alleged negligence of the defendant, it was shown that the plaintiff had executed a release, discharging the defendant from all claim for damages therefor, at the time of the execution of which the defendant paid the plaintiff \$100.

It was contended by the plaintiff that the execution of such release was secured by fraud; that the plaintiff understood the \$100 to be a present, and thought she was signing a receipt therefor.

On an appeal from a verdict in favor of plaintiff, it was held that the action was maintainable, and the plaintiff could impeach the release without first restoring or offering to restore the \$100 which she had received. *Shaw v. Webber*, 79 Hun, 307; s. c. aff'd, 151 N. Y. 655.

Citing *Cleary v. The Municipal G. Co.*, 47 N. Y. St. Rep. 172; aff'd 139 N. Y. 643.

Plaintiff was told that it was necessary to sign a document presented to him before he could secure the payment due him and that it would not interfere with his claim for the other payment to become due in the future. Advantage having been taken of his inability to read to secure a general release he was not prevented thereby from recovering the balance. *Kelly v. New York*, 16 App. Div. 296; *Markowitz v. Metropolitan Street R. Co.*, 32 Misc. 751; *Meyer v. Haas*, 126 Cal. 569; *Re Fisher's Estate*, 189 Pa. St. 179.

See, also, *Whitney &c. Co., v. O'Rourke*, 172 Ill. 177; aff'g s. c., 68 Ill. App. 487; *Pioneer Cooperage Co. v. Romanowitz*, 186 Ill. 9; aff'g s. c., 85 Ill. App. 407; *Great Northern R. Co. v. Kasischki*, 104 Fed. Rep. 440; *Houston &c. R. Co. v. Milam*, (Tex. Civ. App.) 58 S. W. Rep. 735.

As to what does not amount to a fraudulent inducement, see *Demerite R. Co. v. Sullivan*, 21 Colo. 302.

So, where party was so ill as to make it unreasonable to require her

to read the document. *Chesapeake &c. R. Co. v. Howard*, 14 App. D. C. 262; s. c. aff'd, 178 U. S. 153.

There is no ground for avoidance, however, where the mistake was due to his negligent failure to read it. *Jossey v. Georgia Southern &c. R. Co.*, 109 Ga. 439.

See, also, *De Douglass v. Union Trac. Co.*, 198 Pa. St. 430.

Release of a railroad company's liability for obstructing a street released the city's liability for allowing it to exist. *Johanson v. City of New York*, 76 N. Y. Supp. 119.

Release of a director by a president and secretary of a company did not release another director. *Gilbert v. Finch*, 76 N. Y. Supp. 143.

Misrepresentation not believed was not a ground on which a release could be avoided. *Stevens v. Reed*, 60 N. Y. Supp. 726.

See, also, *Missouri &c. R. Co. v. Goodholm*, 61 Kan. 758.

A contract of an employé of a railroad company releasing the company from future damages for injuries does not preclude his widow and next of kin from recovering on account of his wrongful death, under Illinois Rev. Stat., chap. 70, sec. 1 and 2. *Meney v. Chicago &c. R. Co.*, 49 Ill. App. 105.

The acts of adjoining factories in polluting a stream are several and not joint, within the rule as to releases. *Western Tube Co. v. Gang*, 85 Ill. App. 63.

Acceptance by a widow of a death benefit does not affect her action as administrator for the benefit of her children. *Pittsburg &c. R. Co. v. Hosea*, 152 Ind. 412.

See, also, *Chicago &c. R. Co. v. Curtis*, 51 Neb. 442.

See, also, as to effect of release by representatives, *Christie v. Chicago &c. R. Co.*, 104 Iowa, 707; *Hill v. Pennsylvania R. Co.*, 178 Pa. St. 223; s. c., 35 L. R. A. 196; *Cullison v. Baltimore &c. R. Co.*, 4 Oh. N. P. 360; *Southern P. R. Co. v. Tomlinson*, 163 U. S. 369.

A release of a person as a joint trespasser to a person who is not in fact liable to the releasor, does not destroy the right of action of such releasor against those who are liable.

Separate actions may be maintained against the several joint tort-feasors for the same trespass; but there can be but one satisfaction, even though there be several verdicts for judgments.

The damages sustained by reason of a tort are not severable or apportionable between the wrong-doers; and there is no contribution among tort-feasors, as upon joint demands arising *ex contractu*.

Where the plaintiff in an action of trespass, intermarried with one of the joint trespassers after the commission of tort, it operated to discharge all the wrong-doers. *Turner v. Hitchcock*, 20 Iowa, 310.

From opinion.—"It is also an undisputed principle of the common law, that as a general rule the release of one joint wrong-doer releases all. The rule and the reason for it are thus stated in a work of high authority: 'If divers commit a trespass, though this be joint or several, at the election of him to whom the wrong is done yet, if he releases to one of them all are discharged, because his own deed shall be taken more strongly against himself.' Also (which seems to be the better reason), such release is a satisfaction in law which is equal to a satisfaction in fact. Bacon's Abr., Release B.; see, also, *Bronson v. Fitzhugh*, 1 Hill, (N. Y.) 185, where the common law authorities are fully collected; *Brown v. Marsh*, 7 Verm. 320; *Gilpatrick v. Hunter*, 11 Shep., (Me.) 18.

Not only does accord and satisfaction by one wrong-doer discharge all, but a partial satisfaction by one is, on the same principle, a discharge, *pro tanto* to the other. *Merchants' Bank v. Curtiss*, 37 Barb. 317; *Snow v. Chandler*, 10 N. H. 92. 'The reason of the rule,' that the release of one is the release of all, 'seems,' says Bronson, J., with his accustomed clearness and force (1 Hill, 185, *supra*), 'to be that the release being taken most strongly against the releasor, is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tort-feasors, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done.'

While this doctrine is frequently limited, especially in case of joint contracts, to technical releases, still it is always applied, both in tort and contract, where, although there has been no formal release, there has been a satisfaction as to one. This is well exemplified in *Ellis v. Betzer*, 62 Ohio, 891, above cited; see, also, 1 Dane Abr. 139, sec. 4; 2 Saunders, 47t; *Clayton v. Kynaston*, 2 Salk. 573, Id., *Merchants' Bank v. Curtis*, *supra*; *Snow v. Chandler*, *supra*; *Thurman v. Wilds*, 3 Perry & Dav. Rep. 289; s. c., 11 Ad. & E. 453.

It is also settled that the damage is not severable or apportionable between the wrong-doers, but the act of each is the act of all. Not only so, but unlike the case of joint demands arising *ex contractu*, there is no contribution among tort-feasors who have all knowingly committed a wrong. *Merryweather v. Nixon*, 8 Tenn. 183 (1796); *Farebrother v. Ansley*, 1 Campb. 343 (1808); *Wilson v. Milner*, 2 id. 453 (1810); *Betts v. Gibbons*, 4 Nev. & Man. 77; s. c., 2 Ad. & El. 57; *Nelson v. Cook*, 17 Ill. 443 (1856); 2 Greenl. Ev. 115; 1 Parsons on Cont. 37, note and cases; *Jacobs v. Pollard*, 10 Cush. 287.

It is also settled that a release, satisfaction or discharge may be, by operation of law, as the consequence of acts done voluntarily by the plaintiff. 'When,' says Ch. Justice Robertson, in *Alvin v. Shadburne*, 1 Dana, 68, 'a legal cause of action once subsisting has been suspended by the voluntary act of the party who was entitled to it, it is, in most cases, considered as released by law.' See, also, *Thomas v. Thompson*, 2 Johns. 470, 473, and authorities cited.

Therefore it is that 'if a *feme* creditor marry her debtor, or one of two joint debtors, the debt is (at common law aside from statute) discharge by the unity of the right and liability.' Chitty on Cont. 782; Co. Litt. 264b; 1 Bright on Husb. & W. 18, pl. 2; Bac. Abr. Release B., 1 Eng. ed. 609; 8 Co. 136; *Dyer* 140, per Robertson, Co. J.; *Allin v. Shadburne*, above cited; *Roberts v. Peake*, 1 Salk. 325, as to contracts, see, in this state, Revision, sec. 2764."

A release, not under seal, of one partner, by creditors of the partnership, in consideration of a payment of part of debt, drawn out of the

funds of the partnership, is no discharge of the residue. *Beemis v. Hoseley*, 16 Gray, 63.

That plaintiff could not read the paper he signed was no defense in the absence of fraud. *Shanley v. Laclede & Co.*, 63 Mo. App. 123.

See, also, *Chicago & C. R. Co. v. Bellwith*, 83 Fed. Rep. 437.

The courts favor the construction that a payment not being or operating as a full satisfaction, is a covenant not to sue. *Russell v. Adderton*, 64 N. C. 417; *Line v. Nelson*, 38 N. J. L. 358.

An agreement not to sue one of several tort-feasors does not release the others, but may be set up as a bar to an action brought against the one so contracting. *Couch v. Mills*, 21 Wend. 424; *McAllister v. Sprague*, 34 Me. 296; *Eastman v. Grant*, 34 Vt. 390.

A release of one of several obligors, whether they are bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar by all; but to have this effect, it must be a technical release under seal.

A covenant not to sue one of the several obligors is not pleadable in bar—it is a covenant only, and the covenantee is put to his cross action to recover the damages which a breach may occasion him. As an exception to this rule, a sole obligor may plead such covenant in bar, to avoid circuity of action.

A parol agreement by a creditor to accept from his debtor, by way of compromise, less than is due, is not a discharge of the original debt, but on account of the technical character of the rule there are exceptions to it.

To constitute an accord and satisfaction, there must be a satisfaction of the entire debt, so as completely to extinguish it. *Line v. Nelson*, 38 N. J. L. 358.

From opinion.—"That a release to one of several obligors, whether they are bound jointly, or jointly and severally, discharges the other, and may be pleaded in bar by all, will not be controverted. 2 Saund. 48, note 1; *Collyer on Partners*, secs. 606-608; *Rowley v. Stoddard*, 7 Johns. 207.

But a release of one of two joint promissors, to have this effect, must be a technical release under seal.

In *Harrison v. Close*, 2 Johns. 447, an agreement in parol not to look to one of two joint and several makers of a promissory note for payment, was held to constitute no defense to the action. This case was approved and the rule fully recognized by the New York courts in the following, among other cases: *Rowley v. Stoddard*, 7 Johns. 207; *Catskill Bank v. Messenger*, 9 Cowen, 36; *Frink v. Green*, 5 Barb. 455.

The same doctrine prevails in Massachusetts. Justice Dewey, in *Shaw v. Pratt*, 22 Pick. 305, cites the New York cases, and says that the principle is well settled; and it is so regarded by Chief Justice Shaw in the later case of *Pond v. Williams*, 1 Gray, 630.

In our own state, the case of *Adm'rs of Crane v. Alling*, 3 Green, 423, is an authority to the same effect.

This view is fully supported by the English authorities referred to in the cases above cited.

The reason of the rule is, that an agreement not under seal to discharge a particular person, or not to sue him, does not extinguish the debt, and, therefore, cannot bar the suit to recover it.

For the same reason, a covenant not to sue one of several obligors is not pleadable in bar to an action on the bond; it does not amount to a release, but is a covenant only, and the covenantee is put to his cross action to recover the damage which a breach may occasion. As an exception to this rule, a sole obligor may plead such covenant in bar, to avoid circuity of action; for he should recover for breach of the covenant precisely the same damage that he had suffered by suit on the bond. *Collyer on Partnership*, secs. 606-608; *Lacy v. Kinaston*, 1 Ld. Raym. 688; *Dean v. Newhall*, 8 Term. 168; *Hosack v. Rogers*, 8 Paige, 237; *Goodnow v. Smith*, 18 Pick. 414; *Couch v. Mills*, 21 Wend. 424; *Solly v. Forbes*, 2 Brod. & Bing. 38 (6 E. C. L. 11).

An examination of these cases will show a marked tendency to construe covenants as agreements not to sue, so as not to frustrate the intention of the parties, by giving their contracts a wider effect than was contemplated by them.

While it is clear that the arrangement between Nelson, the plaintiff, and Smalley, the defendant, cannot have the operation of a release, it remains to be considered whether it can be set up in bar of the suit by way of accord and satisfaction.

The doctrine established by the leading case of *Cumber v. Wane*, 1 Smith's Lead. Cas. 146, that a parol agreement by a creditor to accept from his debtor, by way of compromise, less than is due, is not a discharge of the original debt, has been adopted by the courts of this state.

In *Daniels v. Hatch*, 1 Zab. 393, Chief Justice Green says: 'It would seem to be well settled by authority, that such an arrangement is *nudum pactum*, and void; and, although payment of the sum agreed upon by way of composition be tendered, or actually received, it is no discharge of the original debt. Although it has been said, with much truth, that the rule rests upon reasons rather technical than satisfactory, it was long since adopted, and is supported by very great weight of authority.'

But, on account of the technical character of this rule, it has constantly been departed from upon slight distinctions.

In *Morris Canal v. Van Vorst*, 1 Zab. 119, Justice Randolph remarks, 'that the rule and the case itself have become so overburdened with exceptions and nice distinctions, and equivocal approbations by the numerous cases decided in the English and American courts, that it is sometimes difficult to ascertain what the law is as applicable to a particular case.' He instances as exceptions to the rule, the payment of a less sum before the due day, or where it is received by way of composition with creditors, or where, upon the dissolution of a firm, the creditor agrees to take the continuing, and discharge the retiring, partner, and the giving the negotiable note of a third person. The American editor of Smith's Leading Cases declares the rule to be, 'That anything of legal value in possession or in action—that is, any legal interest or right which the creditor had not before agreed to be received and actually received in full satisfaction of the debt—is a full satisfaction, without regard to the comparative

magnitude of the satisfaction with the original debt, and may be pleaded in bar as accord and satisfaction.'"

Release of one joint wrong-doer releases all. *Rodgers v. Cox*, 66 N. J. L. 432.

Release of a lot owner for injuries from an excavation abutting on the sidewalk releases the city as he is the party ultimately liable. *Brown v. Town of Louisburg*, 126 N. C. 701.

Where the plaintiff, a passenger, was injured in a street car collision, and for a sum of money paid, released the carrier company from all liability for the injury, he therefore discharged the liability of the other company also. *Seither v. Philadelphia Traction Co.*, 125 Penn. St. 397.

From opinion.—"The plaintiff, while riding as a passenger in a car of the People's Passenger Railway Company, was injured by a collision of said car with a car of a Philadelphia Traction Company, defendant. He brought suit against both companies, and recovered a verdict of \$14,000 against the company first named. This verdict was set aside by the court, probably because of its excessive amount, and a new trial granted. The plaintiff then settled with the said company (the People's), was paid \$6,000 in full of all claims against it, and executed a release in its favor. He also, by said paper, agreed to prosecute his claim against the Traction Company, and in case he should recover against it he was to reimburse the People's company for the wrong he received from it; the balance, if any, over the \$6,000, he was to retain for his own use. The court below held very properly that this agreement and release was a bar to a recovery in this action."

That injuries proved more serious than contemplated is no ground for avoiding a release. *Seeley v. Citizens' Traction Co.*, 179 Pa. St. 334.

Release of damages "which we have sustained or shall sustain by reason of the erection, construction and operation of said railroad or bridges" only covered such as resulted from the constructions in existence at the date of the release. *Browne v. Pine Creek R. Co.*, 183 Pa. St. 38.

See, also, in construction of releases, *Fremont &c. R. Co. v. Harlem*, 50 Neb. 698; *Pittsburg &c. R. Co. v. Mahoney*, 158 Ind. 196.

Where settlement is with one not liable, a joint tort-feasor is not released. *Thomas v. Central R. Co. &c.*, 194 Pa. St. 511.

In England, it is the rule that a judgment against one of two or more joint trespassers operates as a bar to an action against the others. *Buckland v. Johnson*, 15 C. B. 145; *Lovejoy v. Murray*, 3 Wall. 11.

Although this rule was followed in *Lovejoy v. Murray*, 3 Wall. 11; *Wilkes v. Jackson* (Va.) 2 Hen. & Munf. 355, and *Hunt v. Bates*, 7 R. I. 217, it has not been generally adopted. *Livingston v. Bishop*, 1 Johns. 290; *Sheldon v. Kibbe*, 3 Conn. 214 (where the taking of the body of the defendant in execution was not a bar); *Sanderson v. Caldwell*, 2 Aiken 195; *Osterhout v. Roberts*, 8 Cow. 43 (where the defendant

had been taken in execution and imprisoned sixty days); *Elliott v. Porter*, 5 Dana 299; *Blann v. Cochern*, 20 Ala. 320; *Knott v. Cunningham*, 2 Sneed 204; *Paige v. Freeman*, 19 Mo. 421; *Floyd v. Browne*, 1 Rawle 125 (where it was held that after judgment of trover against two trespassers without satisfaction, the plaintiff could not bring *assumpsit* against another trespasser); *Ayer v. Ashmead*, 31 Conn. 447; *Gunther v. Lee*, 45 Md. 60; *Stone v. Dickinson*, 7 Allen 26; *Urton v. Price*, 57 Cal. 270. *Lovejoy v. Murray*, 3 Wall. 1, 10.

From opinion.—"Two propositions, however, seem to be conceded by all the authorities, which bear with more or less force on the main question. * * *

1. That persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may all be sued in one action; or one may be sued alone, and can not plead the nonjoinder of the others in abatement; and so far is the doctrine of several liability carried, that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages.

2. That no matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause."

That the consideration was inadequate was no ground for avoiding the release. *Lumley v. Wabash R. Co.*, 71 Fed. Rep. 21.

See *Cumberland County v. Central Wharf S. T. Co.*, 90 Me. 95; *Borkins v. New Orleans &c. R. Co.*, 48 La. Ann. 831.

That plaintiff misunderstood the effect of accepting a relief benefit in giving a release did not permit him to avoid such release. *Vickers v. Chicago &c. R. Co.*, 71 Fed. Rep. 139.

Receipt by firm for injury to horse was not a release for injury to a member thereof. *Baltimore &c. R. Co. v. McLaughlin*, 73 Fed. Rep. 519.

Release did not embrace unknown injuries, where plaintiff was told, though honestly, by defendant's physician, that pain was the result of a different cause. *Lumley v. Wabash R. Co.*, 76 Fed. Rep. 66; *Wilcox v. Chicago &c. R. Co.*, 111 Fed. Rep. 435.

See, also, *Och v. Missouri &c. R. Co.*, 130 Mo. 27; *Eccles v. Union Pacific R. Co.*, 7 Utah, 335.

But see *Missouri &c. R. Co. v. Goodholm*, 61 Kan. 758.

Joint wrong-doers are severally liable and an action may be dismissed against one. *Biskal v. Chandler*, 26 Wash. 241.

Release of one joint tort-feasor releases the other in spite of a stipulation to the contrary. *Abb v. Northern P. R. Co.*, 28 Wash. 428.

Although an agreement not to sue one of several joint and several contractors, or joint trespassers, made upon a sufficient consideration, is

not a technical release or discharge of the debt or damages, yet, to avoid circuity of action, the party with whom the agreement has been made may set it up as a bar to an action brought against him *alone* for such debt or damages.

In the absence of any technical release or discharge, under seal, of one joint trespasser, the receipt of money from one with an agreement not to prosecute him, discharges the others only where such money is received as an accord and satisfaction for the *whole* injury; where it is received only as *part* satisfaction, it discharges the others only *pro tanto*; and the question of fact is for the jury, at least in all cases where the amount of the damages does not rest chiefly in the discretion of the jury, but is the subject of proof and computation.

In an action for a trespass to real estate by entering thereon and cutting and carrying away from it saw logs, the jury found the amount and value of the logs carried away, and also that plaintiff, in consideration of a certain sum of money (much less than the value of the logs), paid him by one who committed the trespass jointly with the defendants, had agreed not to sue him therefor; that at the time the damages remained unliquidated; but that it was not understood between the parties to such agreement that said sum satisfied plaintiff for the damages sustained, but it was understood that he intended to look to the other joint trespassers therefor. Held, that the action was not barred by such agreement. *Ellis v. Esson*, 50 Wis. 138.

From opinion.—"The proposition of the learned counsel for the appellant is, 'that a release or discharge of one of several joint trespassers is a release or discharge of the whole trespass,' and he argues that it is immaterial what the form of the agreement is between the parties, so long as it is sufficient to bar the right of the injured party from thereafter maintaining an action for such trespass against the party with whom the agreement was made; and that an agreement not to prosecute the party for the trespass, made upon a sufficient consideration, is equally as effective to bar such action against him, as a technical release. In this latter proposition we think the learned counsel is supported by the great weight of authority. Nearly all the authorities hold that, although an agreement not to sue one or more of several joint and several contractors or joint wrong-doers, made upon a sufficient consideration, is not a technical release or discharge of the debt due or of the damages sustained, yet, to avoid circuity of actions, the party with whom the agreement has been made may set it up as a bar to an action brought against him alone for such debt or damages. *Lacy v. Kynaston*, 2 Salk. 575; 1 Parsons on Contract 28, note i, and cases cited.

The learned counsel for the respondent contends that in order to bar an action for a trespass against all of several joint wrong-doers, by an agreement made between the injured party and one or more of such wrong-doers, by which, for a valuable consideration, he agrees not to prosecute or look to them for any of his damages, the contract must be such as shows, either in fact or in law, that the injured party has received full compensation for his injury; and that when

the contract, whether under seal or otherwise, shows that the compensation which he received from the parties whom he contracts to not prosecute further, or whom he in fact discharges from further liability to him for damages, was not intended as a full compensation for his injuries he may still pursue the other wrong-doers for his damages, giving them the benefit of the sums he may have received of those who have purchased their piece. In the language of the learned counsel, 'the injured party is entitled to full compensation for his injuries, and to but one compensation.' When, therefore, the injured party received a full compensation in fact from one of two or more joint wrong-doers, or when he enters into such a contract with one, that the law raises a presumption that he has received such full compensation from him, such receipt of compensation or such agreement is a bar to an action against the other wrong-doers. To bar the action of the injured party it must be shown either that he has received full compensation for his injuries, or what was intended as a full compensation, or that he has released one or more of the wrong-doers by a technical release, under seal.

When a technical release, under seal, is given by the injured party to one of several joint wrong-doers, the courts have quite uniformly held this to release all, and that it is a good bar to an action against those not named in the release. The reason of this rule is based upon the nature of the release under seal. The release being under seal, and absolute, its meaning cannot be controlled by parol evidence, and the law raises a conclusive presumption that it was given in full satisfaction in fact for the injury, and upon a sufficient consideration. The effect of this technical release under seal, and the legal presumptions which arise therefrom, and which cannot be controlled by any parol proofs, is well illustrated in the case of *Bronson v. Fitzhugh*, 1 Hill, 185. In that case two parties, common carriers, were charged by the plaintiff with negligence. Before the action was commenced, the defendant Fitzhugh had agreed in writing, without seal, with the plaintiff 'in consideration that the plaintiff would release Throop, the other defendant, from all liability in this matter, that any liability which he, Fitzhugh, might have incurred, or was subject to in the premises, should in no respect be impaired or affected by the release.' The plaintiff thereupon released Throop, and, as is evident from the statement of the case, by a technical release, under seal, containing no reference in it to the agreement made with Fitzhugh. The plaintiff brought his action against Throop and Fitzhugh, and the process was served on Fitzhugh alone, and he set up the release of Throop as a defense, and the court held the release a bar to the action against Fitzhugh. The ground of the decision was, that, the release being under seal, its effect was a question of law, and no parol evidence could be received to control the effect which the law gave to it. Justice Bronson, who delivered the opinion of the court, says: 'The deed being taken most strongly against the releasor, is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tort-feasors, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done.'

There is no dispute in the authorities on this question. All hold that a technical release of one of two or more joint wrong-doers, under seal, discharge them all, and is a good bar to an action against any or all of them; and the reason of the rule is above stated. Upon the production of the release, the law con-

clusively presumes that the injured party has been fully satisfied for the wrong done, and this legal presumption cannot be changed or disproved by any parol evidence. See *Cocks v. Nash*, 9 Bing. 341; *Brooks v. Stuart*, 9 A. & E. 854.

It is insisted by the counsel for the respondent, that when the contract which is set up as a release of one of several joint wrong-doers is not a technical release, the construction of which is fixed by the law, then the intention of the parties is to govern; and if it be clear that there was no intention on the part of the injured person to release his cause of action against all the wrong-doers, and that the sum received was not in fact a full compensation for his injury, nor intended to be such by the parties, then any agreement of the injured party not to prosecute one or more of several wrong-doers, in consideration of the payment of a specified sum of money, does not discharge the other wrong-doers, except to the extent of the money so received. In other words, when the contract is not of such a nature that the law deems it conclusive evidence that the injured person has been satisfied for the wrong, then it becomes a question of fact for the court or jury whether what he has received of the one wrong-doer was received in full satisfaction of his wrong; and, if it appears that it was not so received, it is only *pro tanto* a bar to an action against the other wrong-doers. And this view of the case, we think, is sustained by the great weight of authority, in all cases where the amount of the damages is the subject of proof and computation, as in this case, though there is some conflict in those cases where the damages are not the subject of proof and computation, but rest mostly in the discretion of the jury, as in cases of assault and battery, slander, libel, false imprisonment, and other actions of that nature.

It is probable that one reason why the rule above stated has not been so universally adopted by the courts in the class of actions above named, is that in such cases the real amount of injury which the plaintiff has sustained is so much a matter of uncertainty that it would be very difficult to tell, before a verdict was obtained, what they were, and any sum received from one of the wrong-doers to buy his peace might well be considered a full compensation for the injury sustained. In cases where there is no technical release and discharge of one of several joint wrong-doers, whether the receipt of money from one, accompanied with an agreement not to prosecute him for the wrong, is a discharge of the other wrong-doers, depends upon the question whether such money was received as an accord and satisfaction for the whole injury. If it was, then all are discharged; if it was not, but only as a part satisfaction, then it is a discharge of the others only *pro tanto*. A court or jury would more readily infer that a receipt of \$200 from a party who had assaulted and beaten another, by the party injured, was intended as a satisfaction for the whole injury done, than if the same sum of money had been received by the injured party of one of two or more persons who had tortiously converted a thousand bushels of wheat worth \$1,000. See *Brown v. Cambridge*, 3 Allen, 475; *Stone v. Dickinson*, 5 id. 29. The distinction made by the courts between the class of cases above mentioned, where there is no fixed legal measure of damages, and those where there is a fixed legal measure, is considered and commented upon in the following cases: *McCrillis v. Hawes*, 38 Me. 568; *Gilpatrick v. Hunter*, 24 id. 18; *Eastman v. Grant*, 34 Vt. 390; *Ellis v. Bitzer*, 2 Ohio, 295; *Knickerbacker v. Colver*, 8 Cow. 111.

In the case of *Eastman v. Grant*, *supra*, which was an action for assault and battery, in commenting upon the effect which must be given to the contract

made with two of the joint wrong-doers, by which, in consideration of \$100 paid by each, the plaintiff agreed not to prosecute them, and to save them harmless from all liability to the plaintiff for all damages sustained by reason of the assault and battery, the court says: 'The plaintiff's claim rests solely in damages. There was no criterion by which the amount could be definitely determined. It was a matter of mere estimation, based on opinion and judgment, not of computation based on any fixed data. If the question were submitted to a jury, they could determine it only by estimation. Here the plaintiff and the Bowens got together and determined the matter for themselves. They estimated the damages and fixed the amount of the plaintiff's claim against them, and they paid it and were discharged. * * * There is nothing in the case to indicate that the amount paid was not the full amount of the damages, and the extent of the plaintiff's claim on them. If the plaintiff had brought his action against the Bowens and had received \$200 damages, and they had paid the judgment, that clearly would have discharged all. If these parties agree upon the amount without the intervention of a court or jury, and the amount is paid, the effect, we apprehend, must be the same. The plaintiff's claim is the same against all the parties engaged in the trespass. He may pursue them jointly or severally to enforce it, but when that claim is once paid it is cancelled as to all the parties.'

It will be seen, from the opinion of the court in this case, that the reason for holding that the settlement by the two joint wrong-doers was a bar to the action against the others, was put upon the ground that the evidence showed that the plaintiffs had received from the two what was agreed upon between the parties to be a full compensation for the injury the plaintiff had sustained by the assault and battery, and not solely upon the ground that the plaintiff had agreed not to prosecute these parties further for such injury. The rule governing in actions of tort is briefly stated by Judge Cooley in his work on torts, 139: 'The bar arises not from any particular form that the proceedings assume, but from the fact that the injured party has actually received satisfaction, or what in law was deemed the equivalent.' Story on Contracts, sec. 997, says: 'A parol release to one of several joint obligors will never operate as a complete discharge of the others, unless the debt be fully satisfied by him. If it be partially satisfied, it may *pro tanto* be pleaded in discharge of the others.' The courts have uniformly applied the same rule to actions in court.

Robertson, Ch. J., in 3 Robt. 713, says: 'The sole ground of the effect of a release of one of several joint contractors or wrong-doers, in discharging all, is that it was, in presumption of law, a satisfaction; and whenever a release was in such form, or accompanied by such restrictions as to repel such presumption, it did not necessarily discharge all.'

Parsons, in his work on Contracts, vol. 1, p. 29 (6th ed.) says: 'If an action be brought against many, and to this an accord and satisfaction by one be pleaded in bar, it must be complete, covering the whole ground, and fully executed. It is not enough if it be in effect only a settlement with one of the defendants for his share of the damages; nor would it be enough if it were only this in fact, although in form an accord and satisfaction of the whole.'

Justice Miller, in the case of Lovejoy v. Murray, 3 Wall. 1-17, says: 'When the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same damages.'

But it is not easy to see how he is so affected until he has received full satisfaction, or that which the law must consider as such.'

It is not claimed by the learned counsel for the appellants, that the contract made between the plaintiff and Comstock shows that the plaintiff received the \$200 as satisfaction in full for his damages, or that it was understood between the parties that the \$200 was a full compensation therefor, or that the plaintiff intended to relinquish his right to claim further compensation and damages from the defendants for his injury. The finding of the jury is express that it was understood at the time that the plaintiff intended to look to the defendants for the balance of his damages over the \$200 received of Comstock.

But it is insisted by the counsel for the appellants that because the plaintiff bound himself, by a valid contract, not to prosecute Comstock for the trespass, he was discharged from all further liability to the plaintiff on account of such trespass, and the other wrong-doers were also discharged, notwithstanding it was not so agreed or intended by the parties. It is possible that this rule might apply to a case of two or more persons who were jointly and not severally bound by the contract. If, in such case, the person to whom the parties were jointly bound should make a contract upon sufficient consideration, by which he discharged one, no action could be maintained against the other joint contractors, because the rules of practice in such cases require that all the joint contractors shall be sued together, and the other parties may insist upon such joinder of parties. If, therefore, one of the joint contractors has been discharged from further liability by the plaintiff, so that the joint action cannot be maintained against him, it must fail as to all. *Bowen v. Hastings*, 47 Wis. 236. In such cases, however, when it is apparent that it was not the intention of the parties to discharge or satisfy the debt or claim, but only to relieve one party from all liability to pay the same, the courts have usually avoided the difficulty by construing such contract as a simple contract not to sue the party discharged, and permit the action to proceed against all the parties notwithstanding the contract, leaving the discharged party to his action against the plaintiff for any damages he may sustain by reason of his being sued contrary to the conditions of such contract. *Line & Nelson v. Nelson & Smalley*, 38 N. J. Law, 358; *Solly v. Forbes*, 2 Brod. & Bing. 38 (6 E. C. L. 11); *Couch v. Mills*, 21 Wend. 424; *Price v. Barker*, 1 Jurist. 775 (N. S.); *Dean v. Newhall*, 8 T. R. 168. Admitting that the rule contended for by the learned counsel for the appellants would apply to the case of joint contractors, it could have no application to joint wrong-doers, who are always held liable to the injured party severally as well as jointly. * * *

This rule is, we think, supported by the great weight of authority, as will be seen by an examination of the large number of authorities cited by the learned counsel for the respondents. The following cases fully sustain the position stated: *Snow v. Chandler*, 10 N. H. 92; *McCrillis v. Hawes*, 68 Me. 568; *Spencer v. Williams*, 2 Vt. 209; *Chamberlain v. Murphy*, 41 id. 110; *Sloan v. Herriek*, 49 id. 328; *Matthews v. Chicopee Co.*, 3 Robt. 712; *Bloss v. Plymale*, 3 W. Va. 393; *Shaw v. Pratt*, 22 Pick. 307, *Pond v. Williams*, 1 Gray, 630, 636; *Bank v. Messenger*, 9 Cow. 37; *Line v. Nelson*, 38 N. J. L. 358; *Irvine v. Milbank*, 15 Abb. Pr. 376 (N. S.); *Solly v. Forbes*, 6 Eng. Com. Law, 11; *Thompson v. Lack*, 54 id. 551; *Bank v. Burtiss*, 37 Barb. 319-320; *Gunther v. Lee*, 45 Md. 60-67.

Many other cases will be found in the books holding the same doctrine, and so

far as we have been able to find, there are very few which hold the contrary doctrine. Nearly all the cases in which it has been held that an agreement by the injured party discharging one or more of several joint trespassers was a discharge of all, proceed upon the ground that the contract evidencing the discharge showed that the plaintiff had received a full compensation for all his injuries from the person discharged. The case of *Gunther v. Lee*, last above cited, proceeds upon this distinction. In that case one of the joint wrong-doers had been released, under seal, with a reservation that the release should not prejudice the plaintiff's right to proceed against the other wrong-doers for damages claimed by the plaintiff. The court says: 'Here the release expresses a consideration on its face which was received in full satisfaction of the wrong complained of,' and then holds the proviso in the release void, as repugnant to the legal effect and operation of the release itself."

STATE.

Liability of, for Acts of Officers, Agents, &c.

The state is not liable for the negligence or misfeasance of its agents, unless such liability has been voluntarily assumed by it by legislative enactment. *Sipple v. State*, 99 N. Y. 287; *Rexford v. State of New York*, 105 id. 229; *Lewis v. State of New York*, 96 id. 71.

The only existing general authority to enforce a claim against the state of New York, is that given by chapter 205 of the Laws of 1883, "An act to abolish the office of the canal appraiser and the state board of audit, and to establish a board of claims and define its powers and duties," amended by chapter 60, Laws of 1884. Section seven of this act is as follows: "Said board shall have jurisdiction to hear, audit and determine all private claims against the state which shall have accrued within two years prior to the time when such claim is filed, except claims barred by any existing statute, and to allow thereon such sums as should be paid by the state. Such board, however, shall have jurisdiction of such claims as were formerly cognizable by the state board of audit, provided they shall be filed on or before July first, eighteen hundred and eighty-four. It shall also have jurisdiction of all claims on the part of the state against any person making a claim against the state before the said board, and shall determine such claim or demand, both on the part of the state and the claimant, and if it finds that the demand of the state exceeds the demand of the claimant, it shall award such excess in favor of the state against the claimant."

By section 13 of said act it is provided that, "all the jurisdiction and power to hear and determine claims against the state, formerly possessed by the canal appraisers and the state board of audit, is hereby vested in the board of claims."

In *Locke v. State*, 140 N. Y. 482, decided in 1894, it is said: "This state, through its legislature, has created a tribunal for the determination of certain claims that its citizens may have against it, and has consented to be bound by its judgments so far as they proceed upon legal principles (Laws of 1883, chap. 205). But this assent applies only to a limited class of claims arising from the use or management of the canals (Laws of 1870, chap. 321). As to every claim or class of claims not expressly, or by fair implication included within the language of the statute, the state, as the sovereign, is still exempt from liability in any judicial tribunal (*Rexford v. State*, 105 N. Y. 229). The jurisdiction of the board of claims under the act of 1883, is the same as that of the canal appraisers under the act of 1870, and unless the state in that act consented to be sued, impleaded or held liable in such a case as this, then the board of claims properly dismissed the case. The jurisdiction which the board of claims may exercise has been conferred by the legislature in the following language:

"To hear and determine all claims against the state of any and all persons and corporations, for damages alleged to have been sustained by them from the canals, or from their use and management, or resulting or arising from the negligence or conduct of any officer of the state having charge thereof, or resulting or arising from any accident or matter or thing connected with the canals; but no award shall be made unless the facts proved shall make out a case which would create a legal liability against the state, were the same estab-

lished in a court of justice against any individual or corporation, * * * provided that the provisions of this act shall not extend to claims arising from damages resulting from the navigation of the canals." See Laws of 1870, chap. 321.

This seems to accord with *Rexford v. State of New York*, 105 N. Y. 231.

Plaintiff, while a prisoner in the state reformatory, was injured by the breaking of a ladle in which he was carrying molten iron; he had discovered a defect in the ladle some time before, and had called the overseer's attention thereto, but no attention had been paid to his complaint. The state was not liable; no such liability was imposed by the act creating a board of audit (chap. 444, Laws of 1876), or by that establishing the board of claims (chap. 505, Laws of 1883). *Lewis v. State of New York*, 96 N. Y. 71, aff'g dismissal of claim.

From opinion.—"It is apparent that even if this is so (that overseer was negligent) the claimant must fail unless the doctrine of *respondeat superior* can be applied to the state, and the state made liable for the negligence or misfeasance of its agents, in like manner as a natural person is responsible for the acts of his servants. We are aware of no principle of law, nor of any adjudged case, which makes that application, except when the state, by its legislature, has voluntarily assumed it. The contrary of this is well settled upon grounds of public policy, and the doctrine is so uniformly asserted by writers of approved authority and the courts, that fresh discussion would be superfluous (Story on Agency, sec. 319 [7th ed.]). Indeed, the principle upon which the doctrine is founded—that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it, excludes such a case as we have before us. The claimant was not a voluntary servant for hire and reward, nor was the state his master in the ordinary sense. He was compelled to labor as a means of reformation, and to endure imprisonment as a punishment and for the protection of the community. While employed he was subject to such regulations as the keeper charged with his custody might, from time to time, prescribe, and if in the course of service he sustained injury, it must be attributed to the cause which placed him in confinement."

Under N. Y. act of 1883 (sec. 13, chap. 205, Laws of 1883; sec. 1, chap. 321, Laws of 1870), giving the board of claims jurisdiction for damages sustained "from the canals or from their use and management, or resulting from the negligence or conduct of any officer of the state having charge thereof, or from any accident or other matter or thing connected therewith," but prohibiting an award unless the case be such as would create a legal liability "were the same established against an individual or corporation," liability for injuries from negligence is not limited to negligence of some person described by law as an officer of the state, but extends to injury from negligence of those intrusted by the state with the execution of its work, provided an individual or corporation would be liable under the same circumstances.

The keeper of a lock on a canal went away, and, as he testified, left the gates in proper condition; but they were opened, and the water overflowed the level and damaged the plaintiff's property. The keeper had no right to go away and the state was liable. *Sipple v. State*, 99 N. Y. 284, aff'g award for claimant.

Where the state had no authority to and was prohibited from using more water from a river than was necessary for the purposes of the navigation of a canal, but more water was unlawfully diverted therefrom on account of defects in locks, gates, walls, &c., of the canal, than the superintendent of public works, in the exercise of his discretion, required for the use of the canal and for navigation, whereby a riparian proprietor and mill owner on the river was deprived of the lawful use of a portion of the excess of water so taken, he was entitled to damages therefor. A finding of neglect to prevent leakage was not necessary, as it was incumbent on the state to prevent leakage. As the injury to the rights was continuing, such part as occurred within two years of filing the claim was not bound by the statute. *Silsby Mfg. Co. v. State of New York*, 104 N. Y. 562, rev'g judg't awarding nothing.

An employé of the state, while digging clay under a bank of overhanging earth, loosened by the captain of the state boat, under whom he was working, was injured by the fall of such earth. The injury was caused by the negligence of a co-servant and the state was not liable. *Loughlin v. State of New York*, 105 N. Y. 159.

Prior to the act of 1870 (chap. 321) "for the appraisal of canal claims against the state," there was no general statute giving to the canal appraisers jurisdiction over injuries resulting from neglect, or which were temporary and occasional in their character and involved no permanent and continuous damage.

The claim was for damages for overflow of premises by an improper construction of the banks of the Oswego canal, so that the water soaked through. The claim was improperly rejected by the board of claims on the ground of a defective pleading, as was another claim that the leaving of a portion of coffer dams in the Oswego river after completion of such, so that the level of the water was raised and premises flooded. The decision turned upon the construction of enabling acts. *Heacock v. State of New York*, 105 N. Y. 246.

The plaintiff stopped to get clearance papers on the Erie canal while his boat proceeded on its way. While going along the berme bank to overtake it he was obliged to climb over an abutment of the bridge. The iron rod used for a handle, which had been loose for a year, gave way and he was injured. The state was liable under chapter 321, Laws 1870, rev'g judg't awarding nothing. *Rexford v. State*, 105 N. Y. 229.

In the construction of a reservoir and its embankments the soil was removed from one side of the reservoir, exposing a bed of coarse gravel, through which the water flowed and was discharged upon lands of owners, doing damage. The state was chargeable with negligence. *Pixley v. Clark*, 35 N. Y. 520; *Jutte v. Hughes*, 67 id. 267; *Mairs v. Manhattan R. E. Assn.*, 89 id. 506.

The rules regulating the rights and liabilities of adjacent owners of land with reference to interference with underground currents and streams had no application.

As the claim was maintainable for injuries inflicted from time to time, it was not barred by the statute of limitations. *Reed v. State of New York*, 108 N. Y. 407, rev'g judg't awarding nothing.

From opinion.—"In *Clements v. The State* (105 N. Y. 621), in which the award was affirmed in this court, it held the state liable for not properly puddling the banks of the canal after raising the level of the water in the canal. In the cases of *Heacock v. The State*, 105 N. Y. 246; *Avery v. The State*, id. 636, and *Collins v. The State*, id. 641, a refusal to award damages for such percolations was reversed by this court and the claims sent back for a rehearing upon the merits."

The plaintiff fell through a bridge across a side cut of the canal. The plaintiff was negligent, and also the state owed him no duty. *Splitstorf v. State*, 108 N. Y. 205, aff'g judg't dismissing claim.

New York Laws 1870, (chap. 321) authorizing appraisal of claims against the state for the negligence of its officers in the use and management of canals, the personal representative of a person killed by such negligence may recover, where a natural person or a corporation would have been chargeable under the same circumstances under the Code of Civil Procedure (p. 1902). The alleged negligence consisted in leaving the railing of a bridge in a dangerous and insecure condition. *Bowen v. State of New York*, 108 N. Y. 166, aff'g award.

Splitstorf v. State, 108 N. Y. 205.

When through the negligence of the agents of the state, certain highway bridges of a town were injured, the state was liable for the expense of repairing the same, and claim therefor was properly presented by the supervisor. *Bidleman v. State of New York*, 110 N. Y. 232, rev'g judg't awarding nothing.

Citing *Bridges v. Supervisors*, 92 N. Y. 570, distinguishing *Cornell v. Butternuts &c. Co.*, 25 Wend. 364; *Morey v. Town of Newfane*, 8 Barb. 645; *Monk v. Town of New Utrecht*, 104 N. Y. 557; *People v. Auditors of Little Valley*, 75 id. 316; *Town of Fishkill v. Plank Road Co.*, 22 Barb. 634, 647; *Town of Galen v. Plank Road Co.*, 27 id. 543; *People v. Pennock*, 60 N. Y. 421.

The state constructed a sewer in a street, taking up an old sewer previously constructed by the city and into which the owners had drained

the adjoining lots. Those in charge of the state work made provision for connecting therewith drains from adjoining lots. The state was liable for the subsequent negligent obstruction of the sewer whereby water set back into the basement of a store on a lot connected with the sewer, as it was bound to use reasonable care in the management and repair of sewer, and its duty was the same as that of a city to abutting owners under the same circumstances. The superintendent of canals, with which sewer was connected, had notice of the defect. *Ballou v. State of New York*, 111 N. Y. 496, rev'g judg't awarding nothing.

Barton v. City of Syracuse, 36 N. Y. 54; *Nims v. City of Troy*, 59 id. 500.

A feeder of a canal was constructed many years before the accident, and was covered by timbers and planks, upon which earth was laid, and for more than twenty years the public had used the same as a highway in a city, but it had never been opened as a street. While claimant was passing the timbers gave way on account of decay and she was injured. She knew the construction of the feeder, its use, &c. She was not entitled to recover. The legal dedication of the land as a public highway could not be inferred on theory of prescription. The state owed no duty of active vigilance to persons using the land for their own convenience. *Donahue v. State of New York*, 112 N. Y. 143, aff'g judg't awarding nothing.

Splittorf v. State, 108 N. Y. 205.

The fact that board of claims are required to view premises for the damage of which claim is made, does not deprive the court of power to review award upon the question of damages, yet, unless it appears that they adopted some erroneous rule of damages, or the evidence and findings show a misconception of the facts, or error in their estimate, their award will be affirmed. *Perkins v. State of New York*, 113 N. Y. 660, aff'g award.

The cases that fall generally within chap. 321, Laws 1870, "providing for the appraisal of canal claims against the state," are for damages arising from the canals themselves, their use and management, and the negligence and conduct of officials in matters relating to and connected with the canals.

A claim arising out of the permanent appropriation by the state of lands or an easement therein, which will presumably continue while the canals exist, is controlled by the revised statute, (1 R. S. 222, secs. 46-48), or by the act of 1830. (Chap. 293, Laws 1830.)

Plaintiff claimed damages for the overflow of his land by a permanent dam, constructed under act of 1864, chap. 151. Such overflow was the taking of a permanent easement under the act of 1830, the land having

been appropriated when the dam was completed and the water of the river raised, and neglect to present claim within one year thereafter was a waiver of all right to damages. *Benedict v. State of New York*, 120 N. Y. 228, aff'g judg't awarding nothing.

The court of appeals, under chap. 507, Laws 1887, which authorizes an appeal to that court from a final award or order of the board of claims, "upon questions of law only arising upon the hearing of the claim, or upon the excess or insufficiency of such award or order," and provides that the court "shall hear such appeal and affirm, reverse or modify such award or order, or dismiss such appeal, or award a new hearing before the board of claims, as justice may require," may for any legal error increase or diminish the award as justice may require, and, as modified, affirm the decision without sending the case back for a rehearing.

The court held that claimant was entitled to amount shown rather than amount allowed for overflowing land; also damages for loss of use while land was unfit for cultivation; also for sum expended in removing piles of earth thrown on land by canal commissioners; also a sum expended for reclaiming land after it had been drained. *Sayre v. State of New York*, 123 N. Y. 291, increasing award.

The abandonment and discontinuance of a canal under statute, did not release the state, so far as the abandoned portion was concerned, from liability imposed upon it by the act of 1870 (chap. 321), for damages sustained by individuals through negligence of state officials. Plaintiff was injured by the fall of a farm bridge over the canal. *Woodman v. State of New York*, 127 N. Y. 397, aff'g award.

See, as to liability in case of the abandonment of a canal, *Stone v. State*, 138 N. Y. 124.

When a claim has been wholly rejected by the board of claims, to sustain an appeal, the right to recover some sum must so conclusively appear, as to raise a question of law, or there must be some material or erroneous ruling adverse to the claimant. *Spencer v. State of New York*, 135 N. Y. 619.

Upon a trial before the board of claims, claimant erroneously was allowed to give in evidence the record of an award by the board to another person, for damages alleged to have been caused by the same negligence, their being no priority between the parties.

While it appeared that the overflow of the claimant's land would not have occurred had the guard bank, constructed by the state to protect adjoining lands in changing the channel of a river, been kept in repair and at its original height, there was no evidence that the overflow was greater than if the channel had not been made, and state was not liable.

Stone v. State of New York, 138 N. Y. 124, rev'g judg't awarding damages.

The state cannot be impleaded in the courts or made liable in damages, save in such cases as it has itself consented to be made liable.

Chap. 205, Laws 1883, extends only to such claims as are expressly or by fair implication included within the language of the statute.

As the jurisdiction of said board is the same as that of the canal appraisers, under act 1870 (chap. 321), which, it is provided, "shall not extend to claims arising from damages resulting from the navigation of the canals," the board of claims has no jurisdiction over such a claim.

The basis of a claim was that claimant's intestate, while upon a canal boat passing under a bridge over a state canal, through the negligence of the agents or servants of the state operating the bridge, was injured. The damages resulted "from the navigation of the canals," within meaning of the act, and claim was properly dismissed. *Locke v. State of New York*, 140 N. Y. 480, aff'g dismissal of award.

See *Chisholm v. State*, 141 N. Y. 246.

Act of 1895, ch. 342, "to authorize the board of claims to hear, audit and determine the claim of John Roberts," for damages for wrongful conviction and imprisonment held, not to constitute such board merely a tribunal to assess damages as a recognized liability on the part of the state, but to adjudicate on the validity of the claim itself. *Roberts v. The State*, 160 N. Y. 217.

From opinion.—"It is manifest that the appellant's pardon and restoration to the rights of citizenship, had no retroactive effect upon the judgment of conviction which remains unrevised and has not been set aside. We think the effect of a pardon is to relieve the offender of all unenforced penalties annexed to the conviction, but what the party convicted has already endured or paid, the pardon does not restore. When it takes effect, it puts an end to any further infliction of punishment, but has no operation upon the portion of the sentence already executed. A pardon proceeds not upon the theory of innocence, but implies guilt. If there was no guilt, theoretically at least, there would be no basis for pardon. It is granted not as a matter of right, but of grace. In the language of another: 'A party is acquitted on the ground of innocence; he is pardoned through favor.' The pardon in this case shows upon its face that it was granted as an act of mercy, not as one of justice. It was upon the representation that the appellant was a fit subject for mercy that it was obtained, and not upon the ground that the judgment was unjust or invalid. If the judgment was erroneous, the remedy was by appeal or by application to set it aside, and not by pardon.

That question was for the judicial branch of the state government to determine, and not for the legislative or executive department. Upon this branch of the case we concur in the conclusion reached by the learned appellate division, which has so carefully considered the question that no further discussion seems necessary.

Assuming, as we must, that the plaintiff's pardon and restoration to citizenship affected the judgment of conviction only to relieve him from future or further punishment, it follows that the imprisonment for which he seeks to recover damages was in all respects proper.

The judgment of conviction was introduced in evidence before the court of claims so that the record of the trial in this action contains a judgment adjudging the plaintiff guilty of the crime with which he was charged and for which he was convicted and imprisoned. Thus it was conclusively established that he was guilty of the offense charged and that his punishment was legal. Under these circumstances, it is obvious that he was not entitled to recover unless that right is expressly conferred by the statute of 1895, or is to be clearly and necessarily implied from its provisions.

This brings us to a consideration of the provisions of that act. By it the appellant was authorized to present a claim to the board of claims for damages sustained by reason of his conviction and imprisonment. The board was then authorized to hear and pass upon the claim, and award such compensation as should appear to be just and reasonable.

The evident purpose of this statute was threefold:

1. To permit the plaintiff to present to the board of claims any claim he had or supposed he had against the state for damages sustained by reason of his conviction and imprisonment for the crime of burglary.
2. When a claim was presented, to authorize the board to pass upon it and determine whether it was valid or invalid; and
3. If found valid, to allow it to determine what just and reasonable compensation he should receive for the damages he had sustained by reason thereof.

Thus, if a claim was presented, the statute contemplated a trial before the board of two questions. The primary and fundamental one was whether the claim was proper and valid, which included the propriety or impropriety of the appellant's conviction and imprisonment. The other related to the amount of damages and became important only after the board determined that the appellant's imprisonment was improper and the claim presented by him valid. The solution of these questions was dependent upon the proof adduced upon the trial. Obviously it was not the intention of the legislature to itself pass upon the question, whether the appellant's conviction was proper or otherwise, but to submit that question, together with the question of damages, to the board for its consideration and determination."

State, not liable for debts of its board of agriculture, was not liable for its negligence in connection with a state fair exclusively under its control. *Melvin v. State*, 121 Cal. 16.

Action to recover for goods taken by officers claiming to act in behalf of the state under an unconstituted statute, held not to be one against the state under the Eleventh Amendment, Constitution. *Scott v. Donald*, 165 U. S. 58; s. c. aff'g 74 Fed. Rep. 859.

Nor was a suit to prevent the enforcement of an unconstitutional statute as to the fixing of rates of transportation. *Smyth v. Ames*, 169 U. S. 466; mod. s. c., 171 U. S. 361.

See *Titts v. McGhee*, 172 U. S. 516.

State is not chargeable with the unauthorized or illegal acts of its officers in unlawfully placing land purchased for the state on land books in the name of the former owner. *Totten v. Nighbert*, 41 W. Va. 800.

STREETS—INJURIES RECEIVED ON.

I. ABUTTING OWNERS.

- (a) Nature of the liability.
- (b) Building materials.
- (c) Obstructions on sidewalk and streets.
- (d) Excavations, openings in streets and coal holes.
- (e) Defects in sidewalks or roadways.
- (f) Duty to keep in repair.
- (g) Falling walls and objects from buildings.
- (h) Miscellaneous acts of negligence.

II. STREET RAILWAYS.

- (a) Rights and duties of cars and the public.
- (b) Duty and degree of care by railways to the public.
 1. By cars.
 2. By the public.
 3. By both.
- (c) Duty and degree of care by the public to railways.

III. STEAM RAILROADS.

IV. VEHICLES AND PEDESTRIANS.

- (a) Rights and duties.
 1. In general.
 2. Of drivers, toward each other.
 3. Toward pedestrians.
 4. Toward both pedestrians and other drivers.
 5. By pedestrians toward drivers.

V. NAVIGABLE HIGHWAYS.

ABUTTING OWNERS.—Abutting owners are of two classes: (1) Those who own some portion of the street upon which their premises face; (2) those whose ownership is bounded by the near line of the street. Those of the first class may use the land within the limits of a street in any way and for any purpose consistent with the easement or servitude, which its appropriation for a road has vested in the public, viz., right of passage with the powers and privileges incident to such a right. *Kent's Com.*, vol. 3, pp. 432-3; *Bloomfield &c. Co. v. Calkins*, 62 N. Y. 388.

Nature of their liability.—Abutting owners, who have no ownership of the fee of the street, have no strict right to the use of that part of the street upon which their premises abut, beyond that possessed by the public, except the right of exit and entrance, and as it has been considered, the right to light and air. *Story v. Railway Co.*, 90 N. Y. 122; *People v. Kerr*, 27 id. 188; *Kellinger v. Railway Co.*, 50 id. 208. Hence, in the absence of authority,

soon to be noticed, those of the second class would, for injury arising from the use of a street for purposes other than passage, exit and entrance, be adjudged by the law of trespass or nuisance, while in the case of the first class the action would, in legal theory, fall under the law of negligence, subject to such exception as will be mentioned. *Kelly v. Doody*, 116 N. Y. 581; *Babbage v. Powers*, 130 id. 281; *post*, pp. 2233-35; Wharton's Negligence, sec. 816.

License by municipality.—But when the municipality has the title or control of a street, it may license an abutting owner to do acts upon the street, whereby his liability for consequent injury would depend upon his care and skill in doing such acts, and indeed, although the abutting owner had title to the soil of the street, such license might, on account of prohibitory laws otherwise applicable, be necessary to make certain uses of the street lawful. (See cases last above cited.) But neither the owner of the soil of a street, nor a municipality, can lawfully do an act in the nature of a nuisance or trespass upon a street, and hence the municipality cannot authorize another to do such act. *Hume v. Mayor*, 74 N. Y. 264; *Cohen v. Mayor*, 113 id. 535. Nor absolve the offender from the results of his negligence. *Kessel v. Butler*, 53 N. Y. 612; *Sexton v. Zett*, 44 id. 430.

Acts constituting a nuisance or trespass.—What acts constitute a nuisance or trespass, as distinguished from a negligent act, are not, in view of the decisions, clearly ascertainable. If the person has no right to do or attempt the performance of an act from which injury arises, the law of negligence is clearly inapplicable. In addition, as negligence involves the idea of unintentional injury (Wharton on Negligence, secs. 4, 12), certain acts done wantonly, or so recklessly as to indicate a necessary inference that the wrongdoer was quite indifferent to the safety of others, and acts obviously injurious or known to be injurious, are often regarded as willful acts, and classified under the head of nuisance or trespass. (*Ante*, pp. 659, 2057.) It cannot be doubted, however, that courts have frequently used the term "nuisance" in place of "negligence *per se*," and in violation of essential principles. See opinion in *Babbage v. Powers*, 130 N. Y. 281, and the able discussion of Dr. Wharton (Wharton's Negligence, secs. 1-25).

(b) *Building materials.*—There is a further justifiable use of a street arising from a reasonable necessity for depositing material for the purpose of building or repair on abutting premises. If a license from the municipality be required by law as a condition precedent to this use it must of course be obtained, but otherwise necessity justifies a measurable obstruction of a street for this purpose. But neither in extent or continuance can it exceed the demands of a reasonable necessity (*post*, pp. 2237, 2253.)

(c) *Storekeepers obstructing sidewalk.*—So, a storekeeper may temporarily obstruct a sidewalk in front of his store for the purpose of loading or unloading merchandise and conveying the same in or out of his building, and will only be liable for negligent injury in consequence thereof; but such obstruction must only exist in connection with his business, and must have a reasonable reference to the rights of the public, and should not be for the mere purpose of displaying his merchandise (*post*, p. 2238.)

(d) *Excavations, openings in streets and coal holes.*—If one authorized to make excavations in a street, or to make and maintain openings, like coal holes in a sidewalk, he does so at no greater peril than that arising from

failure to use reasonable care to prevent injury therefrom. The person receiving a license to do such acts, impliedly agrees to exercise the right with due care for the public safety (*post*, pp. 2231-7). It has been held that the right of a person to make and maintain excavations under a public street might be inferred from the construction of the same without objection by the public authorities, or from their acquiescence therein (*post*, pp. 2233-5), but it is not competent to show that the protection of an area was according to the usual custom (*post*, p. 2257).

(e) *Falling of walls and objects from buildings*.—The owner of land abutting on a street has the right to erect buildings thereon and to use and maintain the same. But in the construction thereof and the use thereof, he must exercise reasonable care and diligence to prevent the walls of the building, or materials in the course of construction, or objects attached to or stored in the building, from falling upon persons passing in the street. The degree of care required must be measured by the conditions existing; but as the passer-by is ordinarily under no obligations to anticipate or guard against injury from such cause, unless it were so apparent that a man of ordinary prudence would not disregard the same, *Brusso v. City of Buffalo*, 90 N. Y. 679; and as serious injury from such causes usually results, the courts are inclined to hold the offending person to a proportionate diligence to protect those traveling on the street. Consequently, it has been held that the fall of material or objects in such cases raised a presumption of negligence, and placed the burden of explanation upon the alleged wrongdoer. (*post*, pp. 2262-3), and see "Evidence," p. 1095; "Private Premises," p. 2077).

(f) *Keeping sidewalks in repair*.—An abutting owner is not liable to one injured on a sidewalk from failure to keep the same in repair or free from snow and ice, although an ordinance required the owner to remove such snow. *Moore v. Gadsden*, 93 N. Y. 12, pp. 1859, 2232.

II. RAILWAY COMPANIES. — A railway company, whose tracks occupy a street, should use due care not to injure other vehicles or pedestrians while also lawfully using the street. The care should be suited to the nature of the motive power, the density of travel on the street, the hazards to be encountered and the consequences of negligent operation. *Unger v. Railway Co.*, 51 N. Y. 497; *Shea v. Potrero &c. R. Co.*, 44 Cal. 414.

(a) *Degree of care required*.—The operation of a horse car requires the same, but no greater, care than that required of those in charge of other vehicles (*post*, p. 2275). When the car is operated by mechanical power, rendering it more difficult to put it under control than if operated by horses, there would seem to be a demand for greater caution on the part of the person in charge. *Van Patten v. Railway Co.*, 80 Hun, 494; *Young v. Railway Co.*, 10 Misc. 541.

Watchfulness.—The decisions indicate that continuing watchfulness is required to discover impending dangers, and the application of available means to avert the same, and especial care is required at crosswalks. *Murphy v. Orr*, 96 N. Y. 14; *Moebus v. Herrman*, 108 id. 349 (*post*, p. 2292); *McClain v. Railway Co.*, 116 N. Y. 459; *Bahrenburgh v. Railway Co.*, 56 id. 652; *Adolph v. Railway Co.*, 76 id. 530; *Stone v. Railway Co.*, 115 id. 105; *Meisch v. Railway Co.*, 72 Hun, 604; *Mangam v. Railway Co.*, 38 N. Y. 455; *Railroad Co. v. Gladmon*, 15 Wall, 401; *Clark v. Koehler*, 46 Hun, 536; *Scotti*

v. Behsmann, 81 Hun, 604; Mason v. Railway Co., 4 Misc. 291; Mitchell v. Railway Co., id. 575; Rotenberg v. Segelke, 6 id. 3; Eckenberger v. Amend, 7 id. 452; 10 id. 145; Heffran v. Railway Co., 8 id. 41; Keenan v. Railway Co., id. 601; Mills v. Railway Co., 10 id. 1; McCormick v. Railway Co., id. 8; Tholen v. Railway Co., id. 283; Timony v. Railway Co., id. 263; Jones v. Railway Co., id. 543; Farris v. Railway Co., 80 Mo. 325; Welsh v. Railway Co., 81 id. 466; Citizens' &c. Co. v. Foxley, 107 Penn. St. 537.

Stopping or checking speed of car.—It follows that a person in charge of a car may be required to check the speed of his car upon seeing a person or vehicle on the track; and in dangerous proximity, or about to enter thereon, and this is especially the case where the safety of children is involved. Cases last cited, also Birkett v. Knickerbocker Ice Co., 110 N. Y. 504; Stone v. Railway Co., 115 id. 105; Buhrens v. Railway Co., 53 Hun, 571; Wells v. Railway Co., 58 id. 389; Meagher v. Railway Co., 75 id. 455; Huerzeler v. Railway Co., 1 Misc. 136; Wilson v. Railway Co., 8 id. 451; Kerr v. Railway Co., 10 id. 264. But a person in charge of a car is not usually bound to guard persons from injury at points beyond the front platform. Bulger v. Railway Co., 42 N. Y. 459; see, dissenting opinion, Schmidt v. Railway Co., 132 N. Y. 566; Spaulding v. Jarvis, 32 Hun, 621; McCaffrey v. Railway Co., 47 id. 404. But the company may be negligent in moving a car backwards, without sufficient warning. Eaton v. Railway Co., 51 N. Y. 544; Maginnis v. Railway Co., 52 id. 215; Lundy v. Railway Co., 1 Misc. 100. See "Crossings," p. 795.

(b) *Construction and maintenance of track.*—Although a railway company have the right to construct a railway in a street, it must, both in the construction and maintenance thereof, use due care and skill, or it will be liable for injury therefrom to persons lawfully using the street. Worster v. Forty-second Street R. Co., 50 N. Y. 203 (*post*, p. 2275). And so in respect to restoring the street. Wasmer v. Railway Co., 80 N. Y. 212; Bell v. Railway Co., 29 Hun, 561. And when injuries arise from failure of an imposed duty to keep the street occupied by tracks in proper condition, and injury results from failure to perform this duty, or from some improper condition caused by the railway company, liability may ensue (p. 2269). But where the railway lawfully extends over a bridge owned or controlled by the state, the company is not bound to maintain the same. Birmingham v. Railway Co., 137 N. Y. 13; and same principle, Snell v. Railway Co., 64 Hun, 476.

(c) *Lights and bells.*—It may be the duty of a railway company to give notice of the approach of its cars by lights or bells, or both. Johnson v. Railway Co., 20 N. Y. 615; Maginnis v. Railway Co., 52 id. 215. But it is not its absolute duty to furnish lights sufficient to discover objects on the track in time to avoid them. Memphis City R. Co. v. Logue, 13 Lea, (Tenn.) 32.

(d) *Paramount but not exclusive right to use tracks.*—A street railway company has a paramount but not exclusive right to the use of that portion of the street occupied by its tracks. A person lawfully driving on the tracks may not recklessly or negligently obstruct the passage of cars, but he is not absolutely bound to keep off or get off the same, and if he fairly and in a reasonable manner respects the paramount right and is, without fault on his part, injured by the carelessness or fault of the company, it will be liable therefore. Flechenstein v. Railway Co., 105 N. Y. 655; Shea v. Rail-

way Co., 44 Cal. 414; Railway Co. v. Norton, 24 Penn. St. 465; Lynn &c. R. Co. v. Boston &c. Corp., 114 Mass. 91; see p. 2343.

III. VEHICLES, PERSONS IN CHARGE OF.—What has been said of railway companies has direct bearing on this subject.

(a) *Degree of care required.*—A person driving a vehicle on a street must use reasonable care to avoid collisions with other vehicles and pedestrians. This care is measured by the hazards to be encountered and the consequences of his negligence. Unger v. Railway Co., 51 N. Y. 497.

Speed.—This care demands a reasonably moderate speed. Barrett v. Smith, 128 N. Y. 607; Van Houten v. Fleischman, 1 Misc. 130; Abernethy v. Van Buren, 52 Mich. 383; but see Carter v. Chambers, 79 Ala. 223; and precludes racing or speeding of horses. Moody v. Osgood, 54 N. Y. 488; Potter v. Moran, 61 Mich. 60. But driving at a lively trot in a city street is not *per se* negligent. Crocker v. Knickerbocker Ice Co., 92 N. Y. 562; Derman v. Johnston, 85 Mich. 387; Dudley v. Westcott, 18 N. Y. Supp. 130.

Corners and crosswalks.—And some special caution is required in turning corners and crossing streets. Sheehan v. Edgar, 58 N. Y. 631; Sheehy v. Burger, 62 id. 558; Birkett v. Knickerbocker Ice Co., 110 id. 504; Scotti v. Behsmann, 81 Hun, 604; Eckensberger v. Amend. 7 Misc. 452; 10 id. 145; And special care must be taken at crosswalks where pedestrians may be expected. Murphy v. Orr, 96 N. Y. 14; Moebus v. Herman, 108 id. 349; Birkett v. Knickerbocker Ice Co., 110 id. 504; Elze v. Baumann, 2 Misc. 72.

Children.—And special care is due toward children in the street. Barrett v. Smith, 128 N. Y. 607; Martineau v. Railway Co., 81 Hun, 263; Keenan v. Railway Co., 8 Misc. 601; Tholen v. Railway Co., 10 id. 283; Timony v. Railway Co., id. 263; Moebus v. Herman, 108 N. Y. 349; Huerzeller v. Railway Co., 139 id. 490; Farris v. Railway Co., 80 Mo. 325; 8 Mo. App. 588; Welsh v. Railway Co., 81 Mo. 466; Citizens' &c. R. Co. v. Foxley, 107 Penn. St. 537.

(b) *Animals loose and unattended.*—It is negligence to allow a horse to go loose and unattended on a thoroughfare (*post*, p. 2359). Dickson v. McCoy, 39 N. Y. 400; Doherty v. Sweetser, 82 Hun, 556. But this does not apply to a cow driven through the street. Moynahan v. Wheeler, 117 N. Y. 285; nor to a cow led by a boy. Smith v. Matteson, 41 Hun, 216; see "Domestic Animals," *ante*, p. 1009.

(c) *Passage of vehicles going in the opposite directions.*

(d) *Passage of vehicles going in the same direction.*

(e) *Horses running away.*

(f) *Hitching horses.*—(*Post*, p. 2361.)

(g) *Frightening horses.*—(*Post*, p. 2366.)

IV. PEDESTRIANS.—A pedestrian has the right to walk on any portion of a street, to cross the same at any point, and both he and those in charge of vehicles must use due care to prevent a collision; especially at crosswalks (p. 2343). Moebus v. Herrman, 108 N. Y. 349; *post*, p. 2343; McClain v. Railway Co., 116 N. Y. 459; *post*, p. 2323; Baker v. Railway Co., 62 Hun, 39; Eckensberger v. Amend. 10 Misc. 145; Meyer v. Railway Co., 6 Mo. App. 27; Phila. R. Co. v. Henrice, 92 Penn. 431, (*post*, p. 2343). But as to crossing where there is a known excavation, see Thieme v. Gillen, 41 Hun, 443; and Buesching v. R. Co., 6 Mo. App. 85.

(a) *Children and defective persons.*—As to children injured in street, see pp. 704, 2352; as to defective persons, see *post*, pp. 701, 2352; as to expecting

a person to cross a street except at crosswalk, see *Reich v. Railway Co.*, 78 Hun, 417.

(b) *Looking for approaching vehicles.*—A person about to enter upon a street crossing, where vehicles are numerous and collisions likely to occur, should look in both directions and notice the speed and proximity of approaching vehicles. *Barker v. Savage*, 45 N. Y. 191; *Lennon v. Railway Co.*, 65 Hun, 578; *Van Patten v. Railway Co.*, 80 id. 494. **Duty to look and listen before crossing electric road.** See cases cited, *post*, p. 2297; *Winter v. Railway Co.*, 8 Misc. 362; *Zlotovsky v. Railway Co.*, id. 463. **Boy stood on track.** *Campbell v. Railway Co.*, 9 Misc. 483. But see *Mentz v. Railway Co.*, 3 Abb. App. Dec. 274.

(c) *Running ahead of vehicles.*—It is negligent for a pedestrian crossing a street to make a trial of speed with a vehicle in dangerous proximity, and for injury received in negligently exposing himself to an approaching vehicle, he will be precluded from recovering. *Belton v. Baxter*, 54 N. Y. 245; 58 id. 411; *Davenport v. Railway Co.*, 100 id.; *McClain v. Railway Co.*, 116 id. 459; *Fenton v. Railway Co.*, 56 Hun, 99. **Person fell in front of car.** *Lennon v. Railway Co.*, 65 Hun, 578; *Mackin v. Railway Co.*, 10 Misc. 4 (trolley car); *Timony v. Railway Co.*, 10 Misc. 263 (trolley car).

See *Baker v. Railway Co.*, 62 Hun, 39, where person crossed behind car; *Hamilton v. R. Co.*, 6 Misc. 382 (vehicle passing in front of cable car); *Reynolds v. Railway Co.*, 8 Misc. 313; *Giles v. Railway Co.*, 33 La. Ann. 154 (walking between tracks); *Louisville R. Co. v. Yniestra*, 21 Fla. 701 (walking on switch track); *Kelly v. R. Co.*, 75 Mo. 138 (crossing in front of engine, *post*, p. 2340).

Pedestrian is not obliged to anticipate that goods in the course of unloading will fall upon her. *Blaustein v. Guindon*, 83 Hun, 5; but see *Buesching v. R. Co.*, 6 Mo. App. 85.

I. Abutting Owners.

(a). NATURE OF THE LIABILITY.

Persons who, without special authority, make an excavation in a street for private purposes are, in the absence of the negligence of the one injured thereby, liable for such injury, and as the action is founded in the wrong, the defendant's negligence is not involved.

This is the case, although the cover of the excavation be removed by a wrong-doer, as the person making an unauthorized excavation must keep the highway safe at his peril. *Congreve v. Morgan & Smith*, 18 N. Y. 84, *aff'g* judg't for pl'ff.

If there be no permission to make an excavation in a sidewalk, the act is a nuisance; if there be such permission, and it be unskillfully exercised, the act is negligent. *Creed v. Hartman*, 29 N. Y. 591, *aff'g* judg't for pl'ff.

An unauthorized excavation in the street of a city, for the benefit of adjoining premises, is a nuisance, and all persons who continue, or in any way become responsible for it, are liable, irrespective of any ques-

tion of negligence. If the excavation be licensed, the one making it is bound to use it in a careful manner, and see that it is properly and carefully covered. Liability attaches to whomsoever continues to use it in an improper and unsafe condition. Notice of a defect, discoverable by proper examination, is not necessary to fix this liability. So a lessor and lessee are jointly and separately liable for continuing a coal hole improperly covered. *Irvine v. Wood*, 51 N. Y. 224, aff'g 4 Robt. 138, and judg't for pl'ff.

Brown v. Cayuga & S. R. R. Co., 12 N. Y. 486; *Blunt v. Aikin*, 15 Wend. 522; *Davenport v. Ruckman*, 10 Bosw. 20; *King v. Pedley*, 1 Adol. & Ellis, 822; *Anderson v. Dickie*, 26 How. Pr. 105; *People v. Erwin*, 4 Den. 129.

As to liability in case of work contracted, see *Jones v. Chantry*, 1 Hun, 613; *Baxter v. Warner*, 6 id. 185; *McGrath v. Walker*, 64 Hun, 179. (See *ante*, pp. 631, 1917).

The city omitted to have an accumulation of snow and ice removed from the sidewalk and the plaintiff slipped on the sidewalk and was injured. The owner of the abutting premises was not responsible to the plaintiff, even though an ordinance required him to remove the snow. The city police regulation is not sufficient to give a cause of action to a party injured as above. *Moore v. Gadsden*, 93 N. Y. 12, rev'g judg't for pl'ff; s. c., 87 id. 84.

The defendant, with authority, removed a sidewalk for the purpose of excavation and made a temporary bridge. The defendant was not bound to make it perfectly safe but only to use care and prudence in building it, so as to reasonably protect passers, and they were bound to observe and use care with reference to it. *Nolan v. King*, 97 N. Y. 565, rev'g judg't for pl'ff.

Distinguishing Clifford v. Dam, 81 N. Y. 56; *McGuire v. Spence*, 91 id. 303; *Wasmer v. D., L. & W. R. R. Co.*, 80 id. 212; *Irvine v. Wood*, 51 id. 224.

See *Mauerman v. Siemerts*, 71 Mo. 101, *post*, p. 2267; *Finegan v. Moore*, 46 N. J. L. 602.

Whoever, without special authority, obstructs a highway or renders its use hazardous above or below the surface is guilty of a nuisance, but where the act was done with the consent of the proper officials, the liability is governed by the ordinary principles of the law of negligence. License to encroach upon the public street carries an agreement, that the work should be performed with due care for the safety of the public, but it relieves the licensee from the imputation of trespass. License may be inferred from acquiescence of nine years.

Where a vault has been constructed, with knowledge of the city officials, under the sidewalk of a city street, in front of a block erected and used for business purposes, and had been in use for nine years, held, consent to its construction was to be inferred from the acquiescence of

the city officials having charge of the street and power to give such consent. *Jorgensen v. Squires*, 144 N. Y. 280.

In an action to recover damages by plaintiff from falling through into a vault constructed under the sidewalk in front of a block of stores belonging to plaintiff in the city of R., the following facts appeared: The vault was covered with flagstones forming the sidewalk; one of these gave way as plaintiff, a heavy man, stepped upon it, and he fell through into the vault. It was not shown when this flag was broken, or whether it was defective. No negligence on the part of defendant or his grantor in constructing or maintaining the sidewalk was claimed further than was inferable from the accident itself. The vault was constructed under the sidewalk with full knowledge upon the part of the proper city officials and in accordance with the common custom in the erection of business blocks in the city, and had been in use over nine years.

The plaintiff was properly nonsuited; consent to the construction of the vault was to be inferred, and, therefore, defendant could not be made liable as a trespasser and no negligence on his part was proved. *Babbage v. Powers*, 130 N. Y. 281, aff'g nonsuit.

Kelly v. Doody, 116 N. Y. 581; *Jennings v. Van Schaick*, 108 N. Y. 530; aff'g 13 Daly, 438; *Woram v. Noble*, 41 Hun, 398; *Wells v. Sibley*, 31 St. Rep. 40; 9 N. Y. Supp. 343; *Hughes v. Orange Co. &c. Ass'n*, 56 Hun, 396; *Maltbie v. Bolting*, 6 Misc. 339; *Churchill v. Holt*, 127 Mass. 165; s. c., 131 Mass. 67; *Barry v. Terkildsen*, 72 Cal. 254; *Wolf v. Kilpatrick*, 101 N. Y. 146; *Dygert v. Schenck*, 23 Wend. 445; *Anderson v. Dickie*, 1 Robt. 238; *Davenport v. Ruckman*, 37 N. Y. 568; *Dickson v. Hollister*, 123 Penn. St. 42; see, also cases cited in opinions; see, also, *Garland v. Towne*, 55 N. H. 55; *Sexton v. Zett*, 44 N. Y. 430; *Severin v. Eddy*, 52 Ill. 189; *Jochem v. Robinson*, 66 Wis. 638.

From opinion.—"The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it, and whoever, without special authority, materially obstructs it, or renders its use hazardous by doing anything upon, above or below the surface is guilty of a nuisance. * * * No question of negligence can arise, the act being wrongful. * * * There can be no difference in regard to the nature of the act or the rule of liability, whether the fee of the land within the limits of the easement is in a municipal corporation, or in him by whom the act complained of was done. In another case, arising out of the same accident, it was held that even if the stone covering the excavation was broken after it was laid, by the wrongful act of others, the defendant would still be liable because they were bound at their peril to keep the area covered in such a manner that it would be as safe as if it had not been built. *Congreve v. Morgan*, 18 N. Y. 84. These cases have been followed and made the basis of judgment in many others. *Creed v. Hartmann*, 29 N. Y. 591; *Irvine v. Wood*, 51 id. 224; *Whalen v. Gloucester*, 4 Hun, 24; *Anderson v. Dickie*, 26 How. Pr. 105; *Wendell v. Mayor &c.*, 39 Barb. 329; s. c., 4 Keyes 261. Although called to the attention of the court, they seem to have been disregarded in *McCarthy v. City of Syracuse*, 46 N. Y. 194, 199, where it was said: 'The excavation by the plaintiffs of the area under the sidewalk was not lawful. They owned to the center of the street, subject to the right of way of the public over the surface. For any interference with this right of way the plaintiffs

would have been responsible, but so long as they did no injury to the street, they were at liberty to use the space under it, as they might any other part of their property.' Assuming, however, the rule to be as stated in the *Congreve Cases*, *supra*, when the excavation is made without authority, *Clifford v. Dam*, 81 N. Y. 52, 56, it is clear that when it is made with the consent of the proper municipal officers, the rule of liability relaxes its severity and rests upon the ordinary principles governing actions of negligence. The person receiving the license is held to impliedly agree to perform the act permitted with due care for the safety of the public, and is made liable for any violation of duty in this regard. *Village of Port Jervis v. First National Bank*, 96 N. Y. 550, 556; *Clifford v. Dam*, 81 id. 52; *Dickinson v. Mayor &c.* 92 id. 584, 587; *Village of Seneca Falls v. Zalinski*, 8 Hun, 571, 574; *Newton v. Ellis*, 85 Eng. C. L. 123.

When conditions, whether express or implied, are annexed to the license, substantial compliance therewith is essential to the protection of the license, but consent and compliance relieve the owner from the imputation of trespassing in doing the act consented to, and place him in the position of one liable for negligence only. *Wolf v. Kilpatrick*, 101 N. Y. 146; *Nolan v. King*, 97 id. 565; *Elliot on Roads and Streets*, p. 541. * * *

The question presented for our determination, therefore, is whether consent to the maintenance of this vault may be inferred from the long acquiescence of the municipal authorities, under the circumstances stated?

A similar question was under consideration by this court in the case of *Jennings v. Van Schaick*, 108 N. Y. 530, where the plaintiff fell through an uncovered and unguarded coal-hole in the sidewalk. Although the building was rented in flats or apartments to tenants who used the coal-hole, the owner was held liable because he remained in control of the hall and a part of the basement, and employed a janitor to take care of the premises, who, in the discharge of his duty as such, controlled the coal vault and the opening thereto in the sidewalk, and through his negligence in leaving the hole unguarded the accident happened. * *

Thus, while the court held the owner liable on the ground of negligence, it was also held that he was not liable as an original trespasser, because it inferred from the acquiescence of the municipal officers that they had consented to the construction and maintenance of the covered area. The question was presented to the supreme court of the United States in *Chicago City v. Robbins*, 2 Black, 418, 425, and also in *Robbins v. Chicago City*, 4 Wall. 657, 659, where it was held that permission to build and maintain an area in a public sidewalk might be inferred from the fact of its construction and maintenance without objection from the officers of the city. So, it has been held, that the deposit of building materials in a street for use in the erection of a house, with the full knowledge of the superintendent and trustees of a village, is sufficient to authorize and even compel a jury to find consent by implication to such use of the street. *Village of Seneca Falls v. Zalinski*, 8 Hun, 571, 573.

The supreme court of Massachusetts in laying down a similar rule, said: 'What may be deemed a reasonable and proper use of a way, public or private, must depend much on the local situation and much on public usage. The general use and the acquiescence of the public is evidence of the right. The owner may make such a reasonable use of the way adjoining his land as is usually made by others similarly situated. As to the reasonableness of the use it may well be laid down that in a populous town where land is very valuable, where the owner of a lot has occasion to build, and for that purpose to dig cellars, he may right-

fully lay his building materials and earth within the limit of the streets, provided he takes care not to improperly obstruct the same, and to remove them in a reasonable time.' *Van O'Linda v. Lothrop*, 21 Pick. 292, 297.

The supreme court of Michigan holds that excavations properly and safely constructed under the public streets of cities for the convenience of the owners of premises adjoining are not unlawful, even in the absence of permission from the municipal authorities. *Fisher v. Thirkell*, 21 Mich. 1, 21.

In Illinois, the rule, as laid down by the supreme court, is that where the corporate authorities of a city have knowledge of the fact that a lot owner is constructing a vault under the sidewalk for his own convenience, and make no objection, authority to construct the same may be inferred, and when the same is continued for many years without objection, the acquiescence on the part of the city will be regarded as sufficient authority to construct and maintain it in a careful and prudent manner. *Gridley v. City of Bloomington*, 68 Ill. 47, 50. In an earlier case involving the same question, that learned court said: 'We are not prepared to admit that the defendant could, by reason of his ownership of the adjoining property, claim the absolute right to take up the sidewalk and extend his coal cellar under it, but as such a privilege is of great convenience in a city, and may, with proper care be exercised with little or no inconvenience to the public, we think that authority to make such cellars may be implied in the absence of any action of the corporate authorities to the contrary, they having been aware of the progress of the work.' *Nelson v. Godfrey*, 12 Ill. 20, 23. See, also, *Clark v. Fry*, 8 Ohio St. 358; *Wood v. Mears*, 12 Ind. 515; *Mallory v. Griffey*, 85 Penn. St. 275; *Hundhausen v. Bond*, 36 Wis. 1; *Irvin v. Fowler*, 5 Rob. 482; *Dillon on Mun. Corp.*, vol. 2, secs. 699, 700; *Cooley on Torts*, 748. * * *

Where the power resides in a single officer, and there is no statute regulating the subject, no reason is apparent why his verbal consent would not suffice the same as a verbal license from an adjoining owner to his next neighbor, to construct on the land of the latter a wall or anything which, without consent, would be a trespass. *Miller v. Auburn &c. R. R. Co.*, 6 Hill, 61; *Murray v. Gibson*, 21 Ill. App. 488; 13 Am. & Eng. Ency. 546. * * * Due regard should also be had to the custom with reference to constructing vaults under sidewalks, so universal in the erection of modern buildings for business purposes in the cities of this state, that the court may take judicial notice of the fact, as a matter of constant observation and common knowledge. *Gibson v. Stevens*, 8 How., (U. S.) 384, 399; *Raymond v. City of Lowell*, 6 Mass. 524, 534; *Wade's Law of Notice*, (2d ed.) secs. 1408, 1410, 1417."

Paving stones were piled on the side of the street and one fell and hurt a boy playing marbles. Contractor offered to prove that he piled the stones on the street under a contract with the city of New York to repair and grade the street. Excluded; error.

Such acts, if done without proper authority from the city were illegal and unlawful acts, constituting a nuisance for which any individual, suffering damages special to himself, could maintain an action against the defendant. *Cunningham v. Wright*, 28 Hun, 178, rev'g judg't for pl'ff.

Defendant granted a grocer the right to store a wagon in the street in front of the store when not in use. Another wagon hit it, and threw it around, and the thills, tied up with a string, fell down and killed a passerby on the sidewalk. The court charged that it was only a question of damages; error. Even if the permit was void the city was not liable for the mere negligence of the grocer in exercising an alleged right, i. e., in fastening up the thills. *Cohen v. Mayor*, 33 Hun, 404, rev'g judg't for pl'ff; on second trial verdict was ordered for defendant and sustained, 43 Hun, 315, but was itself rev'd, 113 N. Y. 535. (See *ante*, p. 1916.)

By an action brought against the plaintiff for injury from an electric pole, it was found to be a nuisance on account of its location. It appeared that it had been put there by consent of the plaintiffs. Held, that both plaintiff and defendant above were joint wrong-doers, and plaintiff could not levy contribution on account of the sum it had been obliged to pay in the first action. *Trustees of Geneva v. Brush Electric Co.*, 50 Hun, 581, rev'g judg't for pl'ff.

From seven or eight o'clock in the morning until 9.30 o'clock in the evening, a box had been left on a sidewalk, in a city, in front of a store. An employé in attempting to bring it in turned it over, and a protruding nail caught in the trousers of a passerby and ruined them. A recovery therefor was sustained, on the ground, that pedestrians have a right to the unobstructed use of the sidewalks in cities, with exceptions justified by necessity or public convenience. *McCarten v. Flagler*, 69 Hun, 131, aff'g judg't for pl'ff.

Although a person owns the fee of a land in a highway, yet, if in repairing a structure, he, from Thursday afternoon until the following Saturday morning, leave two small sticks ten feet long by twelve inches thick in a ditch six or seven feet from the traveled portion of the highway, and meanwhile some colts that have been driven but two or three months are frightened thereby, whereby the driver's wife is injured, her cause of action against the defendant is based upon nuisance. *Tinker v. N. Y., O. & W. R. R. Co.*, 71 Hun, 431, rev'g nonsuit.

A count for negligence in leaving a ditch exposed and without proper safeguards, is in case for the recovery of damages to person and property by reason of the nuisance. *South. &c. R. Co. v. Chappell*, 61 Ala. 527.

Neither the city nor the owner is an insurer of the sidewalk's safety—negligence is the gist of their liability. *Gaston v. Bailey*, 14 Ind. App. 581.

City paying damages may recover of the owner, though the person injured could not have. *Holyoke v. Hadley Water Power Co.*, 174 Mass. 424.

Knowledge, actual or constructive, of a defect constituting a nuisance, imposes absolute liability. *Davis v. Rich*, 180 Mass. 235.

Statutory duty of abutting owners to keep sidewalks in repair, held to be for the benefit of the public primarily, but ultimately to the advantage of the city. *Lincoln v. Janesch*, 63 Neb. 707.

The primary duty of repairing a sidewalk rests upon the abutting owner. *Mintze v. Hogg*, 192 Pa. St. 137.

See, also, *Bevine v. Fond du Lac*, 113 Wis. 61. See further as to whether and when the duty is primary or secondary, *post*, p. 2259.

While an owner is not liable for neglect to repair, he is liable for creating a positive nuisance. *Morris v. Woodburn*, 57 Oh. St. 330.

City though liable in the first instance may plead over against the company agreeing to keep the street in repair. *Ft. Worth Street R. Co. v. Allen*, (Tex. Civ. App.) 39 S. W. Rep. 125.

By setting off a space from public use, the ordinance is suspended, and the common law set in operation. Rules governing the private relations between owner and one employed to make repairs held to apply. *Sullivan v. City National Bank*, (Tex. Civ. App.) 65 S. W. Rep. 39.

(b). BUILDING MATERIAL.

The People v. Cunningham, 1 Denio 524, following *Commonwealth v. Passmore*, 1 Serg. & Rawle 219, held that a necessity, *not absolute but reasonable*, justified even the obstruction of the highway. It was stated that "no man has a right to throw wood or stones into the street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle a merchant may have his goods placed in the street for the purpose of removing them to his store within a reasonable time, but he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it." To show that it was the common law that an obstruction of the street for the necessary purposes of business, building or repair was proper, the doctrine of Lord Ellenborough in *Rex v. Jones*, 3 Camp. 230, was cited that, in the matter of repairing a house, the public must submit to the inconvenience necessarily occasioned by it. And so, the rule was adopted which is now the law of this state, that if the obstruction is of a temporary character, even the streets of popular cities may be invaded in the interest of both commerce, repairing and building. *Shook v. Cohoes*, 108 N. Y. 648.

The People v. Horton, 64 N. Y. 610; Welsh v. Wilson, 101 id. 254; Cohen v. The Mayor, 113 id. 535; Zanger v. Detroit City R. Co., 87 Mich. 646; Vidalat v. New Orleans, 43 La. Ann. 1125; Westliche Post Asso. v. Allen 26 Mo. App. 181; Grocer v. Robinson, 72 Wis. 199; Cushing v. Adams, 18 Pick. 110. (See *post*, p. 2253.)

In placing of quick lime on a street it was not reasonably to be contemplated that boys might take some into an adjoining lot and handle it so as to cause an explosion which would destroy the eyes of one of them. *Beetz v. City of Brooklyn*, 10 App. Div. 382.

Defendant had a permit for placing building materials in the street, but in piling iron rails therein, the top rail was left in a loose and insecure position and unguarded, by reason of which a boy of 10, sitting thereon, was injured by its slipping. Defendant was held negligent. The fact that a truckman whom he had engaged to deliver them, did the piling, did not affect his liability, as they remained in such condition for two weeks. *Ramsey v. National Contracting Co.*, 49 App. Div. 11.

Builders contracting for sand, after it was unloaded in the street rejected it and ordered the party delivering it to cart it away again. The fact that the latter neglected to do so did not excuse such builders from protecting the public by guarding it while it remained there. *Romney v. New York*, 49 App. Div. 64.

Where lumber was piled so negligently near sidewalk that it fell upon a child attempting to climb upon it. Recovery was proper. *Earl v. Crouch*, 16 N. Y. Supp. 770.

A pile of sand was not sufficiently guarded by lights 20 feet away and nearer the sidewalk. *Reilly v. Sicilian Asphalt Pa. Co.*, 16 Misc. 65.

Fall of stones when hit by a passing wagon shows negligent piling. *Mahar v. Steuer*, 170 Mass. 454.

Where building material is properly guarded a contractor is not liable to those who intrude, though small children. *Pueschell v. Kansas City Wire &c. Works*, 79 Mo. App. 459.

Where the structure is a dangerous one reasonable care demands precautions to prevent removal of guards by wrong-doers. *Beck v. Hood*, 185 Pa. St. 32.

(c). OBSTRUCTIONS ON SIDEWALKS AND STREETS.

The plaintiff, in the night time, was injured by the dangerous construction of a platform erected by the defendant on the sidewalk in front of his premises. Permission from the public authority could not absolve him from the result of his negligence in constructing the same. *Kessel v. Butler*, 53 N. Y. 612, aff'g judg't for pl'ff.

One using reasonable care may temporarily obstruct a sidewalk of a

populous city to load merchandise, and need not furnish safe passage around the obstruction. The plaintiff, to get around skids on sidewalk, went on defendant's step and slipped down. No liability. *Welsh v. Wilson*, 101 N. Y. 254, aff'g nonsuit.

Citing *People v. Cunningham*, 1 Denio, 524, 530; *ante*, p. 2237; *Commonwealth v. Passmore*, 1 Serg. & Rawle, 219; *People v. Horton*, 64 N. Y. 610.

See, also, *Commonwealth v. Ruggles*, 88 Mass. 588; *Hart v. Mayor*, 9 Wend. 571; *Matthews v. Kelsey*, 58 Me. 56; *Blaustein v. Guindon*, 83 Hun, 5.

In an action to recover damages for injuries alleged to have been caused by defendant's negligence, these facts appeared: Plaintiff, while passing defendant's store in the city of New York, stepped upon an iron cover to a coal hole which was slippery with snow just fallen; he fell, and in falling hit the leg of a horse, one of a team attached to a truck belonging to defendants and standing on the sidewalk. The horse raised his foot, and in putting it down struck plaintiff's ankle and broke it. The street was narrow and occupied partly by the tracks of a street railroad. There was not room for a truck to stand on the street between the sidewalk and the nearest track. The other horse of the team was standing on the street, leaving just room for cars to pass. The team was in charge of its driver, the horses gentle, and neither stirred at the time except as above stated. Sufficient space was left on the sidewalk for wayfarers to pass. By a city ordinance it was made lawful for an occupant of a store on any street "in which the rails of any railroad company are laid so close to the curb-stone" as to prevent him from keeping a cart or other vehicle in the carriage way in front of his store without interference with the passage of cars, "to occupy with such cart or other vehicle" such portion of the sidewalk as shall be necessary, provided sufficient space be left for the passage of pedestrians.

The evidence failed to show any negligence on the part of defendants and a refusal to nonsuit was error; the permission given by the ordinance applied as well to the horses as to "the cart or other vehicle." *Merritt v. Fitzgibbons*, 102 N. Y. 362, rev'g 29 Hun, 634, and judg't for pl'ff.

A tradesman may convey goods to and from a street to his adjoining store, and thereby temporarily obstruct the sidewalk, but such obstruction must only be necessary in connection with the tradesman's business, and must have reasonable reference to the rights of the public.

A grocer in the city of New York loaded and unloaded his trucks by means of a bridge extending from the truck to the house stoop, intercepting travel on the sidewalk from four to five hours of each business day between 9 A. M. and 5 P. M. Such use was unreasonable and a nuisance. *Callanan v. Gilman*, 107 N. Y. 360.

See *Jochen v. Robinson*, 66 Wis. 638.

Defendant pursuant to permit from the city authorities removed the flagging from the sidewalk and made an excavation, but left a space five feet wide undisturbed and unobstructed for the passage of pedestrians. Plaintiff, a woman with unimpaired faculties, instead of using such clear space attempted to step over the displaced flagstone which was in plain sight and was three feet wide and four feet long. She was held not to have exercised ordinary prudence, and was precluded from recovering for her injuries. *Whalen v. Citizens &c. Gaslight Co.*, 151 N. Y. 70.

A railroad for the purpose of repairing its cattle guards placed timbers along the highway within the highway limits though not within the traveled portions thereof. They were of such a character and so placed, as to be calculated to frighten ordinarily gentle horses and were not placed there through any necessity required by the operations in which they were concerned. It was an unreasonable interference with the rights of the public in the highway and constituted an obstruction to travel and a nuisance. That the defendant itself owned all the road was held to be no defense as that gave no right to use the road in a way that would be inconsistent with the rights of the public thereon. *Tinker v. New York &c. R. Co.*, 157 N. Y. 312, aff'g 92 Hun, 269.

A permanent platform having steps at each end wholly upon premises adjoining the sidewalk to which trucks may back up to load and unload merchandise is not *per se* a nuisance. Whether it is such or not depends upon the reasonableness of the use made of it. From opinion (copy selections). *Murphy v. Leggett*, 164 N. Y. 121, aff'g s. c., 29 App. Div. 309; *Linehen v. Western Electric Co.*, 29 App. Div. 462.

In the latter case, the depth of snow prevented plaintiff from going around in front of the horses, and she waited eight minutes before attempting to pass by mounting the platform. In the former case, the steps were muddy and slippery, and in the latter the platform was icy.

From opinion.—"We think this judgment may be sustained upon the ground that it was a question of fact for the determination of the jury whether the use made by the defendants of their platform and the sidewalk in front was reasonable and necessary in the conduct of their business. It is true that persons engaged in business in a city have the right to use the streets and sidewalks for the purpose of unloading and loading goods that have to be taken into and from their buildings and storehouses. It is also true that highways and sidewalks may be temporarily blocked when necessary. A person engaged in constructing a large building upon a street may have to make necessary excavation for its foundation and transport to it the iron and stone used in its construction. Heavy machinery and large safes may be moved into a building, taking considerable time, all of which necessarily interrupts and causes inconvenience to the public in the use of the highway. The municipalities may, doubtless, provide rules or regulations controlling the manner and times in which these interruptions may be made. They must be necessary, temporary and reasonable, for no

person can be permitted to permanently or unreasonably occupy the highway to the detriment of the public. The question, therefore, always is as to whether the use is necessary, temporary and reasonable."

Party who directs an obstruction to be put in the highway is not shielded by a claim that it was put there by contractor. *Jones v. Chantry*, 1 Hun, 613, aff'g judg't for pl'ff.

The patrons of a cider mill, with the assent of the owner, obstructed a right of way over his farm, depriving the plaintiff of his due use of the way. The owner was responsible for such obstruction. *Dennis v. Sipperly*, 17 Hun, 69.

Defendant's locomotive negligently ran through an open draw bridge into the canal beneath and delayed the plaintiff's canal boat to his damage. Defendant liable. *Briggs v. New York Cent. & Hud. River R. R. Co.*, 30 Hun, 291, ordering judg't for pl'ff on verdict.

Defendant's servants were driving a wagon up a steep hill in the city; one of the team lost a shoe, and the wagon was driven to the side of the road and blocked, so that it would not go back of itself, after which the horses were detached and taken to the blacksmith shop. A wagon coming down the hill slid around on the ice and hit the other wagon, and it went down the hill and struck a carriage standing below it. Held, that defendant's servants had made the wagon reasonably secure and no liability attached. *Newcomb v. Van Zile*, 34 Hun, 275, rev'g judg't for pl'ff.

From opinion.—"We have been cited to several cases by the plaintiff's counsel. One is *Powell v. Deveney*, 3 Cush. 300. In that case the defendant's servant left, for the night, a truck standing in the street. The driver of another truck struck the defendant's truck and thus threw the shafts, which had been supported on a plank, against the plaintiff and injured her. She was allowed to recover. In *Lane v. Atlantic Works*, 111 Mass. 136, the defendants left, between six and seven in the evening a truck, with a bar of iron on it, standing in the street. A boy meddled with it and the iron fell on the plaintiff. He was allowed to recover. In *Clark v. Chambers*, L. R. 3 Q. B. Div. 327, the defendant had unlawfully placed a dangerous instrument in the carriage road. Another person removed it to the foot-path and the plaintiff was injured. He recovered. In the opinion in that case many authorities are cited we need not discuss in detail."

Defendant supported a telegraph pole in the highway by a wire not easily discoverable; it caught the wheel of a passing vehicle and did injury. Defendant liable, as its use of the road was subject to the public easement, and it could not obstruct nor render it dangerous. *Sheldon v. W. U. T. Co.*, 51 Hun, 591, aff'g judg't for pl'ff.

The slipping of a stone placed in a public street, by which injury is caused to a person on the street, is evidence tending to show negligence on the part of the person, who may be responsible for the position of the

stone and renders proper the submission to a jury of the question as to the negligence of such person.

A stone placed in one of the public streets of a city in violation of an ordinance of such city, if not so placed by the permission of the municipal authorities, is a nuisance, and the person who is responsible for such location of the stone is liable for the damages resulting from its being put where it was, although it was placed by a contractor under him.

An ordinance of a city is, if relevant, competent evidence on the question of the negligence of the defendant, upon the trial of an action brought to recover damages for personal injuries sustained by the plaintiff by reason of such alleged negligence. *Skelton v. Larkin*, 82 Hun, 388.

Upon the trial of an action brought to recover damages for personal injuries evidence was given tending to show that the defendant, a street railway company, by the use of its snow plow in removing the snow from its tracks, had created an obstruction in the highway at the point where the injury occurred, which was more or less dangerous to passengers in the street, and that the injury in question was caused by such obstruction.

Held, that as the question, whether the obstruction so created constituted an actionable nuisance, and one the creation of which might have been avoided by the exercise of reasonable care, was treated by the court and by the parties as a question of fact for the determination of the jury, there was sufficient evidence to justify the verdict of the jury in favor of the plaintiff. *Schrank v. Rochester Railway Company*, 83 Hun, 290.

Although a person has a right to unload hogsheads from a truck on a street in the city of New York, he is bound to exercise such reasonable care and prudence in so doing as not to injure persons lawfully passing on the sidewalk. This can be done either by letting the hogsheads down with ropes or by having men enough to ease them down, or, if it is intended to roll the hogsheads from the truck into a factory, by having some one stationed at the place to warn pedestrians of the danger.

A pedestrian has the right to pass over the sidewalk of a city street, and may assume that she will not be subjected, without warning or signal, to the danger of having a hogshead thrown against her from a truck. She has no reason to anticipate that, just as she is passing by a truck loaded with hogsheads, the driver thereof will let a hogshead roll down upon her, and, although she has knowledge of the presence of the truck, whether her passing between the ends of the skids attached to the truck and the building into which the hogsheads were being rolled was an act of negligence which in any way contributed to her death is for the jury. *Blaustein v. Guindon and another*, 83 Hun, 5.

Boy, while stepping over cable, lying on ground preparatory to string-

ing, was tossed into the air by a sudden tightening of it without warning. Defendant held negligent. *Devine v. Brooklyn &c. R. Co.*, 1 App. Div. 237.

See, also, *Coxhead v. Johnson*, 20 App. Div. 605; s. c. aff'd, 162 N. Y. 640.

While an owner may tether his cow along the highway adjacent to his premises, he cannot do so, so as to interfere with the rights of the public to use it. Defendant was negligent in tethering in such a manner that the chain extended across the roadway causing a horse to stumble over it in passing. *Gulliver v. Blauvelt*, 14 App. Div. 523.

Defendant was not negligent in allowing some gravel, the individual pebbles of which were no larger than marbles, to fall upon its sidewalk from a roof which it was repairing, where it has remained there no longer than fifty minutes—its duty as to its sidewalks being no greater than that of a municipality; that of reasonable care. *O'Reilly v. Long Island R. Co.*, 15 App. Div. 79.

A lamp trimmer upon lowering an electric lamp, for trimming, so that its leg wires hung within six feet of the street surface, saw three vehicles about on a line advancing, he shouted a warning to them to look out for the wire and then turned and went on with his work on the pole bracket. The driver of the last wagon, however, failed to hear the warning and not seeing the wire, did not turn out, so that it was caught upon his wagon and drawn against it as it passed along. Trimmer was chargeable with contributory negligence, but the driver was not chargeable with negligence as he was not bound to anticipate so unusual an obstruction. *Campbell v. Wood*, 22 App. Div. 599.

Where as a condition to the construction of a sewer in a street, a contractor was required to answer for all damages arising from the use of the street and to guard excavations, piles of materials, etc., and in the course of his work, so obstructed the sidewalk with dirt thrown from a trench that a plank covering the edge of the pile, used to enable pedestrians to go around the pile, rested partly on the sidewalk, and partly on the premises, of an adjoining owner, it was no defense to an action for its slipping by being placed so that it in part rested on the premises of an adjoining owner. *Schubert v. Cowles*, 31 App. Div. 418.

An adjoining owner may recover from a railroad company authorized to build an embankment in a street so as to effectually close it, for cutting off driveway to her premises leaving her only a space of eight to ten feet along a side piazza as a means of approach, besides the connection with an adjoining shop. *Egner v. New York &c. R. Co.*, 39 App. Div. 652.

The fact that logs so piled along the highway as to become a nuisance were piled by third parties under contract to deliver them, was no defense to an action against an adjoining owner, where they had remained in

that condition for five days, without his attempting to abate the nuisance. They were so piled that if one fell, it would be likely to become an obstruction to travel. *Lawton v. Olmstead*, 40 App. Div. 544.

Negligence in driver colliding with obstruction, telegraph pole, cannot be imputed to passenger. *Fisher v. Mt. Vernon*, 41 App. Div. 293.

During a storm a falling tree dragged down one of defendant's wires but not in a position to create danger to the public on the highway or injure the wire. It was subsequently attached to another tree by the road overseer, from which, by some unexplainable cause, it became loosened and fell within reach of passing vehicles. It was discovered on the morning of the accident and prompt measures were taken toward repairing. Defendant was not negligent. *Fitch v. Central &c. Teleg. Co.*, 42 App. Div. 321.

Recovery may be had where the primary cause of injury was attributable to the defendant, though the secondary one was not chargeable to either. *Halstead v. Warsaw*, 43 App. Div. 39.

A person may not use the sidewalk in front of his store for the display of goods so as to deprive the adjoining building of light, air and access. *Lavery v. Hannigan*, 52 N. Y. Supr. Ct. 463.

Same principle, *Hallock v. Schreyer*, 33 Hun, 111; *Denby v. Willer*, 59 Wis. 240.

The defendants, tenants on the first floor, used window of a store on a busy street in New York city for the exhibition of a person with extraordinarily long hair to promote the sale of a "hair restorative." This collected large crowds in front of the building, blocking the street and interfering seriously with the entrance to the plaintiff's store in the basement underneath the premises. Such use of the premises was unreasonable. *Elias v. Sutherland*, 18 Abb. (N. C.) 126.

See *Jacques v. National &c. Co.*, 15 Abb., (N. C.) 250; *Rex v. Carlile*, 6 Car. & P. 636.

Failure to notice a nail on a plank walk constructed as a substitute for the sidewalk during the construction of a building, held not contributory negligence. *Donnelly v. Cowen*, 20 Misc. 100.

A carriage stone 30 inches long by 18 high and 16 wide near the curb, held not a nuisance. *Robert v. Powell*, 24 Misc. 241.

Whether plaintiff should have seen the hanging wire was for the jury where it was broad daylight and the wire was the size of one's little finger. *Lloyd v. City &c. R. Co.*, 110 Ga. 165.

Lumber piled along the outside of a sidewalk held an unauthorized obstruction. *McKune v. Santa Clara Valley M. &c. Co.*, 110 Cal. 480.

Leaving a car on the track at a street crossing in the night. Recovery was allowed. *McCoy v. Penn. &c. R. Co.*, 5 Houst. (Del.) 599.

Cotton piled on the sidewalk in front of a warehouse, fell and injured a passerby. Recovery was allowed. *Maddox v. Cunningham*, 68 Ga. 431.

Contrary to ordinance, leaving obstruction unguarded by lights, even though lights be extinguished by unknown cause, and even though the negligence be that of a contractor in the employ of the owner of the materials, gave recovery. *Wilson v. White*, 71 Ga. 506.

Obstruction of the passage of customers to private premises from the street gives rise to a private liability for the special damage regardless of the city's duty to keep the street open. *Brunswick &c. R. Co. v. Hardey*, 112 Ga. 604.

See, also, *Coggens v. Myrick*, (Ala.) 31 South Rep. 22; *Strink v. Pritchett*, 27 Ind. App. 582; *Bembe v. Commissioners &c.*, 94 Mo. 32; *Hulet v. Missouri &c. R. Co.*, 80 Mo. App. 87; *Nutler v. Pearl*, (N. H.) 51 Atl. 897; *Machine Co. v. Kaufmann-Latimer Co.*, 5 Oh. N. P. 505; *Knowles v. Pennsylvania R. Co.*, 175 Pa. St. 623.

Fences turned in along a stream to a bridge where it would be impracticable to continue them across the stream, were not considered an obstruction. *Sadorus v. Black*, 65 Ill. App. 72.

But see *Cornielson v. State*, (Tex. Civ. App.) 49 S. W. Rep. 384.

No obstruction where an overhanging wire was high enough for ordinary purposes. *Gross v. South Chicago City R. Co.*, 73 Ill. App. 217.

Defendant obstructed the highway by leaving a house in the course of removal upon it, though done by an independent contractor, who abandoned the work. *Caldwell v. Pre-emption*, 74 Ill. App. 32.

Owner leased the farm but retained the roadway. Allowed to sue a telegraph company for obstructing the road. *American Telegraph &c. Co. v. Jones*, 78 Ill. App. 372.

Piling stones while repairing a street next a street car track held to be a concurring cause of injury to one thrown from a car. *North Chicago St. R. Co. v. Dudgeon*, 184 Ill. 477; aff'g s. c., 83 Ill. App. 528.

A hand car on highway injured a team at night. Plaintiff recovered. *Pittsburg &c. R. Co. v. Sponier*, 85 Ind. 165.

Same principle, *Bussian v. Milwaukee &c. R. Co.*, 56 Wis. 325; *Paine v. Grand Trunk R. Co.*, 58 N. H. 611; *Myers v. Richmond &c. R. Co.*, 87 N. C. 345.

Obstruction in the street caused injury, where horses running away collided with it. *Mt. Vernon v. Hoehn*, 22 Ind. App. 282.

Gas pipe had lain along the surface of the highway for years so as to be covered by grass and weeds. Plaintiff before turning with his engine across it had sent another on ahead to examine the way. He was entitled to the benefit of a doubt as to his knowledge of its existence. *Indiana &c. Gas Co. v. McMath*, 26 Ind. App. 154.

Person looking behind drove into a swing stretched across the road. Contributory negligence barred recovery. *Tuffre v. State Centre*, 57 Iowa, 538.

A runaway horse struck a wagon eleven feet from the sidewalk, so that the suspended tongue fell upon the plaintiff passing on the sidewalk. Recovery was not allowed. *Sikes v. Shelden*, 58 Iowa, 744.

One drove against an obstruction which he might readily have seen. He was contributorily negligent. *Yahn v. Ottemwa*, 60 Iowa, 429.

Lumber company set up as a defense to its obstructing the street with its cars, that a railroad company had gained the right to have cars upon the street and that the reasonable use of its premises made such obstruction necessary. Held untenable. *Jenks v. Lansing Lumber Co.*, 97 Iowa, 342.

The right to flush water mains does not permit the interference with traffic. *Topeka Water Co. v. Whiting*, 58 Kan. 639; s. c., 39 L. R. A. 90.

As to the right to obstruct a turnpike, see *Valley Turnpike &c. Co. v. Lyons*, (Ky.) 58 S. W. Rep. 502.

A passenger on a street car was guilty of contributory negligence in putting his head out of the window, whereby he was injured by an electric light pole in dangerous proximity to the track. *Moore v. Edison Electric Light Co.*, 43 La. Ann. 792.

Lessee in course of repairs on his house, left lumber on the sidewalk without lights or guards. Held liable. *Shidet v. Jules Dreyfuss Co.*, 50 La. Ann. 296.

Defendant rolled a heavy barrel down a skid over a sidewalk without warning. Held liable. *Mahan v. Everett*, 50 La. Ann. 1162.

An owner was not allowed to excavate a neighbor's portion of the highway, (within the highway limits but beyond the traveled way) or construct masonry thereon to enable him to reach his own premises from the highway. *Burr v. Stevens*, 90 Me. 500.

But see *State v. Campbell*, 80 Mo. App. 110.

Obstruction of sidewalk with a water hydrant is allowed under legislative authority, but it must be located with strict compliance with the permission where it is apt to become dangerous. *Bean v. Maine Water Co.*, 92 Me. 469.

That guards forming an obstruction was a necessity was no defense where the excavation guarded was not. *Gunther v. Dranbauer*, 86 Md. 1.

One who is illegally engaged in stringing a wire, cannot recover for injuries occasioned by negligent driving against the same. *Banks v. Highland Street Railroad Co.*, 136 Mass. 485.

Plaintiff recovered where a traveler collided with a wagon left within

one foot of the traveled part of the highway. *Joslin v. La Baron*, 41 Mich. 160.

A horse becoming frightened ran into a car obstructing the highway. The former was the proximate cause of injury. *Lambeck v. Grand Rapids &c. R. Co.*, 106 Mich. 512.

The same was held where a horse in running away struck a defective planking. *Murphy v. Michigan C. R. Co.*, 107 Mich. 627.

Defendant kicked cars which it stored in the street against one another without ascertaining whether there were persons in the spaces between them. Held liable. *Iehman v. Eureka Iron &c. Works*, 114 Mich. 260.

Whether a telephone company was negligent in leaving its wire suspended in the street long enough to make connections without guarding against injury was for the jury. *Hovey v. Michigan Teleph. Co.*, 124 Mich. 607.

Plaintiff not allowed to recover for injuries by his horse catching his foot between the curb and an electric light pole, which he used as a hitching post. *Rytheer v. Austin*, 72 Minn. 24.

Leaving a ladder standing along a sidewalk was the cause of its fall and not an intervening high wind. *Moore v. Townsend*, 76 Minn. 64.

Independent contractor engaged to lay a sidewalk obstructed the highway. Owner not liable. *Independence v. Slack*, 134 Mo. 66.

See *Luke v. El Paso*, (Tex. Civ. App.) 60 S. W. Rep. 363.

Defendant obstructed a highway by timbers taken from bridge being repaired. Liability established. *Golden v. Chicago &c. R. Co.*, 84 Mo. App. 59.

That the shying of plaintiff's horse contributed, held no defense to negligent stringing of a guy wire. *Lundeen v. Livingston &c. Light Co.*, 17 Mont. 32.

Plaintiff on top of a high load, with knowledge of projecting stumps of telegraph poles, drove a spirited team down a steep, rough hill. Held, contributorily negligent. *Nebraska Tel. Co. v. Jones*, 59 Neb. 510; s. c. aff'd, 60 id. 396.

A city may recover damages for obstructing a street. *Concord v. Burleigh*, 67 N. H. 106.

Mill owner was not chargeable with obstruction made by one engaged to haul the objects of the obstruction. *Manchester v. Warren*, 67 N. H. 482.

Owner may temporarily obstruct the sidewalk while receiving goods from his store. Plaintiff instead of waiting or going around, attempted to climb over, and was negligent in doing so. *Berdan v. Brownlee*, 12 Oh. C. C. 269.

Obstruction caused special injury where a contractor carting at so

much a load, was prevented from carrying as many loads. *Knowles v. Pennsylvania R. Co.*, 175 Pa. St. 623.

Owner was allowed to cut down an unlicensed telephone pole in front of his premises. *New York Telephone Co. v. Keeseey*, 5 Pa. Dist. Rep. 366.

Contractor repairing a street, was negligent in obstructing the highway to the middle on one side, without putting up lights, where there was an obstruction only eight feet away in the opposite side. Held liable. *Hooker v. Oakdale*, 5 Pa. Super. Ct. 404.

Driver stepped on frozen banks of snow, with which defendant had obstructed the highway, while endeavoring to right his load which had overturned. Held not contributorily negligent. *Stanton v. Scranton T. Co.*, 11 Pa. Super. Ct. 180.

Recovery was not denied because plaintiff failed to carry a lantern which would have enabled him to have seen a toll gate open and pointing toward him. *Stewart v. Chester & D. T. Road Co.*, 3 Pa. Super. Ct. 86.

Abutting owner may obstruct a street car's passage a reasonable time while shipping goods. *Patterson v. Pittston*, 8 Kulp. 530.

See, also, *Kuhnert v. Angel*, 8 N. D. 198.

Defendants were engaged in removing poles and had warned plaintiff, a boy, to keep away. Contributory negligence was for the jury. *McGaw v. Lancaster*, 14 Lanc. L. Rev. 276.

Snow left by "A." overturned "B.'s" sleigh, scaring his horse so that it injured "C.," making "A." liable to "C." *Lee v. Union &c. R. Co.*, 12 R. I. 383.

That obstruction is in front of defendant's premises does not show defendant caused it. *Sneeson v. Kupfer*, 21 R. I. 560.

Plaintiff voluntarily went near stones piled on the sidewalk without necessity and in broad daylight. Held contributorily negligent. *Nicholas v. Peck*, 21 R. I. 404; s. c., 20 R. I. 533.

Owner of a push cart partially obstructing the sidewalk may possibly be held liable with an iceman driving against it as contributor to the accident. Question not directly decided. *Snyder v. Witt*, 99 Tenn. 618.

Defendant, held negligent in leaving a telegraph wire suspended across a street about two feet from the ground for two months and a half. *Western &c. Teleg. Co. v. Engler*, 75 Fed. Rep. 102.

While an electric company is not an insurer of the safety of the public, it is bound to know the dangers which may naturally be caused by the use of the streets for the erection of poles and to guard against the same by the exercise of all the foresight and caution which can reasonably be expected of prudent men. *Denver v. Sherret*, 88 Fed. Rep. 226.

Right to use the highway for the purpose of intimidating persons going

to and from adjoining premises denied. *Mackall v. Ratchford*, 82 Fed. Rep. 41.

See, also, *American Steel & Co. v. Wire Drawers' &c. Unions*, 90 Fed. Rep. 608.

Water company complied with ordinance in the original construction of its stop box in the sidewalk. It was not liable for its subsequent condition due to reconstruction of the walk. *Mahoney v. Helena*, 96 Fed. Rep. 790.

Statute prohibiting the creation of obstructions to navigation not authorized by law, held applicable where additional weight was added to embankment made by a railroad company which forced soil from under it into the river so as to form a bar creating such an obstruction. *North-ern Pac. R. Co. v. United States*, 104 Fed. Rep. 691.

A supervisor may abate as a nuisance, a fence erected purposely to prevent travel. *Whitaker v. Ferguson*, 16 Utah, 240.

Defendant was not liable for the removal of lights or guards about an obstruction where he has not had time to discover it. *Raymond v. Kesse-berg*, 91 Wis. 191.

Defendant left a buggy, partially wheelless, ten feet out of the traveled portion of the highway in a backwoods district, till called for. Question of negligence was for the jury. *Kumba v. Gilham*, 103 Wis. 312.

Erection of a pole in front of a show window without the consent of the adjoining proprietor, held to be a continuing trespass. *Krueger v. Wisconsin Tel. Co.*, 106 Wis. 96.

(d). EXCAVATIONS, OPENINGS IN STREET AND COAL HOLES.

The defendant dug a ditch across a sidewalk, and left it open in the night time, without warning; it was negligence *per se*.

Permission from the municipality is not a defense to an action for negligence. *Creed v. Hartman*, 29 N. Y. 591; *Congreve v. Smith*, 18 id. 79; *Congreve v. Morgan*, 18 id. 84; *Storrs v. City of Utica*, 17 id. 104; *Sexton v. Zett*, 44 N. Y. 430, aff'g judg't for pl'ff.

A contractor should expect the sinking of replaced earth and should use care to guard against injuries from it. *Johnson v. Friel*, 50 N. Y. 679, aff'g judg't for pl'ff.

If the owner of land make an excavation thereon adjacent to the highway, or so near as to make the use of the highway unsafe or dangerous, he will be liable to a traveler who, while using ordinary care, falls into it and is injured. The owner of a hotel fronting upon a street, and bounded on the side by a public thoroughfare or alley had for a long time allowed the portion of his premises adjoining the street and alley to be

used by the public as a public place and as a portion of the highway. He subsequently erected a building upon such portion of his premises and made an excavation by the side thereof and about ten feet from the alley. Plaintiff passing over the space between the building and the alley on a dark night fell into the excavation, which had been covered with boards, at that time removed. *Beck v. Carter*, 65 N. Y. 283, aff'g 6 Hun, 604, and judg't for pl'ff.

The public are entitled to an unobstructed passage upon the streets, including the sidewalks of a city.

A hole in a sidewalk, communicating with a coal vault beneath, is an obstruction.

When permission is given by a municipal authority to thus interfere with a sidewalk, solely for private use and convenience, the person obtaining the permission must see to it that the street is restored to its original safety and usefulness.

If a permit was material, it could only be to mitigate the act from an absolute nuisance to one involving care in construction and maintenance; it was necessary not only to plead it but to allege and prove a compliance with its terms, and that the structure was properly made and maintained to secure the same safety to the public that the sidewalk would have done without it. *Clifford v. Dam*, 81 N. Y. 52, aff'g judg't for pl'ff.

Crawford v. Wilson &c. Co., 8 Misc. 48.

The plaintiff fell between the angle of the bridge and the corner of an adjacent building through an opening. He had, on a dark night, left a party with a light and wandered off alone. It was contributory negligence. *Cummins v. City of Syracuse*, 100 N. Y. 637.

The defendant lawfully opened a trench in a city street. The plaintiff, a passenger in a street car, was injured on his arm by a railing erected to guard the trench, and sufficiently near to car to strike plaintiff's arm. It was for the jury to say whether it was negligence for the plaintiff to have his arm out of the window. *Francis v. N. Y. Steam Co.*, 114 N. Y. 380, aff'g 13 Daly, 510, and judg't for pl'ff.

Defendant employed Reynolds to make an excavation in the street, which was done and barricaded, but not lighted. Hence, on a dark night, in turning out for it plaintiff hit a post, and hence the injury. As there was no authority to make an excavation in the street the defendant could not excuse himself on the ground that Reynolds was an independent contractor, as action is for wrong. *Baxter v. Warner*, 6 Hun, 585, aff'g judg't for pl'ff.

Ellis v. Sheffield Gas Com. Co., 2 Ell. & Bl. 767; *Gray v. Pullin*, 5 B. & S. 970, 981; *Pickard v. Smith*, 10 C. B., (N. S.) 470; *Mersey Docks v. Trustees*.

L. R., 1 H. of L. 114; *Storrs v. City of Utica*, 17 N. Y. 104; *Congreve v. Smith*, 18 id. 79; *Creed v. Hartman*, 29 id. 591.

A contractor dug a ditch for water pipe, not interrupting regular crossing for pedestrians one hundred or two hundred feet away. A woman tried to cross the road at another point and fell in. Defendant not liable; not obliged to make crossing for person where the city had none. *Thieme v. Gillen*, 41 Hun, 443, aff'g judg't for def't.

Plaintiff, passing through a street which was quite dark, and with a strong wind blowing in his face, fell into a manure pit under the sidewalk, the cover of which had not been replaced by the servant of the tenant of the adjoining building, to which it belonged. Defendant was bound to see that the sidewalk was made safe while the pit was open. *Hughes v. Orange County Milk Association*, 56 Hun, 396, aff'g judg't for pl'ff.

Defendant purchased premises formerly used as a stable, for which purpose a runway had been excavated in the sidewalk of a city street in order to reach the basement. This runway began at the outer line of the step of the house and descended at an angle of fifteen degrees towards the house, at which point it reached a depth of four feet. In the absence of evidence, that the city had authorized the construction, the runway was held to be a nuisance, and the continuance of it, although the property was in the hands of a tenant, made the defendant liable for injury to plaintiff who fell into the runway at night. *McGrath v. Walker*, 64 Hun, 179, aff'g judg't for pl'ff.

It was for the jury to say whether defendant was negligent, where plaintiff testified that she stepped upon the cover of a coal hole which "flew away" so that she fell into the hole, while defendant testified that the cover and means of securing it were in perfect condition before the accident, and immediately after it he found it properly secured. *Kuechenmeister v. Brown*, 1 App. Div. 56.

Defendant's servants were lawfully engaged in digging a trench for a pipe in a street, having left ample room for the passage of vehicles and were not negligent because they threw dirt while a team was passing. *Nilan v. Richmond County Gaslight Co.*, 1 App. Div. 234.

Defendant's bridge contained a trap door, opening from below, in a space between a footwalk and a railway, along which plaintiff and others had been permitted to walk with baby carriages. Plaintiff was injured by a workman's coming from below while she was passing over it. It was held that in view of the extreme improbability of such an accident occurring, and from the fact that none such had occurred during ten years' use, defendant could not be charged with negligence. *Favro v. Troy &c. Bridge Co.*, 4 App. Div. 241.

A street railroad with a city's permission opened up a street in the course of operations to lay a track, when it was ordered to suspend work pending the establishment of a grade, which it did, erecting a fence about the excavation. Plaintiff was injured by running into the fence upon an accident happening to his harness. It was for the jury to say whether the railroad or city was negligent in leaving the trench open and in such condition from the beginning of December to the middle of the following July, and whether the fence as constructed was sufficient for the purposes for which it was built. *Lane v. Syracuse*, 12 App. Div. 118.

A pedestrian on the street fell into a coal hole owing to the insecurity of the fastenings. The owner of the premises was chargeable with the negligence. *Matthews v. De Groff*, 13 App. Div. 356.

See, also, *Collier v. Hyatt*, 110 Ga. 317.

Defendant maintained a ditch along the southerly side of its tracks at a crossing. The sidewalk connecting the bridge was guarded with a fence, but the sidewalk and fencing stopped a short distance beyond, beyond which there was no defined path across the tracks. So that a person coming from the opposite direction across the tracks on a dark night by missing the sidewalk might fall into the ditch adjoining the highway. The maintenance of such a condition for 21 years was held to charge defendant with negligence. *Thompson v. New York &c. R. Co.*, 41 App. Div. 78.

Owner was not liable for the removal of the coal hole cover in front of his premises where it was in proper condition, and securely fastened, but the employé of one delivering coal had removed it without his knowledge or apprehension. *Brady v. Shepard*, 42 App. Div. 24.

Where the case was tried on the theory that defendant might be liable for negligence in respect to the covering of a coal hole in front of his premises, it was proper to refuse a request as to the coal hole being a nuisance. Evidence that third parties were delivering coal at the time plaintiff fell through was not admissible to show a delegation of the duty to keep it in safe condition, but was competent as showing circumstances which might charge plaintiff with contributory negligence. *Campion v. Rollwagen*, 43 App. Div. 117.

A boy slipped on sand on a sidewalk and fell into an unguarded elevator pit adjacent. The lack of proper guard was held to be the proximate cause of the injury. *Porcella v. Mutual &c. Asso.*, 50 App. Div. 158.

The temporary use of coal holes, if required by the exigencies of trying situations, does not, if sufficiently guarded, constitute under all circumstances a nuisance *per se*. To make it a nuisance it is necessary to prove that the use was unusual, unnecessary or unreasonable, or that the

manner of use was inherently dangerous, and that the rights and safety of the public had not been sufficiently respected.

The owner of real estate is not bound at his peril to stand by and see that a contractor whom he employs to do a lawful act does not, for the convenience of himself or his employés, commit wrongful acts while performing their duty.

Plaintiff, while walking along the street, struck her knee against the barrel placed over a coal hole in a sidewalk, necessarily left open while repairs to adjoining premises were in progress, and sustained injuries which necessitated amputation of the limb. There was nothing in the terms of the contract or the nature of the work to be done which would render the owner liable for the consequences of the acts of the contractor in placing or continuing the obstruction on the sidewalk.

There was testimony properly given by witnesses familiar with such matters that the method of protecting coal holes adopted by defendants had always been found safe. *Maltbie v. Bolting et al.*, 6 Misc. 339, rev'g judg't for pl'ff.

From opinion.—"While it is undoubtedly true as a rule that the public are entitled to an unobstructed passage upon the streets, including the sidewalks of a city, and that any person by unlawfully placing obstructions thereon may make himself liable as for creating or maintaining a nuisance, it is also true that any temporary use of a highway or street that is rendered absolutely necessary from the necessities of trade, commerce or the erection of buildings, that does not necessarily or unreasonably obstruct the same, is lawful and not the foundation of such an action. Wood on Nuisances, sec. 258; *Commonwealth v. Passmore*, 1 S. & R. 219; *People v. Cunningham*, 1 Denio, 524; *People v. Horton*, 64 N. Y. 610; *Welsh v. Wilson*, 101 id. 254; *Callahan v. Gillman*, 107 id. 360. That temporary use of coal-holes, if required by the exigencies of trying situations, does not, if sufficiently guarded, constitute under all circumstances a nuisance *per se*. To make it a nuisance in that sense it is necessary to prove that the use was unusual, unnecessary or unreasonable, or that the manner of use was inherently dangerous, and that the rights and safety of the public had not been sufficiently respected. See *City v. Zimmermann*, 95 Penn. St. 287. * * *

There was nothing either in the terms of the contract, or in the nature of the work to be done, that made the owner liable for the consequences of the acts of the contractor in placing or continuing the obstruction upon the sidewalk. *Hexamer v. Webb*, 101 N. Y. 377; *Herrington v. Village*, 110 id. 145; *Engel v. Eureka Club*, 137 id. 100; *Ferguson v. Hubbell*, 97 id. 507; *McCafferty v. Railroad Co.*, 61 id. 178; *French v. Vix*, 2 Misc. Rep. 312; *Martin v. Tribune*, 30 Hun, 391; *Sulzbacher v. Dickie*, 6 Daly, 471; *Charlock v. Freel*, 125 N. Y. 357.

The supreme court of the United States in *Robbins v. City*, 4 Wall, 679, recognized the distinction before suggested in these words: 'Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly

from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party.' See, also, *Water Co. v. Ware*, 16 Wall. 576; *Gourdier v. Cormack*, 2 E. D. Smith, 254; *Milford v. Holbrook*, 9 Allen, 21. The obstruction or defect complained of was clearly collateral to the work contracted for, and the case was thus brought within the rule laid down in the authorities cited, which exempts the owner from liability."

One who causes excavations to be made in a sidewalk must use reasonable precautions for the security of travelers. If there is danger that the guards may be thrown down by boys in a thickly settled neighborhood, a watchman should be stationed in the day-time to see that they are kept up.

Defendant had lawfully made large excavations, six feet wide and seven deep, in the sidewalk for the foundations of an elevated railroad structure, which were unguarded. Plaintiff's intestate, a child eight years old, was riding with other children on a boy's wagon, which turned suddenly as it approached one of the excavations and threw the intestate into the hole, causing injuries from which he died. The question of negligence and contributory negligence were for the jury. *Crawford, Jr. v. Wilson & Baillie Manufacturing Co.*, 8 Misc. 48. (City Court of Brooklyn.)

On the evening of a general election the plaintiff, for the purpose of seeing the election returns displayed at certain newspaper offices, took up a position in the street between an open, unguarded trench and a car track, in the midst of a small but rapidly increasing crowd, which swayed back and forth to avoid the cars as they passed on the track. After remaining there over an hour, in one of the rushes of the crowd, plaintiff was pushed into the trench and received the injuries for which action was brought. Plaintiff voluntarily exposed himself to a risk which was obvious to him, and was, therefore, guilty of contributory negligence, and was not entitled to recover. *Bischoff, J.*, dissents. *Roe v. Crimmins*, 10 Misc. 711. (New York Common Pleas.)

A wooden covering for excavation on sidewalk, contrary to ordinance, was a nuisance, and the owner was liable to one falling into the excavation without proof that the owner of the adjoining property removed the covering. *Barry v. Terkildsen*, 72 Cal. 254.

The defendant made an excavation on his own land, a short distance from the sidewalk in a city street, into which a pedestrian having got off the walk in the night, fell. The city recovered indemnity from the defendant on account of damages paid by it. *City of Norwich v. Breed*, 30 Conn. 535.

Citing *Howland v. Vincent*, 10 Met. 371; *Angell on Highways*, sec. 225; *Harcastle v. South Yorkshire R. Co.*, 4 H. & N. 67; *Hounsel v. Smyth*, 7 Com. Bench., (N. S.) 729. See also, *Homan v. Stanley*, 66 Penn. St. 464; *Gramlich*

v. Wurst, 86 id. 74; Temperance Hall Association v. Giles, 33 N. J. L. 260; citing Durant v. Palmer, 5 Dutcher, 544; Barnes v. Ward, 9 M. G. & S. 392; Housel v. Smythe, 7 C. B., (N. S.) 731; Hardcastle v. S. G. & R. D. Co., 4 H. & N. 67; Binks v. The Same, 3 B. & S. 244; Hadley v. Taylor, L R. 1 C. P. 53.

Mere maintenance of an iron door wholly within the shopline from which no accident had ever occurred established no liability. *Sandman v. Baylies*, 21 Misc. 523.

The question being one of negligence. *Sandman v. Baylies*, 26 Misc. 692; aff'g s. c., 21 Misc. 523.

Railway excavated a portion of the highway premises adjoining. It was held that its neglect to see that the proper guards and warnings were posted contributed to the accident and gave judgment for the plaintiff. *Cartesen v. Stratford*, 67 Conn. 428.

Though an ordinance permits construction of a cellar door in the sidewalk, owner is still bound to protect persons passing while it is open. *Louth v. Thompson*, 1 Penn. (Del.) 149.

And such persons are not bound to anticipate that he had failed to do so. *Id.*

Permission to store coal under the sidewalk, held not to make abutting owner an insurer of the safety of pedestrians above it. *West Chicago & C. Ass'n v. Cohn*, 192 Ill. 210.

Culvert was defective but plaintiff drove too near it. No recovery. *Alton v. English*, 69 Ill. App. 197.

A person is not precluded from using a street which he knows is unsafe. It only imposes the duty of greater diligence in proportion to the danger. *Citizen's Street R. Co. v. Ballard*, 22 Ind. App. 151.

Knowledge that coal hole is defective imposes the duty of using extraordinary care to see that it is repaired in time to prevent injury. *Gaston v. Bailey*, 24 Ind. App. 24.

That plaintiff was walking rapidly was not inconsistent with the exercise of care in doing so. *Gaston v. Bailey, supra*.

Allegation of ownership of building adjoining defective coal hole held sufficient to raise liability. *Gaston v. Bailey, supra*.

See, also, *O'Malley v. Gerth*, (N. J. L.) 52 Atl. Rep. 563.

But see *Suesson v. Kupfer*, (R. I.) 45 Atl. Rep. 579.

Plaintiff was not negligent in stepping into a hole in the sidewalk where other objects than her baby carriage, which she pushed in front, obstructed her view. *Bluffton v. McAfee*, (Ind. App.) 53 N. E. Rep. 1058.

The fact that a bridge not guarded nor wide enough contributed to plaintiff's injury, held no defense to negligence in constructing a cattle pass under it. *Gould v. Schermer*, 101 Iowa, 582.

Permission from the city to excavate, required a contractor to guard the hole at his peril. The excavation was not necessarily connected with the construction of the building. *Baumeister v. Markham*, 101 Ky. 122.

Plaintiff stepped, in the dark, off adjoining steps on to coal, which laborers were preparing to shovel into a coal hole, two feet back from the street line. Recovery was asked on the ground that she was a foreigner, ignorant of our customs. Denied. *Lorenzo v. Wirth*, 170 Mass. 596.

A street car company had undertaken to guard a part of another's excavation but for its own benefit. It was claimed that that fact relieved the latter of the duty of seeing that it was sufficiently guarded. Contention held untenable. *Boston v. Coon*, 175 Mass. 283.

Contractor placed barriers at the entrance of a street undergoing alterations, suitable to give reasonable notice that it is closed to travel. He was not required to maintain them so as to absolutely prevent people from getting thereon. Plaintiff in ignorance thereof passed between them in the dark. *Jones v. Collins*, 177 Mass. 444.

Failure to guard an excavation on a wagon way held not the proximate cause of an accident, where a horse, through fright backed some 30 or 40 feet thereto. *LaLonde v. Peake*, 82 Minn. 124.

Failure to use reasonable care in constructing a coal hole made defendant liable for negligence, though another's negligence in replacing its cover contributed. *Benjamin v. Metropolitan Street R. Co.*, 133 Mo. 274.

And though he leases the premises, it being defective at the time of the lease. *Mancusco v. Kansas City*, 74 Mo. App. 138.

So in knowingly allowing it to remain in defective condition. *Kehoe v. Halpin*, 65 Mo. App. 343.

So as to an iron grating in the sidewalk though the owner did not have it constructed originally and never received any benefit from it. A bar out for several years imputed notice. Merely sending men there with instructions to repair, held insufficient. *Stevens v. Walpole*, 76 Mo. App. 213.

So such notice may be inferred where the grating had been defective for a considerable length of time. *Jegglin v. Roeder*, 79 Mo. App. 428.

And as to such defects as are liable to arise through ordinary wear and tear and are apparent upon a reasonable inspection. *Id.*

An owner is not an insurer however as to a small coal hole so as to make him liable *per se* as for a nuisance. *Benjamin v. Metropolitan Street R. Co.*, 133 Mo. 274.

Otherwise, however, where the excavation appropriates nearly the whole

width of the street and is only covered with a wooden door divided into four sections. *Memphis v. Miller*, 78 Mo. App. 67.

A pedestrian must take notice of obstructions incident to the convenience and use of buildings on street. *Buesching v. St. Louis &c. R. Co.*, 6 Mo. App. 85.

Defendant, held liable for leaving an excavation at the edge of the sidewalk unguarded; though an accidental stumble of the plaintiff contributed to the injury. *Cannon v. Lewis*, 18 Mont. 402.

It was not competent for the defendant to show that areas were common in the city; that it was customary to protect them in a certain manner, and that a large number of persons had passed the same without injury. *Bacon v. City of Boston*, 3 Cush. 174. Nor that other people had fallen in the same. *Collins v. Inhab. of Dorchester*, 6 Cush. 396; *Hubbard v. Androscoggin &c. R. Co.*, 39 Maine, 506. Nor that other persons complained of it. *Aldrick v. Inhab. of Pelham*, 1 Gray, 510; *Kidder v. Inhab. of Dunstable*, 11 Gray, 342. *Temperance Hall Association v. Giles*, 33 N. J. L. 260.

Distinguishing House v. Metcalf, 27 Conn. 631; *Calkins v. Hartford*, 33 id. 57, concerning which see *Bailey v. Town of Trumbull*, 31 id. 582.

A contractor who left space so placed as to look as though it were for crossing over an excavation, although designed for another purpose, was liable for the injury that resulted from its use by a pedestrian. *Finegan v. Moore*, 46 N. J. L. 602.

A guard about an excavation must be sufficient to withstand an ordinary wind. *Sutphen v. Hedden*, 67 N. J. L. 324.

Definite injury caused by stepping on a stone negligently placed in the street does not permit speculation as to what might have occurred had it not been there. *Heckman v. Ebenson*, 7 N. D. 173, 180.

Owner of a coal hole, held not relieved because another had promised to guard it during use. *King v. Herb*, 18 Oh. C. C. 41.

There was nothing to prevent plaintiff from pushing her baby carriage on across notwithstanding dirt thrown from an adjoining excavation or recrossing the track backward, the street car being half a square away. In view of such circumstances she was held contributorily negligent in backing away from the crossing at right angles, falling into a manhole. *Lumis v. Philadelphia T. Co.*, 181 Pa. St. 268.

A proprietor of a theatre reasonably apprehending a crowd upon its footway must make all parts thereof reasonably safe for use. *Stewart v. Jermon*, 5 Pa. Super. Ct. 609.

Cellarway extending into the sidewalk two-fifths of its width, must be kept as free from defects as the rest of the walk. *Snader v. Murphy*, 19 Pa. Super. Ct. 35.

Plaintiff knowingly walked in the dark between a trench and the bank of excavated earth next to it. Removal of barrier held no defense. *O'Neil v. Bates*, 20 R. I. 793.

Turning water into a highway in freezing weather creates a nuisance. *Bernard v. Woonsocket Bobbin Co.*, 23 R. I. 581.

By digging a ditch across the sidewalk though to lay a water pipe, an owner assumes the responsibility of its safe condition. *Texas &c. R. Co. v. Hightower*, 12 Tex. Civ. App. 41.

Driving at a rapid rate, dangerously near a trench relying on the grooves of a track to prevent his wheels going over, prevented recovery on the ground of contributory negligence. *Watt v. Southern Bell Teleph. &c. Co.*, (Va.) 40 S. E. Rep. 107.

The defendant dug a sand hole within the limits of a highway near a school-house, into which a boy of nine years entered and was killed by falling sand. There was nothing to show that the highway was rendered unsafe. *Fay v. Kent*, 55 Vt. 557.

Railing about a depression adjoining the street left by elevating the grade of the street had been removed by some one. The unauthorized use thereof by a tenant did not make the abutting owner liable. *Watson v. Webb*, 28 Wash. 580.

(e). DEFECTS IN SIDEWALKS OR ROADWAYS.

A pipe properly constructed to conduct water from a house and discharging it on the sidewalk, is not a nuisance, if not forbidden. The defendant bought a house which, in common with the adjoining one, discharged water through a pipe passing in whole or part on his house and emptying in front of it. He changed the course of the water so that it did not discharge through the pipe, and neither owned nor used it, and his tenant was in possession.

He was not liable for injuries to a person who was injured by slipping on ice formed on the walk by such discharge from the other house. *Wenzlick v. McCotter*, 87 N. Y. 122, rev'g 22 Hun, 60, and judg't for pl'ff.

Distinguishing *Brown v. C. & S. R. R. Co.*, 12 N. Y. 486; *Wasmer v. D., L. & W. R. R. Co.*, 80 id. 212; *Irvine v. Wood*, 51 id. 224; *Clifford v. Dam*, 81 id. 56; *Walsh v. Mead*, 8 Hun, 387.

The plaintiff was negligent, who, with knowledge thereof, drove a top-heavy load upon a sloping elevation of about two feet in a part of a country highway between the turnings of two traveled tracks of a road approaching it, which was unprepared for public use. *Cleveland v. Town of Pittsford*, 72 Hun, 552, aff'g nonsuit.

The materials, e. g. gravel, used in making repairs upon one's build-

ing fall upon the adjoining sidewalk during the course of the work is not sufficient to charge him with negligence when they are not allowed to remain there an unreasonable length of time, as such is a reasonable use of the sidewalk which he is entitled to. *O'Reilly v. Long Island R. Co.*, 4 App. Div. 139.

A mule stepped through a hole in a reasonably safe railway crossing out of the line of travel and injury resulted. No recovery. *Paterson v. Southern &c. R. Co.*, 89 Ala. 318.

Sidewalk having steps leading to different grades constructed under municipal authority and with its approval, held proper. *Hoyt v. Danbury*, 69 Conn. 341.

Knowledge that the walk is defective, does not make it negligent *per se* to use it. *Waverly v. Henry*, 67 Ill. App. 407.

Where plaintiff temporarily forgot it owing to her attention being drawn to her crying child. *Cofeen v. Lang*, 67 Ill. App. 359.

So as to walk in a generally bad condition where there was no particular and conspicuous defect. *Allen v. Du Bois*, 181 Pa. St. 184.

Plaintiff walking with such care as she thought that the slipperiness of the walk demanded was not necessarily negligent in looking elsewhere while doing so. *Shipley v. Proctor*, 177 Mass. 498.

A person walking backward down hill slipped and fell between ties of railroad track. Recovery denied. *Kelly v. Manayunk &c. R. Co.*, 11 Cent. Rep. (Pa.) 415.

Sink water ran in an open drain over the sidewalk. Abutting owner was liable for a fall, upon its freezing. *Brown v. White*, 202 Pa. St. 297.

(f). DUTY TO KEEP IN REPAIR.

In the absence of a duty imposed by the municipality or by statute there is no obligation on a private owner to see that the sidewalk in front of his premises is fit to travel on, and he cannot be held liable for failing to clear away snow on his adjoining premises so as to prevent the water melting from it, running down upon the sidewalk and freezing. *Brown v. Wyson*, 1 App. Div. 423.

Defendant constructed an awning over the sidewalk turning the water from it through a gutter into a leader which discharged the water upon the sidewalk at the base. In cold weather it was liable to freeze and cause persons using the walk to slip and fall. He was liable for injuries so sustained. *Macauley v. Schneider*, 9 App. Div. 279.

From opinion.—"It is undoubtedly true that the duty of maintaining its streets in a reasonably safe condition for travel rests upon the city, and for a failure to discharge that duty the city is liable. But though the city may be

liable, it by no means follows that other persons who have contributed to the unsafe condition of the streets are not also liable.

A contractor for the construction of a bridge, agreed to keep a temporary structure in repair for passage in the meanwhile. He was chargeable with a neglect to repair, at the suit of a third person injured thereby. *Cook v. Dean*, 11 App. Div. 123.

Defendant in constructing a bridge over an excavation he had been making in the sidewalk, left a V-shaped opening in a step leading to it. The bridge was left unlighted and remained in such condition for several days, and plaintiff catching her foot in it sustained injuries therefrom. The fact that no complaint had been made to the building department did not relieve him from liability therefor. *Fischer v. Franke*, 21 App. Div. 635.

An owner of an adjoining lot is not liable for injuries to one falling upon snow swept upon the sidewalk from such lot in the absence of proof that it had been allowed to accumulate thereupon so as to form a dangerous obstruction to travel. *Rohling v. Eich*, 23 App. Div. 179.

Violation of an ordinance as to the removal of snow and ice from the sidewalk, held not negligence *per se*. *Harkin v. Crumbie*, 14 Misc. 439.

Defendant could not plead lack of notice where his own servant caused the defect. *Donnelly v. Cowen*, 20 Misc. 100.

An owner who conducts a stream across the highway to his premises is bound to repair the bridge over it, and not the town. *Clay v. Hart*, 25 Misc. 110.

A sidewalk partly flagged, held to be within an ordinance requiring the removal of snow from "flagged" sidewalks. *New York v. Brown*, 27 Misc. 218.

There is no liability for failure to repair a sidewalk in the absence of statute. *Marintovich v. Wolley*, 128 Cal. 141.

Baustian v. Young, 152 Mo. 317; *Davis v. Omaha*, 47 Neb. 836; *Streator v. Christman*, 88 Ill. App. 24; *Seward v. Wilmington*, 2 Marv. (Del.) 189; *Morris v. Roodburn*, 57 Oh. St. 330.

Requirement that an "owner agent or tenant" remove snow and ice does not contemplate real estate agents. *Holtzman v. United States*, 14 App. D. C. 454.

That plaintiff had an action against the city which might recover over held not to prevent his suing the defendant directly. *Rowe v. Baltimore &c. R. Co.*, 82 Md. 493.

That few come within a requirement that owners of brick and concrete sidewalks remove snow therefrom does not make it class legislation. *Clinton v. Welch*, 166 Mass. 133.

City paid damages as the result of an owner's failure to repair. In-

demnity was allowed though the latter would not have been liable to the person injured. *Holyoke v. Hadley Water Power Co.*, 174 Mass. 424.

A city's failure to guard an excavation was no defense to its maker's failure to do so. *Boston v. Coon*, 175 Mass. 283.

It is usually considered that an abutting owner is not liable for injury arising from neglect to keep a sidewalk in proper condition, when the municipality is bound to repair. (*Ante*, p. 1859). *Eustace v. Johns*, 38 California, 3; *Hartford v. Talcott*, 48 Conn. 525; *Keokuk v. Ind. Dist. of Keokuk*, 53 Iowa, 352; *Kirby v. Boylston Market Co.*, 14 Gray 249; *Flynn v. Canton Co.*, 40 Md. 312; but there is some holding to the contrary; *Peoria v. Simpson*, 110 Ill. 294, but a statute making an adjoining owner liable for neglect in keeping sidewalk in repair has been considered unconstitutional. *Noonan v. Stillwater*, 33 Minn. 198.

These cases should be distinguished from those where a person by direct invasion of a highway has made it defective and thereby made the municipality liable. In such case the municipality may usually recover over against the wrong-doer for his wrong. See "Indemnity," *ante*, p. 1295; "Municipality," *ante*, pp. 1859-60.

See, also, *Littleton v. Richardson*, 34 N. H. 179; *Lowell v. Boston &c. R. Co.*, 23 Pick. 24; *Westfield v. Mayo*, 122 Mass. 100; *West Boylston v. Mason*, 102 Mass. 341; *Lowell v. Short*, 4 Cush. 275; *Robbins v. Chicago*, 4 Wall. 657; *Rockford v. Hildebrand*, 61 Ill. 155; *City of Rochester v. Montgomery*, 72 N. Y. 65; *Norwich v. Breed*, 30 Conn. 535; *McNaughton v. Elkhart*, 85 Ind. 384; *Portland v. Richardson*, 54 Me. 46; *Trustees &c. v. Brush &c. Co.*, 50 Hun, 581, municipality being a wrong-doer could not recover.

As to indemnity between individuals under similar circumstances, see *Churchill v. Holt*, 127 Mass. 165; 131 *id.* 67; *Simpson v. Mercer*, 144 Mass. 413; *Old Colony R. Co. v. Slavens*, 148 Mass. 363.

Not being required to keep a sidewalk free from defects, owner is not bound to prevent an unprotected embankment from falling into the street. *Beck v. Ferd. Heim Brewing Co.*, 167 Mo. 195.

So negligent construction pursuant to notice by the city held not to make the owner responsible, as by accepting it the duty to remedy the defects merged in the city's duty to repair. *Wilhem v. Defiance*, 58 Oh. St. 56, aff'g s. c., 12 Oh. C. C. 346; s. c., 40 L. R. A. 294.

The primary duty of repairing a sidewalk rests upon the abutting owner. *Mintzer v. Hogg*, 192 Pa. St. 137.

For example, under a statute authorizing a city to make them if he fails and to collect the expense. *Chester v. First Nat. Bank*, 9 Pa. Super. Ct. 517.

Both, however, may be joined, though the duty of one is primary and of the other secondary. *Dutton v. Landsdowne*, 10 Pa. Super. Ct. 204.

By bridging a turnpike to construct its road defendant undertook the

duty of constructing it securely and keeping it in repair. *Conshohocken R. Co. v. Penn. R. Co.*, 15 Pa. Co. Ct. 445.

See, also, *Hall v. Texas &c. R. Co.*, (Tex. Civ. App.) 35 S. W. Rep. 321.

The duty to repair a gas box in the sidewalk rests upon the company having it in control, though the owner is made to pay for it with his connection; and the city having been made to pay for its defective condition may recover over. *Washington Gaslight Co. v. District of Columbia*, 161 U. S. 316.

A pedestrian cannot recover of an owner for failure to repair, where the city is given power to regulate the question of sidewalks and their repair, and the duty imposed on the owners is for the benefit of the city only. *Toutloff v. Green Bay*, 91 Wis. 490.

Or where the city charter requires the owner to repair but authorizes it to do so at his expense if he fails to, and places the ultimate responsibility for such failure upon the party whose "wrong, default, or negligence" caused the injury. *Selleck v. Tallman*, 93 Wis. 246.

(g). FALLING WALLS AND OBJECTS FROM BUILDINGS.

A bolt passing through the guard rail and stringer and iron plate of the defendant's elevated railroad broke about two inches from the nut, and fell upon the plaintiff, who was driving in the street under the structure. The defendant proved proper construction of the road, and by its track walker proved an inspection; that his duty was to move carefully over the track every day and carefully examine all the bolts and fastenings and keep them tight, and that during the month in which the accident occurred he followed out these instructions to the best of his ability. The plaintiff's counsel asked to have the defendant's negligence submitted to the jury on the ground that the fact that the bolt fell was presumptive evidence, that the defendant was negligent. A verdict was directed for the defendant.

This was held (three judges dissenting) to be error, and the fact that the bolt was broken and part of it fell raised a presumption, that the defendant's structure was out of repair and dangerous, and the evidence of the inspector was not sufficient to remove such presumption; and that if the inspector's evidence were sufficient to overcome the presumption yet, as he was an interested person, and possibly acted by a motive to shield himself from blame, his culpability was involved and there was a question for the jury. *Volkmar v. M. R. Co.*, 134 N. Y. 418; reversing judgment which directed for defendant. The jury on new trial found for defendant.

From opinion.—"It has been held that where a building adjoining a street falls into the street in the absence of explanatory circumstances negligence will

be presumed, and the burden is placed upon the owner of showing the use of ordinary care; that where a plaintiff was passing on a highway under a railroad bridge when a brick fell from one of the pilasters upon which an iron girder of the bridge rested, striking him upon the shoulder, causing injury, negligence would be presumed; that where a barrel rolled out of the window of a warehouse onto a street, injuring a person passing, negligence would be presumed; that where a person, while walking along the street in front of a building, was struck by a falling chisel, the presumption of negligence is sufficient to call for an explanation; that where plaintiff was injured while walking on the sidewalk of a street immediately under the defendant's railroad by being struck by a heavy piece of metal which fell from one of the defendant's cars passing above, that from the nature of the accident negligence might be inferred, &c. *Mullen v. St. John*, 57 N. Y. 567; *Kearney v. London R. R. Co.*, L. R. (5 Q. B.) 411; s. c., 6 id. 759; *Byrne v. Boadle*, 2 Hurl. & Colt. 722; *Cahalin v. Cochran*, 1 N. Y. St. Rep. 583; *Goll v. Manhattan Ry. Co.*, 24 id. 24; affirmed 125 N. Y. 714; *Payne v. Troy & Boston R. R. Co.*, 83 id. 572."

See *Maher v. Railway Co.*, 53 Hun, 506.

See, also, *Smethurst v. Proprietors &c.*, 148 Mass. 261 (where snow fell from building and upon a horse and frightened him, defendant was liable); *Jager v. Adams*, 123 Mass. 26 (brick fell, liability); *Pasterne v. Adams*, 49 Cal. 87 (lumber piled in street fell, liability); *Gorham v. Gross*, 125 Mass. 232 (walls fell on adjoining buildings, liability; see opinion); *Gray v. Boston Gas Light Co.*, 114 Mass. 149 (chimney fell on passerby, liability); *Murray v. McShane*, 52 Md. 217; *Couts v. Neer*, 70 Tex. 468; *Eccles v. Darragh*, 48 N. Y. Supr. Ct. 528 (brick fell on passerby). See, also, 1 *Sweeny*, (N. Y.) 539; 28 Barb. 196; 2 C. P. Div. 369; *Hungerford v. Bent*, 55 Hun, 3.

City of Albany v. Railroad Co., 76 Hun, 136 (fall of trolley wire).

Defendant for the purpose of advertising, hired from a tenant of a building the use of a sign board erected by the latter under a written license called therein a lease, by which the defendant was required to keep that part of the roof in repair, but had no right or power to change the sign board in any way. It was blown from the roof in a wind storm and injured plaintiff. It was held that the injury not resulting in any way from its use which the contract gave, only, defendant was not liable. Even considering him by virtue of the instrument a sublessee of the roof, the mere contractual relation was held not to give rise to an action in a third party, a stranger to it. *Reynolds v. Van Beuren*, 155 N. Y. 120; rev'g s. c., 10 Misc. 703.

A brick fell from a building, adjoining the street, in which were 17 or 18 independent contractors at work. It was held that while the fall of the brick was evidence of negligence, there was no proof as to what part of the building it came from or whose work it was connected with, so that no presumption could arise as to any one in particular. Complaint was dismissed. *Wolf v. American Tract. &c. Co.*, 164 N. Y. 30; mod'g s. c., 25 App. Div. 98.

See, also, *Jack v. McCabe*, 56 App. Div. 378.

The plaintiff was about to enter his residence when he was struck by the bar of iron which was seen descending from a passing train on defendant's elevated railway, from the time it began to descend until it struck plaintiff. Question of defendant's negligence was for the jury, and as there was reason to believe that the missile emanated from the defendant's structure or machinery, it was bound to give some explanation of the cause of the occurrence. *Maher v. M. R. Co.*, 53 Hun, 506, aff'g judg't for pl'ff.

A plank six feet long was laid on the roof of an opera house and projected eighteen inches over the cornice, and on the front end of the plank was placed a keg filled with brick to keep it in position. The tackling attached to the projecting end was used to hoist the baggage of the showmen to the opera house floor. The apparatus fell from the roof, while in use, and injured the plaintiff in the street. This apparatus had been erected by the previous tenant with the express consent of the owner, who had rented the premises to the present tenant with it in the condition aforesaid, and he was properly held liable for the injury. *Hungerford v. Bent*, 55 Hun, 3, aff'g judg't for pl'ff.

From opinion.—"This precise proposition has been repeatedly affirmed, and is no longer open for discussion. *Edwards v. N. Y. & Harlem R. Co.*, 98 N. Y. 247; *Ahern v. Steele et al.*, 26 N. Y. St. Rep. 295, decided by the court of appeals in October of this year, and not reported in the regular series, is very instructive on this subject. See, also, *Albert v. State*, 66 Md. 325; *Nugent v. B. C. & M. R. Co.*, 80 id. 62; *Joyce v. Martin*, 15 R. I. 558."

In the absence of evidence showing that the use of guard wires, to prevent overhanging telegraph and telephone wires from falling upon the trolley line of a street surface railroad single trolley electric system, is necessary or usual in the construction of such a system, the failure to maintain same is not negligent on the part of the railroad company.

If a telegraph or telephone wire, suspended over the trolley wire of a street surface railroad company operating the single trolley electric system, in the manner in which that system is ordinarily applied in the propulsion of street cars, breaks and falls upon the trolley wire, which is at the time in its proper place, necessarily uninsulated performing its necessary and proper functions in the propulsion of cars, and then falls, while resting upon the trolley wire, upon a horse in the street, and thus communicates a deadly electric current from the trolley wire to the horse, the trolley wire is not the proximate cause of the injury. *The City of Albany v. The Watervliet Turnpike and Railroad Co.*, 76 Hun, 136.

A traveler in a public street is entitled to immunity from injury by the dropping of a street sign attached to an abutting building. It becomes the duty of the owner thereof, in an action brought against him to

recover for the injuries thus sustained, to show that he used reasonable care in its construction and maintenance; the absence of that care may fairly be presumed from the fact that the defect existed from which the accident arose.

In the erection and maintenance of signs upon buildings fronting upon streets of a city, the owner thereof is bound to secure the same, so that they will not only be able to withstand the ordinary known vicissitudes of the weather, but will also be able to sustain the force of gales which experience has shown will be liable to occur. *Morris v. The Strobel & Wilken Company*, 81 Hun, 1.

Defendant's workmen engaged in erecting scaffolding on the exterior of a building, above a sidewalk took boards from a lower scaffold on which there were bricks to place upon the upper one. In doing so a brick was let fall to the sidewalk below which injured plaintiff who was an employé of an independent contractor rightfully there in pursuance of his work. The right to an immunity from such acts was held to be available to him. *Dohn v. Dawson*, 90 Hun, 271.

Defendants in excavating in a lot adjoining a street, erected a derrick which was held in place by guy cables, one of which ran over the adjoining sidewalk into the roadway of the street. During a heavy strain on the derrick, another of the guy cables broke from its fastenings, and in falling, the derrick pulled the guy cable which ran over the sidewalk, down upon it and injured plaintiff who was walking thereon. It was held to be for the jury to say whether it was negligent; in the first place to have subjected the derrick to an undue strain; in the second place, not to have properly secured the moorings of the guy cables; and in the third place, not to have erected a shed over the sidewalk for the protection of pedestrians. *Rosenham v. Galligan*, 5 App. Div. 49.

Deceased, employed as a watchman on a building, not only knew that its condition was such as made it likely that bricks might fall from it at any time, but knew that they actually had fallen shortly before. Under the circumstances, he was chargeable with more than ordinary care for his own safety. The building was entirely in the hands of an independent contractor. *Neumeister v. Eggers*, 29 App. Div. 385.

Carpenters set a window frame in place ready for the masons. Jury properly held both contractors liable for its fall by reason of its being insufficiently braced. *Bishop v. Leahy*, 54 App. Div. 619.

Statutory provision that "the owner or general contractor engaged in the construction" of a building shall erect a roof over the sidewalk while it is in process of construction requires the owner to do so only where the work is done under his supervision and control. *Koch v. Fox*, 75 N. Y. Supp. 913.

The mere falling of a sign into a public street is *prima facie* evidence of negligence.

It is the duty of persons erecting and maintaining signs upon a building to secure the same so that they will not only be equal to the ordinary vicissitudes of the weather, but will withstand the force of gales which experience has shown to be liable to occur in the vicinity.

Plaintiff was injured, while passing along the street, by the fall of a heavy sign from a building. It appeared that defendants were the lessees of roof privileges of such building for the purpose of advertising, and maintained thereon this sign, which was nine feet high and twenty-three feet long, and was covered with galvanized iron. It was fastened with wooden braces, but was in no other manner attached to the building. The evidence tended to show that the wood was old and rotten, the nails drawn through the wood, and that the sign had not been repaired since December, 1891, and it was not shown that it had been examined since that time. The evidence showed negligence. *Reynolds v. Alfred Van Beuren*, 10 Misc. 703.

See, also, *St. Louis &c. R. Co. v. Hopkins*, 54 Ark. 209.

Fall of iron guards from a window above the street raised a presumption of negligence. *Mentz v. Schieren*, 36 Misc. 813.

Failure to maintain a scaffold under a cornice held not the proximate cause of injury where the brick was pushed off by a trespasser. *May v. Thompson Hutchison Building Co.*, 116 Ala. 634.

Traveler was injured by insecurely fastened signs on abutting building. Recovery was allowed. *St. Louis &c. R. Co. v. Hopkins*, 54 Ark. 209.

The use of tools and materials directly over a frequented thoroughfare demands the exercise of extraordinary care. *Knott v. McGilvray*, 124 Cal. 128.

No duty is due from a tenant where the landlord gave the license to use a fence for bill posting. *Chapman v. Boardman*, 69 Conn. 93.

Defendant's foreman heard a workman shout to him that he was going to throw a plank from the building, but failed to warn deceased. Recovery allowed. *Fox v. Kinney*, 72 Conn. 404.

Abutting owners should use ordinary care to keep buildings so that travelers on street shall not suffer. *Khron v. Brock*, 144 Mass. 516; *Lanark Bank v. Eitenmiller*, 14 Ill. App. 22.

Plaintiff did not recover where it did not appear whether the pail left on defendant's overhead bridge was left there by his employés or trespassers. *Lowner v. New York &c. R. Co.*, 175 Mass. 166.

An owner's responsibility for the condition of a building as left by a fire is not affected by the fact that he has made an agreement with an

insurance company by which they have received the right to repair it. *Steppe v. Alter*, 48 La. Ann. 363.

A brick fell from an abutting house on a person in the street. Defendant was liable. *Murray v. McShane*, 52 Md. 217.

Bales of hay were thrown from a building into the street. Judgment for plaintiff. *Dehring v. Comstock*, 78 Mich. 153.

Danger of pulling off a cornice by attaching a wire to it the jury found was obvious. It was held that defendants would have been liable even had it not violated an ordinance against it. *Swanson v. Menominee &c. R. &c. Co.*, 113 Mich. 603.

A broken pane of glass in such a condition that it was likely to be shaken out on persons in the street below established liability. *Detzur v. B. Stroh. Brew. Co.*, 119 Mich. 282; s. c., 44 L. R. A. 500.

A stick from an insecure pile of lumber fell and injured a child. Recovery was allowed. *Holly v. Bennett*, 46 Minn. 386.

A barrier was provided in front of a building undergoing repairs, but a passerby was injured while going around it. For the jury. *Mauerman v. Siemerts*, 71 Mo. 101.

Pavement in front of a building was not covered as required by ordinance. Violation of the ordinance was not itself evidence of negligence. *Rubin v. Miller*, 30 Pittsb. L. J. (N. S.) 351.

But see *Smith v. Milwaukee &c. Exch.*, 91 Wis. 360; s. c., 30 L. R. A. 504.

A liberty pole fell during a high wind. Nonsuit. *Allegheny v. Zimmerman*, 95 Pa. St. 287.

So, as to the failure to erect a fence required by statute where the injury was due to other cause. There was in fact no danger from falling materials. *Waterman v. Shepard*, 21 R. I. 257.

Where buildings were in process of construction and fell during a storm, owner was not liable. *Couts v. Neer*, 70 Tex. 468.

And is liable if same came from neglect to repair, although not the occupant. *O'Connor v. Curtis*, (Tex.) 18 S. W. Rep. 953.

The jury decided the question of negligence where a storekeeper temporarily placed articles on the outer edge of sidewalk, leaving ample room for passage, and they fell and injured a passerby. *Denby v. Willer*, 59 Wis. 240.

A person sitting on a step to rest was injured by the falling of ice. Contributory negligence for jury. *Kaples v. Orth*, 61 Wis. 531; *Dehring v. Comstock*, 78 Mich. 153; *Holly v. Bennett*, 46 Minn. 386; *Earl v. Crouch*, 16 N. Y. Supp. 770; *Denby v. Willer*, 59 Wis. 240.

Walls blew down from high winds, owner was liable. *Nordheimer v. Alexander*, Mont. L. R. 6 Q. B. 402.

(h). MISCELLANEOUS ACTS OF NEGLIGENCE.

A customer ordered the defendants, who were boiler makers, to test a boiler in the street in front of their factory at one hundred and eighty (180) pounds. One of the defendants said that one hundred and fifty pounds was enough. The defendant's superintendent told a customer, after leaving the defendants, that he would test it at two hundred (200) pounds. When the steam began to escape from the safety valve at one hundred and ninety-eight (198) pounds, the superintendent held down the lever and the boiler exploded, injuring the plaintiff who was passing in the street. The defendants were liable. The plaintiff was told that it was not a safe place, and was requested to pass on, but he stopped to watch the test.

It should have been left to the jury to determine whether he was guilty of contributory negligence. *Ochsenbein v. Shapley*, 85 N. Y. 214, rev'g judg't for pl'ff.

Defendant's oil pipe, laid within a few feet of a street sewer, connecting with other sewers, was broken by a contractor of the city, while blasting, so that some fourteen days after, the oil escaped and caused an explosion causing injury. The oil pipe was properly laid and the defendant had no knowledge of the injury done, but had not inspected the same for fourteen days previous, at the end of which time the oil was pumped into the pipe for two and one-half hours before the party at the pump station was notified by the defendant's employés at the other end of the pipe, where the oil was to be discharged, that no oil was being discharged. The question of defendant's negligence was properly submitted to the jury. The laying of the pipe was not *per se* a nuisance. *Lee v. Vacuum Oil Co.*, 54 Hun, 156, aff'g judg't for pl'ff.

It was for the jury to say whether defendants, engaged in stringing an electric cable under the girders of an elevated railroad were negligent in allowing a rope 500 feet long to drag along the street in which persons might happen to be, where it had persons stationed from 150 to 160 feet apart to give warnings; and whether plaintiff was negligent in crossing the street in the middle of the block. The rope, about the color of the dust, moved slowly, noiselessly and inconspicuously, and she did not notice the motions of the watcher at the cross street. *Coxhead v. Johnson*, 20 App. Div. 605.

Plaintiff at his own expense, and with the sanction of the city authorities, planted shade trees along the sidewalk in front of his premises. It was held that though he did not own the fee of the street, he had such a property in the trees as to sustain an action against one who allowed his horse to girdle and destroy them. *Lane v. Lamke*, 53 App. Div. 395.

A placard, paraded or posted in a public street, before the door of an auctioneer cautioning strangers against mock auctions is a nuisance. *Gilbert v. Mickle*, 4 Sandf. Ch. (N. Y.) 57.

The intervening act of a third party in fastening a wire to a tree left hanging in the street held not to prevent the latter act from being the efficient cause of being caught in the loop formed thereby. *District of Columbia v. Dempsey*, 13 App. D. C. 533.

A barrel of fish brine deposited on the street was emptied by an unknown person, and plaintiff's cow, lawfully upon the street, drinking thereof was killed. Defendant was liable. *Henry v. Dennis*, 93 Ind. 452.

City, held not liable for the materials of a sidewalk torn up and carried away, where the one replaced was much better. *Snyder v. Lexington*, (Ky.) 49 S. W. Rep. 765.

A person was injured by a gun in the public street, although he was ordered by the one shooting to get out of the way. Judgment for plaintiff. *Marionaux v. Brugier*, 35 La. Ann. 13.

Gas escaped from main in the street and injured child in adjoining house. Plaintiff recovered. *Smith v. Boston Gas &c. Co.*, 129 Mass. 318.

Setting off fireworks in the street liable to frighten horses, held not to establish willfulness. *Cookman v. Hill*, 81 Mo. App. 297.

The president of a political club ordered fireworks; was held liable for injury therefrom. *Jenne v. Sutton*, 43 N. J. L. 257.

See *Bradley v. Andrews*, 51 Vt. 530.

Death from sudden escape of steam and boiling water gave plaintiff judgment. *Southern &c. Mfg. Co. v. Bradley*, 52 Tex. 587.

Defendant consented to its employes' habit of throwing sticks from its repair train along the street through which its tracks passed, for their own use. It was held to the exercise of reasonable care to secure the protection of persons passing along the street. *Fletcher v. Baltimore &c. R. Co.*, 168 U. S. 135.

Consent of city's officers to the setting off of fireworks on a public street by a crowd did not bind city. *Bartlett v. Clarkesburg*, 45 W. Va., 393; s. c., 43 L. R. A. 295.

II. Street Railways.

(a). RIGHTS AND DUTIES OF CARS AND THE PUBLIC.

One traveling upon a city street has a right to drive his wagon upon or across the track of a street railroad, and this right is not confined to occasions where the other portions of the street are crowded or obstructed.

The only limitation of the right is that he must not unnecessarily interfere with the passage of the cars; these have the preference in the use of the track. *Adolph v. The Central Park &c. R. Co.*, 65 N. Y. 554, rev'g 1 J. & S. 186, and nonsuit.

Same case, 76 N. Y. 530, aff'g 11 J. & S., and judg't for pl'ff.

In this case it was said, "The railway company has the exclusive right to any part of the track over which, at the time, its horses and cars are passing, or just about to pass, and all others then upon it are bound to leave it, then and there, to the unrestricted use of the company."

It was also held that a traveler upon a street has a right to drive upon and along a street railway but was bound to make way for the cars, and to be ready to do this when necessary, so as to cause no unnecessary hinderance; that it was his duty not only to turn off from the track when called upon by the person in charge of the car, but to listen to a signal from a car, and to look behind him from time to time, so that if the car be near he may turn off and allow it to pass without hinderance or undue slackening of ordinary speed. Three judges dissented from the opinion but concurred in the affirmative. (76 N. Y. 530.) In *Hegan v. Eighth Ave. R. Co.*, 15 N. Y. 382, aff'g judg't for pl'ff, it is said: "The company has the exclusive right to the track, which its cars are passing, but its right is not otherwise exclusive. Other carriages must keep out of the way of the cars, and if they are hit when the latter are proceeding at a reasonable and lawful speed, and with all such care as, considering the subject, can reasonably be used, they cannot maintain an action against the company." To same effect see *Craig v. Rochester City &c. R. Co.*, 39 N. Y. 410. In *Whittaker v. Eighth Ave. R. Co.*, 51 N. Y. 299, it is said, "that portion of the public highway upon which the track is authorized to be laid, is necessarily set apart for the exclusive use of the owner of the car and the track as not to permit any one of the public, in passing over the highway, to interfere with the running of such car, or the track upon which it is run, to the unnecessary hinderance of the business of the owner." See *Thompson v. Buffalo R. Co.*, 145 N. Y. 196.

In *Flechenstein v. Dry Dock &c. Co.*, 105 N. Y. 655; s. c., 8 St. Rep. 32, it was held that a street railway company has a paramount, but not exclusive, right to the use of its tracks, and that while a person lawfully driving on its tracks may not recklessly or carelessly obstruct the passage of the cars, he is not absolutely bound to keep off or get off the tracks, and if he fairly and in a reasonable manner respecting the paramount right of the corporation, is, without fault on his part, injured by carelessness or fault chargeable to the company, it will be liable therefor. See, also, *Barker v. Hudson R. Co.*, 4 Daly, 276; *Chicago &c. Co. v. Bert*, 69 Ill. 388; *Orange &c. R. Co. v. Ward*, 47 N. J. L. 560. A street rail-

way company must exercise such care and precaution for the purpose of avoiding accidents and endangering property or person as a reasonable prudence would suggest. The company has only an equal right with the public, with a few exceptions, such as, that the car runs on a track, and a passing vehicle must give way to it. *Shea v. Potrero &c. R. Co.*, 44 Cal. 414; *Railway Co. v. Norton*, 24 Pa. St. 465.

See, also, *Lynn &c. R. Co. v. Boston &c. Corp.*, 114 Mass. 91.

A street railway company has paramount but not exclusive right to the track. While one driving thereon may not obstruct it, yet if, while respecting the paramount right, he be injured, he may recover. *Fleckenstein v. Dry Dock &c. R. Co.*, 105 N. Y. 655, aff'g judg't for pl'ff.

Although it is the duty of the defendant to keep its tracks and the space between the same in repair, it appeared that a surface drain, the grate over its opening and the depression complained of by the plaintiff were constructed by the city several years before the accident, and had since remained substantially in the same condition. Plaintiff's horse slipped in the depression and was injured. Held, that the defect did not arise from want of repairs, but was one of original construction which the defendant was not at liberty to alter, and the city alone was liable. *Snell v. Rochester R. Co.*, 64 Hun, 476, rev'g judg't for pl'ff.

An electric car has no rights superior to those of other vehicles in the street, or at the crossings of streets, and where another vehicle is in the act of crossing the car should be slowed up to allow it to do so in safety. *Burnhard v. Rochester*, 68 Hun, 369.

A motorman on an electric railway may not run down a dog trespassing on the track, if, by reasonable diligence, he might have discovered the danger in time to avoid it; and he should, on such discovery, slacken the speed of the car. It is not *per se* negligent for the superintendent of a cemetery lying on both sides of a highway in which there is an electric railway, the fee of the land being in the owners of the cemetery, to allow his watch dogs on the highway in the business of guarding the premises, but contributory negligence in that respect is for the jury. *Meisch v. Rochester Electric Ry. Co.*, 72 Hun, 604, aff'g judg't for pl'ff. (See, *ante*, pp. 988, 992.)

At the intersection of streets the rights of cars and vehicles are equal. *Zimmerman v. Union R. Co.*, 3 App. Div. 219; *Bresky v. Third Ave. R. Co.*, 16 id. 83; *Huler v. Nassau Electric R. Co.*, 22 id. 426; *Chapman v. Atlantic Ave. R. Co.*, 14 Misc. 404; *Degnan v. Brooklyn City R. Co.*, id. 408; *Nashville &c. R. Co. v. Norman*, 108 Tenn. 324.

There is no superior right even as to the part of the street on which the track is laid. *Hall v. Ogden City R. Co.*, 13 Utah, 243.

And must be adjusted according to the surrounding circumstances. *Kennedy v. Third Ave. R. Co.*, 31 App. Div. 30.

Lawler v. Hartford Street R. Co., 72 Conn. 74; *Lanfer v. Bridgeport T. Co.*, 68 id. 475; s. c., 37 L. R. A. 533; *Price v. Charles Warner Co.*, 1 Penn., (Del.) 462; *Metropolitan Street R. Co. v. Kennedy*, 82 Fed. Rep. 158; *Atlantic &c. R. Co. v. Rennard*, 62 N. J. L. 773.

The duty of avoidance rests with the one to whom the performance of it is easiest—pedestrians and drivers. *Heller v. Spokane Street R. Co.*, 22 Wash. 319.

The party reaching the place first may pass. *Zimmerman v. Union R. Co.*, 3 App. Div. 219.

Dunnican v. Union R. Co., 39 App. Div. 497; *Earle v. Consolidated T. Co.*, 64 N. J. L. 573.

Cars held not to have approached at substantially the same time so as to give the line first laid the right of way where one having stopped within twenty feet thereof started when the other was 100 to 200 feet away. *Becker v. Detroit Citizen's Street R. Co.*, 121 Mich. 580.

But such right of way is not exclusive and gives no right to willfully injure the other; so that the party gaining the right of way must yield it if necessary to avoid injury. *Loudoun v. Eighth Ave. R. Co.*, 16 App. Div. 152.

Kennedy v. Third Ave. R. Co., 31 App. Div. 30; *Tesch v. Milwaukee Electric &c. R. Co.*, 108 Wis. 593; *Earle v. Consolidated T. Co.*, 64 N. J. L. 573.

The strict care and vigilance required of the public in crossing railroad tracks, does not apply to street railways. *Smith v. Metropolitan Street R. Co.*, 7 App. Div. 253.

O'Rourke v. Yonkers R. Co., 32 App. Div. 8; *Reed v. Brooklyn Heights R. Co.*, 32 App. Div. 503. See *Towner v. Brooklyn Heights R. Co.*, 44 App. Div. 628; *R. J. Stevens Co. v. Brooklyn Heights R. Co.*, 59 App. Div. 23.

Along streets the cars have the right of way. *Rosenblatt v. Brooklyn Heights R. Co.*, 26 App. Div. 600.

Brown v. Wilmington City R. Co., 1 Penn. (Del.) 332; *West Chicago Street R. Co. v. Dougherty*, 89 Ill. App. 362; *Adams v. Wilmington &c. R. Co.*, (Del.) 52 Atl. Rep. 264; *Farley v. Id.*, id. 543; *Wilson v. Minneapolis Street R. Co.*, 74 Minn. 436.

Contra, *San Antonio Street R. Co. v. Renken*, 15 Tex. Civ. App. 229.

Which must not be unnecessarily interfered with. *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199.

But while paramount, it is not exclusive. *Cohen v. Metropolitan Street R. Co.*, 34 Misc. 186; *Mertz v. Detroit Electric R. Co.*, 125 Mich. 11; *State Consolidated T. Co. v. Reeves*, 58 N. J. L. 573; *Citizens' Street R. Co. v. Howard*, 102 Tenn. 474; *West Chicago Street R. Co. v. Levy*,

82 Ill. App. 202; *De Lon v. Kokomo City Street R. Co.*, 22 Ind. App. 377.

That is, subject to such paramount right, their rights are equal and the public may use the space occupied by the tracks. *Canfield v. North Chicago &c. R. Co.*, 98 Ill. App. 1.

And are not to be treated as trespassers, not entitled to the exercise of due care. *Brachfeld v. Third Ave. R. Co.*, 29 Misc. 586; *Holzman v. Metropolitan Street R. Co.*, 31 id. 644; *Cohen v. Metropolitan Street R. Co.*, 34 id. 186; *North Chicago Street R. Co. v. Smadraff*, 189 Ill. 155; aff'g s. c., 89 Ill. App. 411; *Joliet R. Co. v. Barty*, 96 Ill. App. 351; *North Chicago Street R. Co. v. Zeigler*, 78 id. 463; *West Chicago Street R. Co. v. O'Connor*, 86 id. 278; *West Chicago Street R. Co. v. Williams*, 87 id. 548; *Hot Springs Street R. Co. v. Johnson*, 64 Ark. 64; *Goldreck v. Union R. Co.*, 20 R. I. 128; *Robinson v. Louisville &c. R. Co.*, 112 Fed. Rep. 484; *Higgins v. Wilmington City R. Co.*, 1 Marv. (Del.) 352.

A dog upon the track has been held not to be a trespasser. *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317; s. c., 40 L. R. A. 518.

And in case of emergency, car must yield its paramount right and use extra care to avoid injury. *Manor v. Bay Cities Consolidated R. Co.*, 118 Mich. 1.

So, notwithstanding plaintiff's having left his horse and wagon in the street so near the track that the horse backed upon it, motorman was negligent in failing to stop in time to avoid injury which he could have done. *Higgins v. Wilmington City R. Co.*, 1 Marv. (Del.) 352.

It may be assumed that one on the track will get out of the way in time unless it appears that he will not. *Siek v. Toledo &c. R. Co.*, 16 Oh. C. C. 393.

Or he is known to be deaf. *Lyons v. Bay Cities Consol. R. Co.*, 115 Mich. 114.

Such assumption may not be made where it appears that a party has broken down. *Sweeny v. Kansas City &c. R. Co.*, 150 Mo. 385.

Or is a small child. *South Chicago &c. R. Co. v. Kinnare*, 96 Ill. App. 210.

See, also, *Citizens' Street R. Co. v. Hainer*, (Ind. App.) 62 N. E. 658; 63 id. 778.

The paramount right of passage of cars imposes upon the public the duty of keeping a lookout for and avoiding such cars. *McCracken v. Consolidated T. Co.*, 201 Pa. St. 378.

Van Patten v. Schenectady Street Railway Co., 80 Hun, 494; *Campbell v. Union Ry. Co.*, 9 Misc. 483; *Everett v. Los Angeles &c. R. Co.*, 115 Cal. 195; s. c., 34 L. R. A. 350; *Welling v. Lewiston &c. R. Co.*, 89 Me. 585; *Siek v. Toledo Consolidated Street R. Co.*, 16 Oh. C. C. 393; *Adams v. Wilmington &c. R. Co.*, (Del.) 52 Atl. Rep. 264; *Farley v. Id.*, id. 543.

And the duty is held to apply to a child *sui juris*. *Fitzhenry v. Consolidated T. Co.*, 64 N. J. L. 674.

And to parties riding with a driver. *Wosika v. St. Paul &c. R. Co.*, 80 Minn. 364; *Diemmer v. Milwaukee &c. R. Co.*, 108 Wis. 589.

The rule, to "stop, look and listen," as to steam railroad crossings does not so strictly apply to street railways. *Trout v. Altoona &c. Electric R. Co.*, 13 Pa. Super. Ct. 17.

Though it does to some extent. *McCauley v. Philadelphia T. Co.*, 13 Pa. Super. Ct. 354.

For example where the surroundings make that reasonably necessary. *Tacoma R. Co. v. Hays*, 110 Fed. Rep. 496; *McCracken v. Consolidated T. Co.*, 201 Pa. St. 378.

Duty to look and listen before crossing, as it applies to steam railroads, held not to apply to street car tracks. *Chisholm v. Seattle Electric Co.*, 27 Wash. 237.

Failure to look and listen held negligent *per se*. *Robbins v. Springfield Street R. Co.*, 165 Mass. 30; *Dennis v. North Jersey Street R. Co.*, 64 N. J. L. 439.

Held not negligent *per se*. *Roberts v. Spokane Street R. Co.*, 23 Wash. 325.

Wilson v. Minneapolis Street R. Co., 74 Minn. 436; *Camden &c. R. Co. v. Preston*, 59 N. J. L. 264; *Lewis v. Cincinnati Street R. Co.*, 10 Oh. S. & C. P. Dec. 53.

Streets intersect where one enters another at an angle which does not quite meet a third leaving the other at an angle similar to the first. *Brozek v. Steinway R. Co.*, 22 App. Div. 623.

So, where one meets but does not cross another. *Schneider v. Market Street R. Co.*, 134 Cal. 482.

Vehicles have the right to drive on the tracks of a dummy railroad where the condition of the way is such that they cannot drive elsewhere. *Kessler v. Brooklyn Heights R. Co.*, 3 App. Div. 426.

Where the crossing is not a regular street crossing, the right of way of street cars is superior, as along a street. *Lawson v. Metropolitan Street R. Co.*, 40 App. Div. 307.

Where a city ordinance gives an ambulance the right of way, street car must yield. *Buys v. Third Ave. R. Co.*, 45 App. Div. 11.

But an ambulance under the jurisdiction of the board of health, but not belonging to it, was not within the provisions of such ordinance. *Dillon v. Nassau Electric R. Co.*, 59 App. Div. 614.

A motor car has no right of way over a horse car at an intersecting street. The question is, who was reasonably to be regarded as being there first. *Metropolitan R. Co. v. Hammett*, 13 App. D. C. 370.

So, driver of a horse car may assume that a motorman of an electric car going at legal speed with his car under proper control will respect his right of first arrival. *Metropolitan R. Co. v. Hammett*, 13 App. D. C. 370.

Mere violation of its charter provisions by a car company was not allowed to be the basis of recovery by an intersecting company. *Chicago General R. Co. v. Chicago City R. Co.*, 186 Ill. 219; aff'g 87 Ill. App. 17.

Gross negligence in a street railway held not to excuse contributory negligence in traveler. *Boesen v. Chicago Electric Transit Co.*, 31 Chic. Leg. News. (Ill.) 371.

Company not allowed to set up against its own neglect the concurring neglect of another company. *O'Rourke v. Lindell R. Co.*, 142 Mo. 342.

Violation of ordinance as to right of way between cars of intersecting streets held evidence of negligence only. *Connor v. Electric T. Co.*, 173 Pa. St. 602.

Where a street railway has only a right in common with other vehicles to the use of its track space it has an exclusive right for a reasonable time necessary to make repairs. *Potter v. Scranton T. Co.*, 176 Pa. St. 271.

Bicyclist need not give way, as the "lighter" vehicle, to ordinary teams which may be expected to do their duty. *Foote v. American Product Co.*, 195 Pa. St. 190; s. c., 49 L. R. A. 764.

Defendant not allowed to set up that a crossing constantly used and maintained by it was not a public one. *Newport News &c. R. Co. v. Bradford*, (Va.) 40 S. E. Rep. 900.

(b). DUTY AND DEGREE OF CARE.

1. CARE REQUIRED BY CARS.

In general:

The degree of diligence required of a street railway company depends on the hazards to be encountered, and the consequences of its negligence.

The owner of a horse car must use the same, but no greater, care to protect pedestrians as other vehicles. In attaching a horse to a car methods in general use and generally found adequate are sufficient.

This action was to recover damages done to the plaintiff by a team of horses which had escaped from one of the defendant's cars in the city of New York, and, running away, ran over and seriously injured her. *Unger v. Forty-second Street & Grand Street Ry. Co.*, 51 N. Y. 497, aff'g order granting new trial after verdict for pl'ff.

Falotio v. Broadway &c. R. Co., 9 Daly, 243.

At about seven o'clock of a winter evening several little girls, one plaintiff's daughter, about seven years of age, started to run across the street car track about 100 feet in front of an approaching trolley car. There was plenty of time to pass in safety had she not in running, stumbled and fallen. The motorman seeing this immediately applied the brakes to stop the car, though he was unable to do so in time to prevent injury. If in fact he should have made use of the particular apparatus for governing the electrical power of the car instead, it was at most an error of judgment which in the emergency produced by the unexpected contingency was insufficient to charge him with negligence. *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511; rev'g s. c., 89 Hun, 609.

Where two cars collide at cross streets the presumption of negligence arises against the one carrying the party injured. It, being one involved as a carrier, was bound to exercise a very high degree of care, while the other bearing no such relation to him, was only chargeable with the use of ordinary care. *Loudoun v. Eighth Ave. R. Co.*, 162 N. Y. 380; rev'g s. c., 16 App. Div. 152.

See, also, *O'Rourke v. Lindell R. Co.*, 142 Mo. 342.

Plaintiff, while crossing a street, was run over by the defendant's horse-car, and while under the platform of the car, with his head under the front wheel, the car was pushed back so as to extricate him without unhitching the horses, and, in consequence of this, the horses trampled on plaintiff. The court erroneously charged that, whether the defendant was liable for knocking plaintiff down or not, yet if he were negligent in the means of extricating him, it would be nevertheless liable for the damage resulting therefrom. If the effort to extricate the person were an error of judgment as to the best means to do so, the defendant would not be liable even if the defendant were negligent in extricating him, yet, if he came into the situation through his own negligence, the defendant would not be liable. *Rhing v. Broadway & Seventh Ave. R. Co.*, 53 Hun, 321, rev'g judg't for pl'ff.

A company operating by electricity a surface railroad in a city, should use all the care and caution that a proper regard for the safety of those traveling upon the public highway requires, consistent with a proper enjoyment by it of its franchise and the right to successfully operate its road. *Van Patten v. Schenectady Street R. Co.*, 80 Hun, 494.

The degree of care in the management of its cars, exacted of a street railway company using electricity as a motive power and traversing the streets of a populous city where danger to pedestrians is to be constantly guarded against is not less than is required by the company to its passengers. *Penny v. Rochester R. Co.*, 7 App. Div. 595.

Deceased had been struck and thrown into the fender, but the car was

stopped in time to prevent his rolling off under the wheels. It was for the jury to say whether defendant was negligent notwithstanding deceased's negligence, in failing to use reasonable care to prevent his further injury. *Weitzman v. Nassau Electric R. Co.*, 33 App. Div. 585.

The degree of care imposed on a street railroad is not such as to require that its cars must be operated so as to be beyond the possibility of injury to pedestrians or vehicles. The obligation is to exercise reasonable care in operation, to be watchful and vigilant when approaching street crossings, and to have the cars well under control. *Harvey v. Nassau Electric R. Co.*, 35 App. Div. 307.

An ordinance requiring the attachment of fenders to cars which shall not be more than three inches from the track, is unreasonable where it appears that owing to the varying degrees of convexity of street surfaces, their grades, the inclination of curves, etc., and the fact that the height of the car to which it must be attached, varies with the load and the fact that when in motion it is apt to swing one way or another, its compliance therewith is impracticable, if not impossible. *Brooklyn v. Nassau Electric R. Co.*, 38 App. Div. 365.

The care required of a street railway company as regards travelers on the street is the same as that demanded of those in charge of other vehicles. *Falotio v. Broadway &c. R. Co.*, 9 Daly, 243.

Failure to stop after discovering the danger of one contributorily negligent must be through want of ordinary care. *Schoenholtz v. Third Ave. R. Co.*, 16 Misc. 7; rev'g s. c., 14 id. 461.

McGary v. West Chicago &c. R. Co., 85 Ill. App. 610; *San Antonio &c. R. Co. v. Rewken*, 15 Tex. Civ. App. 229.

Greater care is required on a public road, than on a private way. *Hooper v. Staten Island Midland R. Co.*, 32 Misc. 721.

The duty held to be the use of reasonable care to avoid danger, operate at reasonable speed and slow up or stop if need be where the danger is imminent. *Maxwell v. Wilmington City Ry. Co.*, 1 Marv. (Del.) 199.

To use the vigilance necessary to see that employes carefully perform their duties. *Brown v. Wilmington City Ry. Co.*, 1 Penn. (Del.) 332.

A street railroad is charged with a greater care on city streets than in suburban districts. *Brown v. Wilmington City Ry. Co.*, 1 Penn. (Del.) 332.

Greater care is to be expected at a crossing than elsewhere. *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462.

See, also, *Wallen v. North Chicago Street R. Co.*, 82 Ill. App. 103.

Upon apprehending imminent danger motorman must use all means

in his power to avert it. *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462.

Louisville &c. R. Co. v. Blaydes, (Ky.) 52 S. W. Rep. 960; s. c., 51 id. 820.

Degree of care required depends upon the degree of danger involved. *Adams v. Wilmington &c. R. Co.*, (Del.) 52 Atl. Rep. 264; *Farley v. The same*, id. 543.

Proportionate to the danger as it reasonably appears. *Stelk v. McNulta*, 99 Fed. Rep. 138.

The highest degree of caution is required where lines intersect. *Metropolitan R. Co. v. Hemmett*, 13 App. D. C. 370.

Great care is necessary in the operation of parallel lines of cars within a few feet of each other. *West Chicago Street R. Co. v. Yund*, 68 Ill. App. 609; s. c. aff'd, 169 Ill. 47.

Care required of a cable train at a crossing, held to be that prudence which the safety of those whom it must in good reason, know are or are likely to be imperiled by the dangerous agency operated in a public place, demands should be exercised. *West Chicago Street R. Co. v. MacCallum*, 169 Ill. 240; aff'g s. c., 67 Ill. App. 645.

Care such as would prevent accident, held too great. *West Chicago St. R. Co. v. Wizemann*, 83 Ill. App. 402.

See, also, *O'Leary v. Brockton Street R. Co.*, 177 Mass. 187.

Gripman must not only be especially watchful in crowded streets, but be prepared to use all reasonable means to avoid accidents. *West Chicago Street R. Co. v. Williams*, 87 Ill. App. 548.

Company failed to approach the standard of equipment but that was not the proximate cause of the injury. See *Snider v. New Orleans &c. R. Co.*, 48 La. Ann. 1.

Notwithstanding a pedestrian's negligence, motorman must exercise ordinary care to avoid injury after he sees or reasonably may see her peril. *Baltimore Consol. R. Co. v. Rifcowitz*, 89 Md. 338.

Fenders need not be used where they had not been used at all except as an experiment. *Mullen v. Springfield Street R. Co.*, 164 Mass. 450.

Buente v. Pittsburg &c. T. Co., 2 Pa. Super. Ct. 185.

Instruction that a street car must use "at least" as much care as a vehicle, held error. *Wilson v. Minneapolis Street R. Co.*, 74 Minn. 436.

Company held not bound by its rule requiring "strict lookout," being greater care than the law requires. *Isaackson v. Duluth Street R. Co.*, 75 Minn. 27.

One company held only to the duty of ordinary care to the passenger of another. *O'Rourke v. Lindell R. Co.*, 142 Mo. 342.

A company held not bound by an *ultra vires* ordinance in absence of

proof of agreement to be bound by it. *Sanders v. Southern Electric R. Co.*, 147 Mo. 411.

Violation of an ordinance enjoining strict care and stoppage on the first appearance of danger, held not to give recovery in the face of contributory negligence. *Murphy v. Lindell R. Co.*, 153 Mo. 252.

Company, subject by indemnity bond, to an ordinance requiring it to keep a vigilant lookout and stop as soon as possible upon the first appearance of danger, held negligent in failing to do so, though the plaintiff was contributorily negligent. *Cooney v. Southern Electric R. Co.*, 80 Mo. App. 226.

Ordinance compelling cars to come to a full stop before crossing an intersecting street, held reasonable. *State v. Cape May*, 59 N. J. L. 404; s. c., 36 L. R. A. 657.

The care required of a trolley road at its grade crossings on its own right of way in the country, is not the same as that required of steam railroads. *Atlantic Coast Electric R. Co. v. Rennard*, 62 N. J. L. 773.

The duty of supplying safety equipage depends upon prudence, not convenience. *Warren v. Manchester St. Ry. Co.*, 70 N. H. 352.

Street cars need only use ordinary care towards pedestrians at crossings. *Altemeier v. Cincinnati Street R. Co.*, 4 Oh. N. P. 224.

Ordinance requiring "the most improved modern pilot or safety guard" required too strict a duty. *Buente v. Pittsburg &c. T. Co.*, 2 Pa. Super. Ct. 185.

The duty of watchfulness required held to be such as will prevent injury to pedestrians who without negligence may not be unable to avoid the car. *Jones v. Greensburg &c. Street R. Co.*, 9 Pa. Super. Ct. 65.

See, also, *San Antonio &c. R. Co. v. Reuken*, 15 Tex. Civ. App. 229.

Presence of a wagon upon the track required caution. But no liability arose where its driver unexpectedly stepped back upon the track. *Gunn v. Union R. Co.*, 22 R. I. 321; s. c., id. 579.

It is for the jury to say whether there was sufficient traffic to require both a motorman and a conductor. *Citizen's Rapid-Transit Co. v. Dew*, 100 Tenn. 317.

Lessor's duty held not to be increased, when the lessee's duty was, by the latter's replacing a single track with double one. *Fort Worth Street R. Co. v. Ferguson*, 9 Tex. Civ. App. 610.

Care required of an electric car on a public street, to travelers, held to be greater than that due from a steam railroad on its own right of way to trespassers. *Stelk v. McNulta*, 99 Fed. Rep. 138.

Increase in motor power increases the care required proportionately. *Hall v. Ogden City Street R. Co.*, 13 Utah, 243.

Thompson v. Salt Lake Rapid Transit Co., 16 Utah, 281; s. c., 40 L. R. A. 172; Cincinnati Street R. Co. v. Snell, 54 Oh. St. 197; s. c., 32 L. R. A. 276.

Reasonable care, held the measure of a motorman's duty to ordinary travelers. *Norfolk R. &c. Co. v. Corletto*, (Va.) 41 S. E. Rep. 740.

See, also, *Memphis Street R. Co. v. Wilson*, (Tenn.) 69 S. W. Rep. 265.

Where the car could not be stopped in time owing to a defective brake, use of all the care possible held no defense. *Roberts v. Spokane Street R. Co.*, 23 Wash. 325.

See, also, *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah, 281; s. c., 40 L. R. A. 172; *Richmond &c. Co. v. Garthright*, 92 Va. 627; s. c., 32 L. R. A. 220.

Otherwise where such care is used when the car was properly equipped. *Cawley v. La Crosse City R. Co.*, 101 Wis. 145.

Motorman, not held to the very best course of action in the excitement of sudden peril. *Bishop v. Belle City Street R. Co.*, 92 Wis. 139.

As to speed:

In the absence of regulation as to speed the running of an electric car in a street at the rate of 12 or 15 miles an hour is not negligent. Mere high speed is not *per se* negligence. It is a question for the jury to say whether under the circumstances, the rate was negligent or not. *Bittner v. Crosstown Street R. Co.*, 153 N. Y. 76; rev'g s. c., 12 Misc. 514.

In an action for injuries from a collision caused by defendant's car striking the car of another road which crossed it, evidence as to the rate of speed of defendant's car at or near the place of collision is relevant and material.

The admission of testimony of the plaintiff that the car was going at quite a rapid pace within two blocks of the place of collision is not prejudicial error, where there is other evidence not objected to that the driver was whipping up his horses as he approached such place; that the horses were galloping and had been made to go quite fast for some distance before reaching it. *Wilson v. Broadway & Seventh Ave. R. Co.*, 8 Misc. 451.

The court can take judicial notice of the fact that a trolley car can be stopped, emergency or no emergency, in a shorter space than 100 feet.

A motorman, when approaching a cross street, should have his car under control to avoid injury to foot passengers and vehicles using such street.

It is not contributory negligence, as matter of law, for a child to run across the street car track when he can cross in safety, if the approaching car is operated at a fair rate of speed.

Plaintiff's intestate, a boy seven years old, attempted to run across defendant's tracks at the intersection of two streets, and had almost

cleared the east rail when struck by a car, which ran 102 feet further before it could be stopped. The road in that vicinity had only been operated by electricity for three days. These facts showed that the car was run at an unsafe rate of speed, and nonsuit was error. *Young v. The Atlantic Avenue Railroad Co.*, 10 Misc. 541.

A car may not as a matter of law run at full speed past a crossing where another car, not more than a foot away from it is discharging passengers. *Dobert v. Troy City R. Co.*, 91 Hun, 28.

It was for the jury to say whether a motorman was negligent in not diminishing his speed (eight to ten miles an hour) where he saw a vehicle crossing the track about 40 or 50 feet ahead of him. *Brozek v. Steinway R. Co.*, 10 App. Div. 360.

A motorman was negligent where having a vehicle crossing the track 150 to 175 feet ahead of him, he failed to check the speed of his car until it was too late to avoid injury. *Hergert v. Union R. Co.*, 25 App. Div. 218.

A speed of 12 miles an hour for a street car at a point where the city ordinance permits it, is not *per se* negligence. *White v. Albany R. Co.*, 35 App. Div. 23.

Except in extreme cases, no rate of speed is negligence *per se*. It was for the jury to say whether it was negligence in a motorman to run a heavy electric car on a down grade in a populous street at such a speed that it could not be stopped within 40 feet. *Fullerton v. Metropolitan Street R. Co.*, 37 App. Div. 386.

That a motorman was proceeding down grade on a dark night with his car going at the rate of 20 miles an hour, beyond control, while only 15 was allowed, and that he was inattentive to his duties, did not charge defendant with negligence where had it been within his control, at proper speed, etc., the injury could not have been prevented. *Hoffman v. Syracuse Rapid-Transit Co.*, 50 App. Div. 83.

It was for the jury to say whether motorman was negligent in running at a rapid rate, over a crossing, at which he might expect persons to be, instead of having his car under proper control. *Hoyt v. Metropolitan Street R. Co.*, 73 App. Div. 249.

See *Hock v. New York &c. R. Co.*, 77 N. Y. Supp. 200.

Car must be under control when approaching a crossing; especially when the view thereof is obstructed. *Schoener v. Metropolitan Street R. Co.*, 76 N. Y. Supp. 157.

See, also, *West Chicago Street R. Co. v. Peters*, 196 Ill. 298; *aff'g s. c.*, 95 Ill. App. 479.

So, where a car passed a crossing at 10 miles an hour when a car going

in the opposite direction cut off the view. Negligence was held to be a question for the jury. *Tupper v. Metropolitan Street R. Co.*, 36 Misc. 819.

See, also, *West Chicago Street R. Co. v. Stoltenburg*, 62 Ill. App. 420.

Recovery was had, where a fire truck had the right of way and the motorman failed to have his car under control. *Geary v. Metropolitan Street R. Co.*, 77 N. Y. Supp. 54.

Motorman held negligent in passing a car which had just discharged a passenger at a crossing at unusual speed without signal. *Pelletreau v. Metropolitan Street R. Co.*, 77 N. Y. Supp. 386.

Fonda v. St. Paul City R. Co., 71 Minn. 438.

In proceeding at full speed over a street crossing, notwithstanding liability to strike a cart thereon. *Reilly v. Third Ave. R. Co.*, 16 Misc. 11; aff'g s. c., 14 id. 445.

In violating an ordinance in running an engine backward as fast as forward. *Highland Ave. &c. R. Co. v. Sampson*, 112 Ala. 425.

Speed such as to preclude stoppage in time to avoid collision is negligence. *Birmingham R. &c. Co. v. City Stable Co.*, 119 Ala. 615.

Lawler v. Hartford Street R. Co., 72 Conn. 74; *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462; *Consolidated T. Co. v. Glynn*, 59 N. J. L. 432; *Flannegan v. St. Paul City R. Co.*, 68 Minn. 300; *Breary v. Traction Co.*, 5 Pa. Dist. 95; *West Chicago Street R. Co. v. Stoltenburg*, 62 Ill. App. 420.

And the duty of reasonable control is not diminished by reason of a washout where it does not appear how long it has existed. *Birmingham R. &c. Co. v. City Stable Co.*, 119 Ala. 615.

Horse car held not negligent in driving over a crossing at a trot or in failing to provide fenders. *West Chicago Street R. Co. v. Sullivan*, 64 Ill. App. 628; s. c. aff'd, 165 Ill. 302.

It was for the jury to say whether or not it was necessarily negligent for two cars to pass each other at a high speed at a crossing in a crowded city liable to injure a person caught between them. *West Chicago Street R. Co. v. Annis*, 62 Ill. App. 180.

A street car company held negligent *per se* in running over a crossing at a high speed and without signal, especially where another car had just passed in the opposite direction. *West Chicago Street R. Co. v. McCallum*, 67 Ill. App. 645.

Mere presence of children on street, near the sidewalk, giving no indication of their liability to run toward or in front of the car, held not to make 12 miles an hour, permitted by law, excessive speed. *Rack v. Chicago City R. Co.*, 69 Ill. App. 656.

Speed in the dark held excessive, where it is such as to prevent stopping

in time to avoid accident, upon discovering a wagon ahead. *Calumet Electric Street R. Co. v. Lynholm*, 70 Ill. App. 371.

The jury should determine whether six miles an hour was excessive speed for a cable-train in view of the surroundings. *Chicago City R. Co. v. Roach*, 76 Ill. App. 496.

Rate of speed prescribed by ordinance for horse cars of a company, held not to apply to the electric cars of its successor. *Bonham v. Citizens' &c. Co.*, 158 Ind. 106.

It was for the jury to say whether it was negligent to run cars at high speed over a crossing in close succession. *Marchal v. Indianapolis Street R. Co.*, 28 Ind. App. 133.

Motorman held not warranted in resuming speed upon seeing leave the track one who is unaware of his approach. *Wilkins v. Omaha &c. Co.*, 96 Iowa, 668.

That a repair gang were accustomed to step out of the way, held no excuse for failure to keep car under control. *Pittsburg Electric R. Co. v. Kelly*, 57 Kan. 514.

It was held negligent *per se* to run a car at the rate of 10 or 11 miles an hour over a much frequented crossing without signal. *Rosenberg v. West End Street R. Co.*, 168 Mass. 561.

See, also, *Evansville &c. R. Co. v. Gentry*, 147 Ind. 408; s. c., 37 L. R. A. 378; *Owensboro City R. Co. v. Kill*, (Ky.) 56 S. W. Rep. 21; *Harkins v. Pittsburg &c. T. Co.*, 173 Pa. St. 149; *Mays v. Tacoma Street R. Co.*, 106 Fed. Rep. 48 (24 miles an hour in violation of ordinance).

Especially at night. *South Covington &c. R. Co. v. Ensleau*, (Ky.) 38 S. W. Rep. 850.

Motorman was negligent where his car was going so fast he could not stop within the distance in which he was able to see a vehicle ahead. *La Pontney v. Shedden Cartage Co.*, 116 Mich. 514.

Defendant was held negligent in running its car 45 miles an hour at night past a crossing which the public had to pass over to reach the platform it had provided for them to board from. *Walker v. St. Paul City Ry. Co.*, 81 Minn. 404; s. c., 51 L. R. A. 632.

Ordinance granting franchise and prescribing limits of speed, held valid. *Choquette v. Southern Electric R. Co.*, 152 Mo. 257.

Violation of ordinance as to speed held not sufficient to establish liability. It must be shown that the company had agreed to be bound by it. *Day v. Citizen's R. Co.*, 81 Mo. App. 471.

So, statute prescribing the rate of speed held to apply to companies whose charters provide that the local authorities may so regulate such speed. *Bly v. Nashua Street R. Co.*, 67 N. H. 474; s. c., 30 L. R. A. 303.

So, limitation of speed is held to be within the police power to regulate the use of streets; and that six miles an hour is not *per se* an unreasonable exercise thereof for a city street. *State v. Cape May*, 59 N. J. L. 393; s. c., 36 L. R. A. 656.

See, also, *Lanfer v. Bridgeport T. Co.*, 68 Conn. 475; s. c., 37 L. R. A. 533.

Motorman need not have his car under such control between streets as at crossings, as he is not bound to apprehend that people will cross in the middle of the block without looking out for themselves. *Bethel v. Cincinnati &c. R. Co.*, 15 Oh. C. C. 381.

In the absence of ordinance, reasonable speed depends upon surrounding conditions. *Cincinnati &c. R. Co. v. Lewis*, 23 Oh. C. C. 127.

Car may move faster than usual between crossings if it is kept under proportionate control. *Kline v. Electric T. Co.*, 181 Pa. St. 276.

Running at the rate of ten miles an hour through a street crowded with children, keeping in mind but one, held to present a question as to negligence for the jury. *Buente v. Pittsburg &c. T. Co.*, 2 Pa. Super. Ct. 185.

Running at a high speed on a dark, windy, dusty night, without light or bell, held to present a question as to negligence for the jury. *Tompkins v. Scranton T. Co.*, 3 Pa. Super. Ct. 576.

Violation of an ordinance as to speed held not to create a liability in the absence of proof of its being the proximate cause of the accident. *Davidson v. Schuylkill T. Co.*, 4 Pa. Super. Ct. 86.

What speed was necessary to keep the car under the proper control considering the narrowness of the way, construction and grade of the track and the difficulty of getting out of the way, held to be a question for the jury. *Id.*

Evidence as to car's speed was conflicting. Plaintiff was working in a stooping attitude on the track. Negligence and contributory negligence was for the jury. *Third Ave. R. Co. v. Kransz*, 112 Fed. Rep. 379.

Memphis Street R. Co. v. Wilson, (Tenn.) 69 S. W. Rep. 265.

Violation of a speed ordinance, held not negligence *per se* but evidence thereof. *Hall v. Ogden City Street R. Co.*, 13 Utah, 243.

Stoppage of a car delayed by reason of a defective motor and brake, showed negligence. *Thompson v. Salt Lake Rapid-Transit Co.*, 16 Utah, 281; s. c., 40 L. R. A. 172.

Overloading and excessive speed of a car combining to hinder its stoppage within reasonable limits constitutes negligence. *Richmond R. &c. Co. v. Garthright*, 92 Va. 627; s. c., 32 L. R. A. 220.

Excessive speed at a crossing is negligence. *Bass v. Norfolk R. &c. Co.*, (Va.) 40 S. E. Rep. 100.

State authority to use a street for cars does not give exemption from municipal regulation as to speed. *Norfolk &c. R. Co. v. Corletto*, (Va.) 41 S. E. Rep. 740.

Whether a car was driven too rapidly was for the jury. *White v. Milwaukee &c. R. Co.*, 61 Wis. 536.

As to lookouts and warnings:

A sober cartman in an obstructed street, on a dark night, in New York, was found dead on the track of the defendant where horse cars had proceeded without lights or bells. The dangerous tendency of the defendant's conduct justified attributing death to the defendant's negligence, without contributory negligence of the intestate. *Johnson v. Hudson R. R. Co.*, 20 N. Y. 615, aff'g judg't for pl'ff.

See 5 Duer, 21.

Plaintiff is not negligent in riding a bicycle along the cable slot of a street railway or in failing to look back for the approach of a car, as he has a right to expect the usual warning will be given him. *Rooks v. Houston &c. R. Co.*, 10 App. Div. 98.

Street car driver was negligent in whipping up his horses just as he came to a crossing over which he might expect persons to be passing, and for whom he was bound to look out. *Ellick v. Metropolitan Street R. Co.*, 15 App. Div. 556.

A street railway company is under no absolute duty to give a vehicle on the track ahead of it, "timely warning." Whether it was negligent in failing to do so, and whether the driver thereof was negligent in failing to use reasonable care to discover the approaching car, are questions for the jury. *Devine v. Brooklyn &c. R. Co.*, 34 App. Div. 248.

It was for the jury to say whether plaintiff was negligent in failing to look and listen for a car before crossing the track along the highway, from a private but well-used road on a dark night, where he could not see a car until it was within 10 feet of him; or whether the car driver was negligent in driving past such place at 15 miles an hour knowing of such use. *Duncan v. Union R. Co.*, 39 App. Div. 497.

A street car company owes to pedestrians crossing their tracks, at street intersections, the duty of having their car under control at such places and of giving warning of its approach in case of necessity. *Towner v. Brooklyn Heights R. Co.*, 44 App. Div. 628.

Motorman's failure to ring his bell at a crossing at which another car had discharged passengers, did not charge defendant where he was immediately preceded by a truck, so that one waiting to cross could not have failed to have seen him. *Johnson v. Third Ave. R. Co.*, 69 App. Div. 247.

It is the duty of a motorman to be watchful of the presence of pedestrians, both adults and infants, approaching his track, and where he fails to see them through inattention, or to slow up upon seeing them, so as to avoid them, he is guilty of negligence. *Jones v. The Brooklyn Heights Railroad Co.*, 10 Misc. 543.

Failure to give warning was not a ground of recovery to one who had observed car's approach. *Schulman v. Houston &c. R. Co.*, 15 Misc. 30; *Anderson v. Metropolitan Street R. Co.*, 30 id. 104; *Williamson v. Metropolitan St. Ry. Co.*, 29 id. 324; *South Covington &c. R. Co. v. Ensleau*, (Ky.) 38 S. W. Rep. 850; *Oates v. Metropolitan Street R. Co.*, 168 Mo. 535.

Where an apparent danger will be materially lessened by signal, motorman must give it. *Murphy v. Derby Street R. Co.*, 73 Conn. 249.

Motorman need not observe the track ahead and portion of the street on each side where there are no circumstances calling for any special care. *Macon &c. Street R. Co. v. Holmes*, 103 Ga. 655.

And he is not bound to apprehend that one will cross in the middle of the block, without looking. *Bethel v. Cincinnati Street R. Co.*, 15 Oh. C. C. 381.

Ordinary care at street crossings includes a reasonable lookout while approaching them. *Chicago &c. R. Co. v. Anderson*, 193 Ill. 9; aff'g s. c., 93 Ill. App. 419.

See, also, *Conrad Grocery Co. v. St. Louis &c. R. Co.*, 89 Mo. App. 391; *Altemeier v. Cincinnati Street R. Co.*, 4 Oh. N. P. 224.

And so, while he must keep watch of vehicles ahead likely to become involved while crossing in front of him, he is not bound to apprehend that one, proceeding parallel with the track and not indicating an intention to cross, will do so. *South Chicago &c. R. Co. v. Kinnare*, 96 Ill. App. 210; See *Joliet &c. R. Co. v. Eich*, id. 240.

But it has been held that a motorman must keep watch on both sides as well as ahead and observe if there are such conditions. *City R. Co. v. Thompson*, 20 Tex. Civ. App. 16.

Cars must use lights after dark and sound their gongs at street crossings. *Canfield v. North Chicago &c. R. Co.*, 98 Ill. App. 1.

Motorman held not negligent in failing to signal to a laborer not near enough to the track to be in danger. *Eddy v. Cedar Rapids &c. R. Co.*, 98 Iowa, 626.

Motorman may assume that one walking along the side of a track will take care of himself till the contrary appears. *Beem v. Tama &c. T. Co.*, 104 Iowa, 563.

Lack of full control in a bicyclist held not a defense to an action for being run over without warning. *Louisville R. Co. v. Blaydes*, (Ky.) 51 S. W. Rep. 820; s. c. aff'd, 52 id. 960.

Presumption of negligence was not against the car where it and a driver were proceeding in a parallel course; as the car could not have deviated, and the driver could. *Rombach v. Crescent City R. Co.*, 50 La. Ann. 473.

Motorman failed to see plaintiff walking ahead on a narrow passageway from which passengers boarded the cars. He was held to have been negligent. *Conway v. New Orleans City &c. R. Co.*, 51 La. Ann. 146.

Motorman must signal to a driver beside the track not reasonably believed to be aware of his approach. *Tashjian v. Worcester Consol. R. Co.*, 177 Mass. 75.

Crossing without looking or listening when looking would have given plenty of time to avoid injury, held a defense to excessive speed and failure to signal. *Bennett v. Detroit Citizens' Street R. Co.*, 123 Mich. 692.

So, where plaintiff on the track unloading a wagon next to it, failed to look or listen. *Davies v. People's R. Co.*, 159 Mo. 1.

Gripman was not held to be negligent where his attention was necessarily diverted from the front to avoid danger at the side. *Culbertson v. Metropolitan Street R. Co.*, 140 Mo. 35.

Statutory requirement to keep a vigilant watch and stop on the first appearance of danger in the shortest space possible, held not too onerous. *Conrad Grocery Co. v. St. Louis &c. R. Co.*, 89 Mo. App. 391.

Use of electric cars, particularly of high speed, requires the use of the extra precaution of audible signals. *Consolidated T. Co. v. Chenoweth*, 61 N. J. L. 554.

See, also, *Breary v. Traction Co.*, 5 Pa. Dist. Rep. 95.

Motorman held not chargeable with a failure to signal, where, after he became aware of a boy's sudden and unexpected movement toward the track, he did all he could to stop the car. *Graham v. Consolidated T. Co.*, 64 N. J. L. 10.

Motorman had looked in the direction from which a bicyclist was coming, then concealed by a wagon, but had momentarily looked in another direction. Held not negligent. *Gould v. Union T. Co.*, 190 Pa. St. 198.

Motorman, seeing a driver ahead in dangerous proximity on the tracks, must sound a signal. *Breary v. T. Co.*, 5 Pa. Dist. Rep. 95.

See, also, *Consolidated T. Co. v. Haight* 59 N. J. L. 577.

Though elsewhere than at a street crossing. *Fenner v. Wilkesbarre &c. T. Co.*, 202 Pa. St. 365.

It was held error to charge that a street railway company is bound to furnish such lights at night as, together with street lights, will enable drivers to see objects ahead in time to avoid them. *Memphis City R. Co. v. Logue*, 13 Lea, (Tenn.) 32.

Texas statutory regulations as to signals for railways held not to apply to street railways. *Citizens' R. Co. v. Holmes*, 19 Tex. Civ. App. 266.

Motorman must sound a signal of warning at a crossing not known to be clear. *Hall v. Ogden City Street R. Co.*, 13 Utah, 243.

Especially when running rapidly over it. See preceding subdivision.

To frightened animals:

A hack driver stood by the open door of his carriage reading and without holding the lines. A passing snow plow on the defendant's road threw snow and mud into the carriage and scared the horses so that they ran away. The trial court allowed damages for injury done by the mud, and a recovery was had for six cents. The court held, on appeal, that the error, if any, was in not granting a nonsuit. *Gray v. Second Ave. R. Co.*, 65 N. Y. 561, aff'g judg't for def't.

Citing *Lynch v. Nurdin*, 4 P. & D. 672; S. C. 2 B. 29; *Illidge v. Goodwin*, 5 C. & P. 190; *Quarman v. Barnett*, 6 M. & W. 499; *Barker v. Savage*, 45 N. Y. 191; *Norris v. Kohler*, 41 id. 42.

Car could be stopped within 15 feet, and plaintiff's horse was from 75 to 100 feet away when it took fright. Had motorman been attending to his duty he would have seen plaintiff's signals. Facts showed negligence. *Geipel v. Steinway R. Co.*, 14 App. Div. 551.

Motorman, though able to do so, made no effort to check car's speed in spite of warnings from plaintiff, whose horse became frightened and got partly beyond his control. Motorman was held wilfully negligent. *Birmingham R. & Co. v. Pinckard*, 124 Ala. 372.

It was for the jury to say whether or not it was negligent to run a car on which the grinding of a new pinion made a loud and unusual noise. *Hill v. Rome Street R. Co.*, 101 Ga. 66.

Unusual and wanton blowing of the whistle, causing the fright of a horse in plain view, gave recovery. *Southern Ry. Co. v. Pool*, 108 Ga. 808.

Motorman held not negligent where he did nothing wrong after discovering the horses' fright. *Galesburg Electric Motor & Co. v. Manville*, 61 Ill. App. 490.

The duty to signal must be made consistent with the duty to prevent accident to a driver's horse which has become frightened and unmanageable. *Wachtel v. East St. Louis & Co. R. Co.*, 77 Ill. App. 465.

Company held not liable where runaway of horses taking fright at the car gong was due plaintiff's inability to properly check them. *East St. Louis & Co. Street R. Co. v. Wachtel*, 63 Ill. App. 181.

Motorman was negligent in not slackening speed where he saw he was

frightening a horse, beyond control. *Richter v. Cicero &c. Street R. Co.*, 70 Ill. App. 196.

Third parties move a car upon the highway, whereby injury came to a horse from fright. Railway company was not liable unless car was left there so long as to impute negligence. *Cleveland &c. R. Co. v. Wynant*, 114 Ind. 525.

Mere fright does not require any precaution in absence of an indication that the horse will become unmanageable and imperil its driver. *Terre Haute Electric R. Co. v. Yant*, 21 Ind. App. 486.

Though the driver has signaled for the motorman to stop. *Molyneux v. Southwest Missouri Electric Ry. Co.*, 81 Mo. App. 25.

Motorman, seeing that his car caused fright, not only failed to check its speed, which he could have done, but increased it and ran past. Held negligent. *Ft. Scott &c. R. Co. v. Page*, 10 Kan. App. 362.

Failure to make any effort to stop the car or the ringing of its bell after seeing that it causes fright, held to be negligence. *Owensboro City R. Co. v. Lyddane*, (Ky.) 41 S. W. Rep. 578.

Citizens' R. Co. v. Hair, (Tex. Civ. App.) 32 S. W. Rep. 1050.

Had the motorman been in his proper place he would have discovered the fright of horses in time to have prevented the accident. He was held to have been negligent. *Montgomery v. Johnson*, (Ky.) 58 S. W. Rep. 476.

Duty arises in such case to so manage the car so as not to precipitate a runaway. *Flewelling v. Lewiston &c. R. Co.*, 89 Me. 585.

Repeated ringing of gong where horse presented no appearance of fright, held not negligent. *Henderson v. Greenfield &c. R. Co.*, 172 Mass. 542.

The plaintiff's horse was frightened by the projection of a draw bar of the defendant's car on the crossing. His negligence was for the jury. *Lawless v. Detroit &c. R. Co.*, 65 Mich. 292.

Question of negligence in failing to stop upon seeing a horse's fright was for the jury where the evidence was in dispute as to whether or not the car was properly equipped with safety apparatus. *White v. Vicksburg R. &c. Co.*, (Miss.) 31 South. Rep. 709.

Violent ringing of bell, held inexcusable in the presence of a frightened horse. *Oates v. Metropolitan Street R. Co.*, 168 Mo. 535.

Motorman as soon as he saw that the horse suddenly turning onto the track, could not get off in time did all he could to stop. No negligence shown. *Lee v. Schuylkill Valley T. Co.*, 13 Mont. Co. L. Rep. 91.

A street car with a sprinkler attachment having in addition waving coats thereon was held to be reasonably calculated to frighten horses, and

made it a question of fact as to whether defendant had adopted reasonable precautions to prevent such a result. *McCann v. Consolidated T. Co.*, 59 N. J. L. 481; s. c., 38 L. R. A. 236.

Error of judgment as to best course in the emergency on seeing a frightened horse approaching was not held to show negligence, though signalled to stop by the driver. *Phillips v. People's Pass. R. Co.*, 190 Pa. St. 222.

Motorman should stop upon seeing a frightened horse, partly unmanageable, approaching the car in a zigzag course. *Wachter v. Second Ave. T. Co.*, 198 Pa. St. 129.

Company not liable where the fright was caused by a sudden and unusual noise on the part of passengers. *Boatwright v. Chester &c. R. Co.*, 4 Pa. Super. Ct. 279.

Defendant's sweeper had stopped at plaintiff's signal, till he had reached a place of safety, but started on again before he had had time to get out of reach of danger. There was sufficient evidence of negligence to go to the jury. *Obold v. United T. Co.*, 19 Pa. Super. Ct. 326.

The whole question turns on whether the motorman acted as a reasonably prudent person would have under the circumstances. *Klatt v. Houston &c. R. Co.*, (Tex. Civ. App.) 57 S. W. Rep. 1112.

If there is no appearance of danger, he may continue the noise ordinarily incident to the starting of its cars. *McDonald v. Toledo Consol. Street R. Co.*, 74 Fed. Rep. 104.

An electric street car held not an "object in the highway calculated to frighten horses of ordinary docility." *Bishop v. Belle City Street R. Co.*, 92 Wis. 139.

Motorman need not stop on the first signs of nervousness if it does not appear that the horse is liable to get beyond the driver's control. *Estwood v. La Crosse City R. Co.*, 94 Wis. 163.

To children and defective people:

After the horse and the front of the car had passed, a child approached side of car and fell under the car. The driver was not required to guard points behind the front platform. *Bulger v. Albany R. Co.*, 42 N. Y. 459, aff'g nonsuit.

Motorman upon seeing a boy immediately in front of the car reversed to prevent or lessen the injury by striking him, not being aware that it had already run over the boy. He was not responsible for the error of judgment, suddenly called upon as he was to act in an emergency. *Bittner v. Crosstown Street R. Co.*, 153 N. Y. 76; rev'g s. c., 12 Misc. 514.

Where little girls, starting to cross the track, had plenty of time to do so if no accident happened, motorman was not bound to antici-

pate and provide for the contingency of their falling. Nor was he responsible for the error of judgment in using the brake to stop the car instead of the motor apparatus suddenly called upon as he was to act in an emergency. *Stabenau v. Atlantic Avenue R. Co.*, 155 N. Y. 511; rev'g s. c., 89 Hun, 609.

The motorman on a car upon an electric surface railroad is not bound to expect or anticipate the fact that a boy is going to cross the car tracks in the middle of a block. *Reich v. The Union Ry. Co. of New York City*, 78 Hun, 417.

Company's duty is to use ordinary care only. Not liable because an inexperienced motorman could not stop as quickly as one with full control of the car. *Cunningham v. Los Angeles R. Co.*, 115 Cal. 561.

Violation of ordinance forbidding games in the street, held not to lessen the care due a child *non sui juris*. *Budd v. Meriden Electric R. Co.*, 69 Conn. 272.

Motorman is charged with an active duty of protecting a small child unaware of his approach. *Chicago &c. R. Co. v. Tuohy*, 95 Ill. App. 314; s. c. aff'd, 196 Ill. 410.

Motormen are required to exercise greater diligence to prevent such injury to a child than they are in the case of an adult. *Passameneck v. Louisville &c. R. Co.*, 98 Ky. 195.

But are bound to use no more than ordinary care in ejecting a boy of nine trespassing. *Nussbaum v. Louisville R. Co.*, (Ky.) 57 S. W. Rep. 249.

Car driver not bound to guard against the bare possibility that a child of five or six on the sidewalk would run out in front of him. *Gannon v. New Orleans City &c. R. Co.*, 48 La. Ann. 1002.

If the driver could, by the exercise of ordinary care, have seen a child on the track, although he did not, the company would be liable for injury. *Welsh v. Jackson &c. R. Co.*, 81 Mo. 466.

Motorman held bound by ordinance to keep especially vigilant watch for children. A failure gave rise to statutory penalty. *Senn v. Southern R. Co.*, 135 Mo. 512.

See, also, *Baird v. Citizens' R. Co.*, 146 Mo. 265.

A high degree of care and watchfulness is required in a street where children may be expected to be playing near the track. *Bergen County T. Co. v. Heitman*, 61 N. J. L. 682.

Sample v. Consolidated Light &c. Co., 50 W. Va. 472.

That a motorman must keep a vigilant lookout for children and stop in the shortest space on the first appearance of danger, held a proper instruction. *Citizens' Street R. Co. v. Dan*, 102 Tenn. 320.

When company is liable:

A child three years and eight months old fell from his father's grocery cart upon the defendant's track in front of a car twenty-five (25) feet distant. The driver did not see it although the people shouted to him, and the car ran over child. The defendant was liable. Not *per se* negligent to allow child to ride on the seat. *Bahrenburgh v. B. C. & C. R. Co.*, 56 N. Y. 652, aff'g judg't for pl'ff.

Plaintiff's daughter, a child six and a half years old, crossing Third avenue on a bright afternoon, stumbled and fell on the defendant's track and was run over by one of its trolley cars. The motorman testified that he saw her from the time she left the sidewalk, twenty-three feet from the track. These facts made out a case for the jury. It was the duty of the motorman, on seeing the child approaching the track, to decrease the speed and get the car under control, and not wait to do so until she had fallen on the track. *Moebus v. Herrmann*, 108 N. Y. 349; *Huerzeller v. Central Crosstown Railroad*, 139 id. 490.

In an action by a father, where his boy eight years old in a city street one hundred feet wide, looked and listened, where he could not see for the distance of fifty-five feet, and then ran a distance of twenty-five feet, when he was struck by an engine moving rapidly without signals, a recovery was had, but was reversed because the court declined to charge, that if the boy saw the train and started to cross ahead of it, there could be no recovery, whether the boy started to cross, taking the risk of crossing in front of the train, or omitted to be governed by the fact that he had seen the engine. *Lennon v. N. Y. C. & H. R. R. Co.*, 65 Hun, 578, rev'g judg't for pl'ff.

Where a child which in attempting to cross a street within 18 feet of the car has fallen, is discovered within 5 feet of the horses, the driver was not negligent in not succeeding in stopping the car in time to avoid injury, where the car was moving slowly and under control, and he immediately applied the brake. *Lavin v. Second Ave. R. Co.*, 12 App. Div. 381.

Driver of a street car saw two women, with babies in their arms and four small children, crossing the street at a crosswalk about 50 feet ahead of him. He was chargeable with active vigilance to keep his horses under control and was negligent in increasing his speed instead. *Wihnsky v. Second Ave. R. Co.*, 14 App. Div. 515.

Car driver was negligent in failing to see a child, of three years and eight months on the track, 10 feet ahead, in time to avoid injury, where the car was moving slowly and might have been completely stopped within 12 feet. *Nugent v. Metropolitan Street R. Co.*, 17 App. Div. 582.

The question of defendant's negligence must be submitted to the jury

where it appears that the motorman might have seen the child (of between 5 and 6) approaching the track anywhere within 50 to 100 feet ahead of him, though he crossed elsewhere than at a crosswalk. *Muller v. Brooklyn &c. R. Co.*, 18 App. Div. 177.

Where a boy of 10 fell on the track 80 feet ahead of him, though in the middle of the block, motorman was negligent in failing to see him in time to avoid injury. It was dusk, but he could have seen a distance of three blocks and the car was going at about 10 to 12 miles an hour. *Kitay v. Brooklyn &c. R. Co.*, 23 App. Div. 228.

Motorman was not chargeable with negligence in failing to stop his car in time to prevent injury to a boy who had suddenly run in front of his car where he had but two seconds within which to see him, conclude what to do and act upon it. *White v. Albany R. Co.*, 35 App. Div. 23.

Motorman was not chargeable with negligence in regard to a boy who had started to run across the street, in the middle of the block, and had crossed behind a car going in one direction, but hesitated between the tracks, looking at the car approaching from the other direction, 40 feet away for some time and proceeded on across directly in front of it, so as to be struck while upon the track. *Greenberg v. Third Ave. R. Co.*, 35 App. Div. 619.

Defendant was not negligent where a boy of about 10 fell on the track about four or five feet ahead of the horses at a point where there was no crossing and no lights (it being about 10 o'clock at night), though the car could have been stopped within six feet, and was not stopped within twenty, and though the motorman was at the time looking another way. The plaintiff being *sui juris*, was negligent in running in front of the horses so near to them. *De Iola v. Metropolitan Street R. Co.*, 37 App. Div. 455.

The jury would have been warranted in finding that where a child of 3½ had crossed in front of a car and was likely to be out of danger, the motorman was not negligent in being unable to stop the car in time to avoid injury, because at a distance of 20 feet ahead, he hesitated about proceeding. *Frohle v. Brooklyn Heights R. Co.*, 41 App. Div. 334.

Evidence that a boy of 10 or 11 who had attempted to cross 50 feet in front of a car and had stumbled and fallen on the track, was run over by a car going up a grade at about six miles an hour, when it could have been stopped within 2 to 4 feet, was sufficient to warrant a finding of negligence. *Totarella v. New York &c. R. Co.*, 53 App. Div. 413.

Motorman was negligent in looking nearly everywhere but in front of him where the child was, on hearing a woman scream. *Fullerton v.*

Metropolitan Street R. Co., 63 App. Div. 1; s. c. aff'd, 63 N. E. Rep. 1116.

Negligence and contributory negligence were for the jury where boy of 5 in charge of a boy of 11 attempted after a car going in one direction had passed, to pass behind a wagon and in front of a car 20 to 40 feet away, going in another direction, and the car driver drove his horses at a rapid rate and urged them on. *Gumby v. Metropolitan Street R. Co.*, 65 App. Div. 38.

Negligence of motorman and contributory negligence of a boy of 15, were for the jury where the former was proceeding at full speed behind a truck on which a boy was sitting with his legs hanging down behind and where the latter started to raise them when the car was 10 feet away, after it had rung its bell 25 feet off. Especially where there is some evidence of an unavoidable accident in the falling of one of the horses of the truck, before it had drawn off the track. *Seletsky v. Third Ave. R. Co.*, 69 App. Div. 27.

Where a child was killed by a car, evidence that the car was running at other than a rate allowed by law, and that although the driver saw the child thirty-five feet away, he neither slackened speed nor applied the brake, which, if done, would have stopped the car and saved the child, is sufficient evidence of negligence. *Huerzeler v. Central &c. R. Co.*, 1 Misc. 136.

Boy of four years, playing on the street, was injured by defendant's driver, and dismissal of complaint was proper. *Jaquinto v. B. & Seventh Ave. R. Co.*, 2 Misc. 174.

Driver of a car did not know that he had run over a boy until he was shown his body on the track in the rear of the car. For jury. *Mason v. Atlantic Ave. R. Co.*, 4 Misc. 291, aff'g judg't for pl'ff. Same principle, *Rotenberg v. Segelke*, 6 Misc. 3.

Plaintiff's intestate, a child about six years old, was permitted by its mother to go down by the door of the house, but crossed the street to a candy store, and returning was run down by defendant's motor car. As the child started to cross the street the car was sixty-five feet distant, and there was nothing to obstruct the motorman's view thereafter. On reaching the tracks the child commenced to run, the car being fifteen feet off at that time, and was struck when almost over the last rail. The motorman was not looking, but had his head bent over the dash board, and did not know of the child's presence until some one cried out and the child was against the car, and did not put on the brake until the intestate was under the car. For jury. *Keenan v. Brooklyn City R. Co.*, 8 Misc. 601; rev'd, 145 N. Y. 348.

Plaintiff's intestate, a child five years old, playing in the street with

an older brother, attempted to run across the street and was struck and killed by a motor which was half a block away when the child started to cross. It appeared that the motorman could have seen the child during the entire time, but made no effort to slow down or stop the car until it was fifty feet beyond the place of the accident. Questions of negligence and contributory negligence were for the jury to determine. *Timony v. Brooklyn City & Newtown R. Co.*, 10 Misc. 263.

Allowing a child, of 4½, to wander on the track did not excuse gross negligence in failing to avoid injury. *Fox v. Oakland Consol. Street R. Co.*, 118 Cal. 55.

Motorman was not negligent in failing to signal on approaching a pile of wood which he had no reason to suppose concealed a child *non sui juris*. *Perry v. Macon Consolidated Street R. Co.*, 101 Ga. 400.

Motorman should have seen a child 2½ before he was almost on her, where a passenger saw her start across the street before the car started. *Calumet Electric Street R. Co. v. Lewis*, 68 Ill. App. 598; s. c. aff'd, 168 Ill. 249.

Gripman held not negligent where there was nothing to indicate that a small boy near the curb would suddenly start to cross the street in front of the car. *Rack v. Chicago City R. Co.*, 173 Ill. 289; aff'g s. c., 69 Ill. App. 656.

See, also, *Campbell v. New Orleans City R. Co.*, 104 La. 183; *Holdridge v. Mendenhall*, 108 Wis. 1.

So, where a child in the gutter gave no indication of his intention to cross until within 10 feet of him. *Fleishman v. Neversink M. R. Co.*, 174 Pa. St. 510.

And a motorman is not chargeable with a lack of proper watchfulness in such a case. *Graham v. Consolidated T. Co.*, 64 N. J. L. 10.

So, where motorman's attention was directed to the safe passage of wagon, and he did not anticipate that a boy thereon would jump off and run before him. He was not negligent. *Baier v. Camden &c. R. Co.*, (N. J. L.) 52 Atl. Rep. 215.

Attempt to run past a girl of nine where the street is obstructed to within three feet of the track presented a question as to negligence for the jury. *Calumet Electric Street R. Co. v. Van Peit*, 68 Ill. App. 582.

Motorman was not *per se* negligent where a child 2½ was 50 or 100 feet away when it left the sidewalk which gave him plenty of time to stop; though the child after crossing suddenly turned back within 10 feet of the car. *North Chicago Street R. Co. v. Hoffart*, 82 Ill. App. 539.

Motorman held not negligent where a boy darted in front of the car

from behind a wagon so near that he could not prevent injury. *Pfeiffer v. Chicago &c. R. Co.*, 96 Ill. App. 10.

See, also, *Schneidan v. New Orleans &c. R. Co.*, 48 La. Ann. 866; *Culbertson v. Crescent City R. Co.*, 48 La. Ann. 1376; *Sciortino v. Crescent City R. Co.*, 49 id. 7; *McLaughlin v. New Orleans &c. R. Co.*, 48 La. Ann. 23; *Mulcahy v. Electric T. Co.*, 185 Pa. St. 427; *Funk v. Electric Traction Co.*, 175 Pa. St. 559; *Kierzenkowski v. Philadelphia Traction Co.*, 184 Pa. St. 459; *Callery v. Easton Traction Co.*, 185 id. 176; *Hunter v. Consolidated Traction Co.*, 193 id. 557.

Defendant was not held for death of boy who was a deaf mute when, as soon as he was seen (it being dark and the headlight hindering vision) the power was reversed and the gong sounded louder. *Bonham v. Citizens' S. R. Co.*, 158 Ind. 106.

While driver was otherwise properly engaged a child of two years placed itself in front of the car horse so that the driver could not see it save by stooping over. Defendant was not liable for injury. *Hearn v. St. Charles Street R. Co.*, 34 La. Ann. 160.

Motorman may assume that a boy of eleven will not after his signal attempt to cross in front of him. *McLaughlin v. New Orleans &c. R. Co.*, 48 La. Ann. 23.

Motorman held negligent in failing to stop where he had ample opportunity of seeing the child. *Nelson v. Crescent City R. Co.*, 49 La. Ann. 491.

A boy of 4¼ went under a car which had stopped in the street for about half an hour. The driver held not bound to anticipate his presence and signal before starting on. *Siacik v. Northern Cent. R. Co.*, 92 Md. 213.

Motorman was negligent in running over six year old child where he came around a corner into a street where children were playing, at 2 to 5 miles an hour and when plaintiff clung to the car step to save himself, increased the speed of the car instead of stopping to let plaintiff off. *Aiken v. Holyoke Street R. Co.*, 180 Mass. 8.

Driver saw a child playing six feet from the track and did not check his horse until within seven feet of the child. It was for the jury. *Farris v. Cass Ave. &c. R. Co.*, 80 Mo. 325.

Failure to provide a fender with which to prevent injury to children, held to present question as to negligence for the jury. *Hogan v. Citizens' R. Co.*, 150 Mo. 36.

Plaintiff was unable to properly care for himself but was helped from a car to the station by the side of the street. He later wandered to the track and slipped under a moving car. No recovery. *Begeard v. Consolidated T. Co.*, 64 N. J. L. 316.

Car going 4 miles an hour and which could be stopped within 12 or

15 feet, had 50 feet before reaching the child. Failure to avoid injury established negligence. *Colter v. Cincinnati St. Ry. Co.*, 18 Oh. C. C. 382.

Where a child ran in front of a horse car and there was evidence of inattention on the part of the driver, the question was for the jury. *Citizens' &c. R. Co. v. Foxley*, 107 Pa. St. 537.

Car driver's negligence was for the jury where he was looking at a crowd which he had just passed. *Reilly v. Phila. T. Co.*, 176 Pa. St. 335.

Motorman failed to see, though warned, a child of 4½ which had started to cross 7 feet from the track, 50 or 60 feet ahead, owing to his looking in another direction. His negligence was for the jury. *Evers v. Philadelphia T. Co.*, 176 Pa. St. 376.

See, also, *Karahuta v. Schuylkill T. Co.*, 6 Pa. Super. Ct. 319; *Rice v. Crescent City R. Co.*, 51 La. Ann. 108.

Motorman should not entirely release his brake on a down grade, though the child for which he had stopped, had turned away; where it was still within five feet of the track and ten feet of the car. *Woekner v. Erie Electric Motor Co.*, 176 Pa. St. 451.

Otherwise where a motorman saw school children near the track on both sides 50 or 60 yards ahead. Question was for the jury. *Oster v. Schuylkill T. Co.*, 195 Pa. St. 320.

Motorman held negligent in causing a boy, stealing a ride, to jump in fright. *Levin v. Second Ave. T. Co.*, 194 Pa. St. 156.

Running over a child of 2, in plain sight, which walked toward and on to the track about two lengths ahead of the car, gave recovery. *Jones v. Union T. Co.*, 201 Pa. St. 344.

Child was in plain sight and started to cross when car was 100 feet away, going at full speed. Negligence was for the jury. *Nolder v. McKeeseport &c. R. Co.*, 201 Pa. St. 169.

See, also, *Hooper v. United T. Co.*, 17 Pa. Super. Ct. 638.

Mere fact that a boy of six years was on a track near the street did not defeat a recovery for injuries sustained. *Johnson v. Chicago &c. R. Co.*, 56 Wis. 274.

See *Central &c. R. Co.*, 70 Ga. 207.

2. CARE REQUIRED BY THE PUBLIC.

In general:

There being no absolute duty on the part of motormen to give warnings of their approach, so as to entitle drivers on the track to rely on its being given it is for the jury to say whether plaintiff was negligent in not exercising ordinary care in keeping a lookout for the approach of

a car, or whether under the circumstances, the motorman was negligent in failing to give warnings. It was dark and the highway was poorly lighted. *Devine v. Brooklyn &c. R. Co.*, 34 App. Div. 248.

A greater degree of care is required where cars are run at high rate of speed close together and in a more noisy district where there is confusion and obstruction to view than ordinarily. *Brown v. Wilmington City R. Co.*, 1 Penn. (Del.) 332.

So, the degree is proportionately greater where the grade is such as to make it difficult to check a car's speed. *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462.

Duty to look and listen is not so great at a street car crossing as at a railroad. *Capital T. Co. v. Lusby*, 12 App. D. C. 295.

Jones Bros. v. Greenburg &c. R. Co., 9 Pa. Super. Ct. 65; *Consolidated T. Co. v. Scott*, 58 N. J. L. 682; s. c., 33 L. R. A. 122; *Consolidated T. Co. v. Haight*, 59 N. J. L. 577; *Cincinnati Street R. Co. v. Snell*, 54 Oh. St. 197; *Evansville Street R. Co. v. Gentry*, 147 Ind. 408, R. A. 378; *Hall v. Ogden City Street R. Co.*, 13 Utah, 243.

But does to some degree and plaintiff may be negligent in failing to do so. *Young v. Citizens' Street R. Co.*, 148 Ind. 54; s. c., 47 N. E. Rep. 142.

Driving a vehicle along a track is not *per se* negligence, only ordinary care is required in doing so. *North Chicago Street R. Co. v. Zeigler*, 182 Ill. 9; aff'g s. c., 78 Ill. App. 463; *Maxwell v. Wilmington City Ry. Co.*, 1 Marv. (Del.) 199; *Siek v. Toledo Consol. Street R. Co.*, 16 Oh. C. C. 393; *Breary v. Traction Co.*, 5 Pa. Dist. Rep. 95; *West Chicago Street R. Co. v. Doherty*, 89 Ill. App. 362; *Citizens' R. Co. v. Holmes*, 19 Tex. Civ. App. 266.

Same has been held in regard to a pedestrian. *West Chicago Street R. Co. v. Nilson*, 70 Ill. App. 171.

A wife riding with a husband is bound to use the same degree of care. *Ulrich v. Toledo &c. Street R. Co.*, 10 Oh. C. C. 635.

And it is not true "that the driver of a vehicle along a street where there are cars must exercise greater caution than on streets where there are none." *Scannell v. Boston &c. R. Co.*, 176 Mass. 170.

A reasonable degree of care and watchfulness is required in crossing a car track. *McLaughlin v. New Orleans &c. R. Co.*, 48 La. Ann. 23.

Travelers must not assume unnecessary risks. *Ponsano v. St. Charles Street R. Co.*, 52 La. Ann. 245.

Driver of a fire truck, though having the right of way, must have his horses under such control as to avoid a collision if necessary. *Garrity v. Detroit Citizens' Street R. Co.*, 112 Mich. 369.

One in the possession of all his faculties has no right to rely on a sig-

nalman at a crossing and proceed without looking or listening. *Culbertson v. Metropolitan Street R. Co.*, 140 Mo. 35.

A driver and his guest are held to the same degree of care as a pedestrian. *Consolidated T. Co. v. Behr*, 59 N. J. L. 477.

The use of electricity as a motor power in cars increases proportionately the degree of care in avoiding injury. *Siek v. Toledo Consol. Street R. Co.*, 16 Oh. C. C. 393.

One is not bound, to know at his peril that it is safe to cross, but is held only to the consequences of a reasonable calculation. *Saunders v. City &c. R. Co.*, 99 Tenn. 130.

See, also, *Lawler v. Hartford Street R. Co.*, 72 Conn. 74.

Plaintiff looked up the track for 1400 feet when 400 feet away from it. He was entitled to rely on the assumption that cars would run at legal speed, in which case it would not be necessary to look again, *Hays v. Tacoma R. &c. Co.*, 106 Fed. Rep. 48.

A pedestrian and a street railway are required to exercise the same degree of care—in the middle of a block—to avoid each other. *Burgess v. Salt Lake City R. Co.*, 17 Utah, 406.

It was error to charge that plaintiff should recover if the motorman failed to exercise ordinary care after seeing her peril where, by the exercise of such care she might herself have avoided injury. *Johnson v. Superior &c. R. Co.*, 91 Wis. 233.

The speed of the car is an element in determining the care required. *Tesch v. Milwaukee Electric R. &c. Co.*, 108 Wis. 593.

By children and defective people:

It is for the jury to say, what degree of care should be expected of a boy of eight. *East St. Louis &c. Street R. Co. v. Burns*, 77 Ill. App. 529.

A bright child of eight held chargeable with such a degree of care as is commensurate with her age and mental capacity. *Weiss v. Metropolitan Street R. Co.*, 33 App. Div. 221.

See, also, *Louisville R. Co. v. Phillips*, (Ky.) 58 S. W. Rep. 995, as to a girl of twelve.

A boy of eleven years and four months held to the exercise of some degree of caution in crossing in front of a car. *McLaughlin v. New Orleans &c. R. Co.*, 48 La. Ann. 23.

A boy is chargeable where he has sufficient intelligence to appreciate his danger. *Anderson v. Detroit Citizens' Street R. Co.*, 116 Mich. 368.

A child of tender years held not chargeable with negligence in failing to look before crossing. *Mitchell v. Tacoma &c. Co.*, 13 Wash. 560.

The fact that a bicyclist turning suddenly in front of a car, was but eleven, held an element of consideration on the question of his contributory negligence. *Roberts v. Spokane Street R. Co.*, 23 Wash. 325.

When company is not liable:

A child of seven attempted to cross the street in front of her father's store to join a companion on the other side. The track of defendant's road was about twelve feet from the sidewalk. As she stepped from it on to the street, an approaching car was fifty feet or more distant. At about that time the speed of the car was increased; its driver was looking back into the car. The child was struck by the car and killed.

See *Moore v. Edison &c.*, 43 La. Ann. 792.

A nonsuit was improperly granted; the question of contributory negligence should have been submitted to the jury. *Stone v. Dry Dock &c. R. Co.*, 115 N. Y. 105, rev'g 46 Hun, 184, and judg't for def't.

Distinguishing *Wendell v. N. Y. Central R. Co.*, 91 N. Y. 420.

From opinion.—"The negligence of the driver of the car is conceded. His conduct in driving rapidly along Canal street at its intersection with Orchard street, without looking ahead, but with his eyes turned to the inside of the car, was grossly negligent. *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455; *Railroad Co. v. Gladmon*, 15 Wall. 401."

The plaintiff, twelve years of age, was run over by the defendant's car, while attempting to cross its track. The plaintiff testified that he saw the car and knew that it had no conductor, and that he thought that he had time to cross the track.

The defendant was alleged to be negligent on the theory that the driver increased the motion of the car just as the plaintiff was crossing the track. There was no testimony to that effect, and it was error to submit the case to the jury. *Manahan v. Steinway & Hunters Point R. Co.*, 125 N. Y. 760, rev'g judg't for pl'ff.

Where a boy of eight was not shown to be *sui juris* it was for the jury to say whether his act in crossing dangerously near a car, the speed of which was suddenly increased by the motorman without looking out for what might be ahead, was negligent or not. *Costello v. Third Ave. R. Co.*, 161 N. Y. 317; rev'g s. c., 26 App. Div. 48; *Stabenau v. Atlantic Ave. R. Co.*, 15 App. Div. 408.

From opinion.—"The presumption that the plaintiff was *non sui juris* was not met by direct evidence but the plaintiff was a witness, and his testimony, as well as the manner of giving it, gave the jury an opportunity to measure his intelligence, and it was for them to say whether he was in fact *sui juris* and if they should conclude that he was not, then the further question remained for their consideration, whether he exercised that degree of care and caution which should be expected from one of his age and experience and intelligence * * * and was not to be judged by the standard of intelligence and judgment applied to an adult, in full possession of his faculties.

The former action was brought by the father for loss of services, the latter by the infant herself.

A child eight years old passed behind an up-town car, and was almost instantly struck by the collar of a horse attached to a down-town car and was injured. One witness for plaintiff stated that just before the accident the driver was looking away from the child; at the moment of the accident, the driver pulled the horse in the direction opposite to that of the child and the plaintiff claimed that that caused the accident. Held, that the driver had no reason to expect that a person would, at such a point, attempt to cross behind an up-town car; that he had to act quickly and that even if the accident might have been avoided, if he had not pulled the horse to one side, yet such an act was not negligent. The pedestrian is bound to exercise reasonable care in keeping out of the way of the cars. *Baker v. Eighth Ave. R. Co.*, 62 Hun, 39, rev'g judg't for pl'ff.

Action to recover for the death of the plaintiff's intestate by the alleged negligence of the defendant. A child of two and one-half years old, while under the care of her mother, was permitted by her to cross the street, attended by her sister, a child of five years of age; before giving her consent to their crossing the street, the mother looked and saw that no car was approaching, and there was nothing in the street to harm the children, who had asked to go to meet their father who was on the other side of the street. The children crossed the street in safety, but in attempting to recross the street, and following their father, who had crossed the street without seeing them, the younger child was run over by an electric car on a surface railroad and killed.

The mother was not, as a matter of law, guilty of contributory negligence. *Martineau v. Rochester Railway Company*, 81 Hun, 263.

A bright boy between 8 and 10 was not free from contributory negligence in crossing in such dangerous proximity to a car, that he was struck by it on falling upon the track before the driver had an opportunity to avoid injury. The car was not going rapidly, and it was dark and the street was narrow. The driver was not bound to anticipate that one would cross in the middle of the block; or if one had done so and calculated that it was safe, that an accident might happen preventing his succeeding. *Bello v. Metropolitan Street R. Co.*, 2 App. Div. 313; aff'g s. c., 14 Misc. 279.

A bright boy of between 7 and 8 was not free from contributory negligence as a matter of fact in crossing so dangerously close in front of the horses of a car, that before the driver could take precautions for his safety, he was struck and thrown under a cart coming from the opposite direction. The driver was not responsible for the error of judgment in

failing to apply the brake, being suddenly called upon as he was to act in an emergency, when the first danger which occupied his attention was to prevent his being struck by the horses. *Flynn v. Metropolitan Street R. Co.*, 10 App. Div. 258.

It was for the jury to say whether a boy of nine, admitted to be *sui juris*, was negligent in attempting to cross a track 24 feet away where a horse car was coming 65 feet away, or in not hallooing on reaching track upon seeing the car suddenly increase its speed. He was not *per se* so. *Ellick v. Metropolitan Street R. Co.*, 15 App. Div. 556.

Negligence of a boy driving a wagon, on which sat his father, was for the jury where on hearing no car approaching on the opposite track, he turned off diagonally across it to pass a truck ahead of him; but after turning partly out, he discovered a car approaching 125 feet away, and, instead of going on across as he had time to do, waited for the truck to move on, so as to get back onto the track he was driving on, which he had not time to do. Defendant was negligent in failing to stop as he had time to do, if such was in fact the distance. *Schron v. Staten Island Electric R. Co.*, 16 App. Div. 111.

A bright boy of eight was negligent in running across a track in the middle of the block dangerously near an approaching car in plain sight without looking though the car was following a wagon and the motor-man without looking ahead, suddenly increased its speed. *Costello v. Third Ave. R. Co.*, 26 App. Div. 48.

Boy of eleven was negligent in deliberately crossing the track in the middle of the block in front of a car in plain sight and but three houses away from him without looking. *Ledman v. Dry Dock &c. R. Co.*, 28 App. Div. 197.

See, also, *Morey v. Gloucester R. Co.*, 171 Mass. 164; *Brady v. Consolidated T. Co.*, 63 N. J. L. 25; *Ryan v. La Crosse City R. Co.*, 108 Wis. 122.

A bright child of eight was charged with negligence in walking a distance of 21 feet to and upon the track of a street railway, while a car was approaching for a distance of 100 feet in plain view all the while. *Weiss v. Metropolitan Street R. Co.*, 33 App. Div. 221.

Though plaintiff was but six, he was ordinarily bright and was chargeable with negligence, where he attempted to follow his father across the street in the middle of the block, in the dark, when a car was but 37 to 75 feet away when he was 18 feet from the track. Motorman was not bound to anticipate their presence. *Adams v. Nassau Electric R. Co.*, 41 App. Div. 334.

Where plaintiff, a boy of six, was crossing in front of a car with other boys who crossed in safety, but stopped to pick up a penny which he had dropped on the track, he was not allowed to recover where he did not

show how far the car was away or that the motorman did not stop as soon as he could have, or that the motorman had any reason to anticipate the child's delay upon the track. Nor was the latter negligent in failing to ring the bell in the emergency, when he was attending to the application of the brake. *Frank v. Metropolitan St. Ry. Co.*, 44 App. Div. 243.

Where a car was 127 feet away when plaintiff, nine years of age, but *sui juris*, was 16 feet from the track, about to go over the crossing, she could not be charged with negligence because she failed to look again after leaving the sidewalk, having testified that she walked "Not too fast, and not too slow, just right." *Hicks v. Nassau Electric R. Co.*, 47 App. Div. 479.

Where plaintiff (a woman of 60) looked before crossing the street, though in the middle of the block, and saw the car slowly coming down at the cross street below, she was not negligent in failing to look again on proceeding. The motorman was not *per se* free from negligence in increasing the speed of his car without looking out ahead. Both questions were for the jury. *Killen v. Brooklyn Heights R. Co.*, 48 App. Div. 557.

Looking before crossing held not to relieve a girl of thirteen from the duty of looking again while crossing, which she did leisurely and after waiting for a covered vehicle to pass. *Biederman v. Dry Dock &c. R. Co.*, 54 App. Div. 291.

See, however, *Rosenberg v. West End Street R. Co.*, 168 Mass. 561.

Pedestrian, a man of sixty, in attempting to cross horse car tracks on a dark stormy night, about nine feet from the curb to the first rail, when the car was 100 feet away, coming a high speed, but presumably under control, was not negligent *per se*. *Frank v. Metropolitan Street R. Co.*, 58 App. Div. 100.

Negligence of a bright boy of fourteen was for the jury where he was knocked down by one car and while limping away, crying, was struck by another. *Pender v. Brooklyn Heights R. Co.*, 65 App. Div. 521.

A messenger boy fourteen years and ten months old is clearly *sui juris*.

Where the evidence in an action for injuries to such a boy, by being struck by a street car, shows that he stood between the rails of the track to allow a wagon to pass, without looking to see if a car was coming, when he might have reached a place of safety by stepping back two feet, his contributory negligence affirmatively appears. Non suit affirmed. *Zlotorsky v. Twenty-Third Street Ry. Co.*, 8 Misc. 463.

Proof that a child was six and a half years old and had been accustomed to go to school unattended for several months, and had been allowed to play on the street in which trolley cars were operated, is sufficient

to make it a question for the jury as to whether the child was or was not *sui juris*. *Tholen v. Brooklyn City R. Co.*, 10 Misc. 283.

Distinguishing *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625; *Dorman v. Broadway R. Co.*, 117 id. 655.

Negligence of boy of six or seven in attempting to cross with the car 50 feet away, was for the jury. He accidentally fell. *Lhowe v. Third Ave. R. Co.*, 14 Misc. 612.

Boy of eight had sufficient intelligence to make him capable of self-protection and was negligent in standing on the track seeing a car going about nine miles an hour, only 75 feet away. Motorman was not negligent in not stopping, seeing that the boy saw him. *Griffith v. Metropolitan Street R. Co.*, 32 Misc. 289.

Parents of child of four held not *per se* negligent in leaving it home with a sister of ten. *West Chicago Street R. Co. v. Scanlan*, 68 Ill. App. 626; s. c. aff'd, 168 Ill. 34.

Custom is no defense to a dangerous practice of permitting small children to play in the street where there are cars. *North Kankakee Street R. Co. v. Blatchford*, 81 Ill. App. 609.

So, as to negligence of parents of child of sixteen months in leaving it in charge of a nurse who allowed it to wander on the track where the car driver could have stopped in time to avoid injury. *Passamaneck v. Louisville R. Co.*, 98 Ky. 195.

Some comprehension in a child of seven of the danger involved in crossing, held not to make him necessarily negligent in hurrying on. *Citizens C. R. Co. v. Hamer*, (Ind. App.) 62 N. E. Rep. 658; s. c., 63 id. 778.

Act of a boy of ten, crossing with a crowd of school children in failing to look out for the cars, was not so negligent as to preclude recovery. Motorman running 12 miles an hour under the circumstances was not so free from negligence as to justify a reversal of a verdict for plaintiff. *Consolidated City &c. R. Co. v. Carlson*, 58 Kan. 62.

Boy of thirteen held negligent in starting to cross at night a track on which was coming a slowly-moving, brightly-lighted, car in plain sight. *Kaiser v. New Orleans &c. R. Co.*, 107 La. 539.

Boy of nine held negligent *per se* in jumping from a wagon in front of a car in spite of warnings. *Mullen v. Springfield Street R. Co.*, 164 Mass. 450.

Mother sent one child to get coal while she was attending to another. Accident happened to first while a third, sent after it, had returned to report its refusal to come home with her. Contributory negligence of mother was for the jury. *Evers v. Pennsylvania T. Co.*, 176 Pa. St. 376.

Parent left his child of four playing in front of the cars while he went

away out of sight. He was not allowed to recover. *Schwartz v. United Traction Co.*, 30 Pittsb. Leg. J. (N. S.) (Pa.) 153.

An intelligent boy, able to comprehend the danger, held negligent in walking diagonally along a car track for a distance of 75 feet without noticing the approach of a car from the rear. *Ashland &c. R. Co.*, 108 Wis. 255.

3. CARE REQUIRED BY BOTH CARS AND THE PUBLIC.

Care required by cars toward pedestrians and drivers at cross streets:

Where the evidence is conflicting as to whether the gripman saw or should have seen, a pedestrian as he emerged from behind a passing wagon in time to prevent accident, or whether he unduly increased its speed at a critical moment, was a question for the jury. *McGuire v. Third Ave. R. Co.*, 9 App. Div. 529.

Evidence that motorman increased the speed of his car as he approached without warning, a crosswalk on which plaintiff was crossing the track in plain sight, was sufficient to sustain a verdict of negligence. From the close headway of the cars, it was necessary for pedestrian to cross somewhat close in front of them. *Fandel v. Third Ave R. Co.*, 15 App. Div. 426.

Failure of gripman to stop his car in time to prevent a collision where the vehicle at the time of its crossing was 100 feet away from him, was negligence. *Cass v. Third Ave. R. Co.*, 20 App. Div. 591.

Whether a driver of a heavily loaded truck is negligent in attempting to cross the track of a street railway when the car is from 150 to 175 feet away, or not is a question for the jury depending on the surrounding appearances. *Hergert v. Union R. Co.*, 25 App. Div. 218.

See, also, *Martin v. Third Ave. R. Co.*, 27 App. Div. 52.

Gripman's negligence was for the jury, where it appears that he had sufficient time to stop within five to fifteen feet of the vehicle after he saw the latter was attempting to cross ahead of him, but failed to make any effort till collision was inevitable. *Kennedy v. Third Ave. R. Co.*, 31 App. Div. 30.

Motorman was negligent where a vehicle started to cross his track, between cross streets, when he was beyond one of such cross streets, but he failed to check his speed in time to prevent injury. *Blate v. Third Ave. R. Co.*, 44 App. Div. 163.

Violation of an ordinance requiring street cars to yield to ambulances, is evidence of negligence. *Buys v. Third Ave. R. Co.*, 45 App. Div. 11.

Evidence that a gripman failed to check the speed of his car, on seeing

a wagon approach from an intersecting street justifies a finding of negligence. *Knoll v. Third Ave. R. Co.*, 46 App. Div. 527.

Evidence that deceased was compelled to drive for a short distance along defendant's tracks in a covered wagon, in broad daylight; that upon doing so, his wife looked out for a car from behind but saw none, and that after proceeding slowly for about half a block he was run down by a car, held sufficient to sustain a finding that the motorman did not use reasonable care in seeing the vehicle in time to avoid injury. *Seifter v. Brooklyn Heights R. Co.*, 55 App. Div. 10.

Negligence and contributory negligence were for the jury where plaintiff failed to see a car though he testified that he looked before crossing and the motorman advanced at high speed without signal. *Sesselman v. Metropolitan Street R. Co.*, 65 App. Div. 484.

Negligence and contributory negligence were for the jury where plaintiff drove on the track when the car was but 70 feet away, and where the car could have been stopped within 14 feet. *Bruss v. Metropolitan Street R. Co.*, 66 App. Div. 554.

Negligence and contributory negligence were for the jury where plaintiff took no heed of the car after seeing that it was half a block away, though it approached rapidly and where motorman made no attempt to check his speed though the car could be stopped within 10 or 15 feet. *Smith v. Metropolitan Street R. Co.*, 66 App. Div. 600.

Plaintiff started to cross when the car on the nearest track was two blocks off. While she was halted between the tracks by a car passing on the farther track, the one on the nearer passed catching her between the cars. Negligence was established. *O'Callaghan v. Metropolitan Street R. Co.*, 69 App. Div. 574.

Motorman was not *per se* free from negligence nor *per se* negligent in failing to slacken his speed (20 miles an hour) where plaintiff started to cross 15 to 20 feet off; plaintiff having almost cleared the track when struck, it might be regarded as an error of judgment only. *Handy v. Metropolitan Street R. Co.*, 70 App. Div. 26.

It was for the jury to say whether motorman's turning his attention aside when there were a number of children on the street in front of him was such negligence as to give a verdict for plaintiff. *Sciurba v. Metropolitan Street R. Co.*, 73 App. Div. 170.

As plaintiff was standing on a crosswalk awaiting an opportunity to take one of defendant's horse cars, which stood at the walk, a horse car came from the opposite direction at such speed that the driver was unable to stop it before it reached the car plaintiff was about to take. Plaintiff was almost run down by the horses, and the fright and excitement made her unconscious, and, as a result of the shock, she had a mis-

carriage; from the medical testimony it appeared that the shock was sufficient cause for all the physical ailments from which she subsequently suffered.

In an action to recover damages plaintiff was nonsuited on the ground that no action would lie for a negligent act of a defendant where the only injury produced as the result of such act is fright or apprehension of danger, although such fright is followed by a physical injury which is the result of it. The ruling was erroneous; the case should have gone to the jury, as on the facts it would have been competent for them to find that the negligence of the defendant was the proximate cause of plaintiff's injuries. *Mitchell v. Rochester R. Co.*, 4 Misc. 575.

Disapproving *Victorian Railway Comrs. v. Coutlas*, 13 App. Cas. 222; distinguishing *Lehman v. Brooklyn City R. Co.*, 47 Hun, 355.

Gripman may assume that a pedestrian will stop where the car has first reached the crossing and partly passed her. *McQuade v. Metropolitan Street R. Co.*, 17 Misc. 154.

Motorman saw a wagon about to cross 100 feet away and did not slacken its speed or give warning though it could have been stopped within 12 feet. He was held to have been negligent. *Piercy v. Metropolitan Street R. Co.*, 30 Misc. 612.

Rear fender causing accident, had been properly folded on starting on the trip, and remained so till within nine blocks of the accident. No negligence was shown. *Levison v. Metropolitan Street R. Co.*, 36 Misc. 827.

Question of negligence is for the jury where the evidence is conflicting as to what the car did when a hose cart was coming through a cross street at full speed with its gong sounding. *Birmingham &c. R. Co. v. Baker*, 132 Ala. 507.

Though pedestrian was crossing thoughtlessly without looking, injury could have been avoided had the motorman been looking ahead and had hold of the motor crank. *Cain v. Macon Consol. Street R. Co.*, 97 Ga. 298.

Motorman held negligent in proceeding where a car on the adjoining track shut off his view of the crossing. *West Chicago Street R. Co. v. Nilson*, 70 Ill. App. 171.

Negligence in driving over a crossing without looking held not to preclude recovery where the motorman started on after the wagon had been upset by the first impact. *McDevitt v. Des Moines Street R. Co.*, 99 Iowa, 141.

Had the motorman been at the proper distance behind the preceding car he could have seen a driver's danger in time to avoid injury. He was held to have been negligent. *Hart v. Cedar Rapids &c. R. Co.*, 109 Iowa, 631.

Motorman may assume that a boy standing at the side of the track was waiting for his car to pass when it did not appear that he was in fact waiting for another. *O'Rourke v. New Orleans City &c. R. Co.*, 51 La. Ann. 755.

Plaintiff, though old and slow, was not defective in sight or hearing and gave no indication that he could not avoid injury. The motorman having slackened his speed, sounded his gong, and halloosed to him, was held to have performed his duty. *Farrar v. New Orleans &c. R. Co.*, 52 La. Ann. 417.

Negligence in walking on the tracks without stopping or looking, held not to preclude recovery where the motorman might by the exercise of ordinary care have avoided the consequences thereof. *Baltimore Consol. R. Co. v. Rifecowitz*, 89 Md. 338.

See, also, *Owensboro City R. Co. v. Hill*, (Ky.) 56 S. W. Rep. 21; *O'Keefe v. St. Louis & S. R. Co.*, 81 Mo. App. 386.

Motorman was negligent in carelessly running his car past another standing at a crossing discharging and receiving passengers. *Consolidated T. Co. v. Scott*, 58 N. J. L. 682.

Hale v. Ogden City Street R. Co., 13 Utah, 243.

The rule in Tennessee that contributory negligence only mitigates damages does not apply to the common law negligence exhibited in street railway accidents. *Saunders v. City &c. R. Co.*, 99 Tenn. 130.

Care required by pedestrians and drivers toward cars at cross streets:

It is negligent to enter on a street crossing where vehicles are numerous and collisions with them would be likely to produce serious injury without looking in both directions and noticing the speed and distance of approaching vehicles. *Barker v. Savage*, 45 N. Y. 191.

But see *Mentz v. Railway Co.*, 3 Abbott's App. Dec. 274.

The intended backward motion of a long freight train, partly across a street of a city, is not sufficiently indicated by the bell and whistle, but omission of signals does not absolve a traveler from care. A man advised by someone not to cross, waited a few minutes, led his horse across a track and was hurt. It was for the jury. *Eaton v. Erie R. Co.*, 51 N. Y. 544, aff'g judg't for pl'ff.

See "Crossings," p. 795.

A person saw street car fifty to seventy-five feet away going at rate of five miles per hour, and went on track to take car going the other way. *Davenport v. B. City R. Co.*, 100 N. Y. 632, aff'g nonsuit.

Driver was negligent in attempting to hurry across by going diagonally.

in front of the car when it was so near that collision was inevitable. *Rider v. Syracuse Street R. Co.*, 171 N. Y. 139.

Plaintiff drove across track and supposing he had cleared horse cars, stopped to talk, but side fender struck his wagon. Contributory negligence. *Spaulding v. Jarvis*, 32 Hun, 621, aff'g nonsuit.

Plaintiff, crossing Broadway, passed behind a car and stepped on a wire attached to the axle and was dragged thereon four feet behind the car and was then thrown to the ground. Wire was no part of the car, and there was no evidence of how long it had been there. No negligence shown: nonsuit proper. *McCaffrey v. Twenty-third Street R. Co.*, 47 Hun, 404, aff'g nonsuit.

On a dark and rainy morning, but when electric lights were burning and a person could see three-quarters of a block away, plaintiff, driving his wagon through Pike street, at the intersection of East Broadway, saw a horse-car coming "terribly" fast, seventy-five feet away on the latter street. Plaintiff was about ten feet from the car track, which was slippery, and the track was on a down grade. Plaintiff made no attempt to check his speed, and the car struck the hind wheel of his wagon and plaintiff was injured. Question of plaintiff's contributory negligence was for the jury, for he had the right to believe that those in charge of the car would exercise the proper care. Defendant was not entitled to the right of way in crossing a street, but had the same right of way as any other vehicle, wherein the rule is somewhat different than in respect to vehicles passing in the same or opposite directions to that of other cars within a space enclosed by their tracks. *Buhrens v. Dry Dock &c. R. Co.*, 53 Hun, 571, aff'g judg't for pl'ff.

The fact that a person attempted to cross a street in front of a street car, which he had ample time to do, but by reason of his having fallen into the street in front of the car, was injured, does not establish contributory negligence. Such a case is distinguished from one where a person made a miscalculation as to his ability to safely cross the track before the car. *Fenton v. Second Ave. R. Co.*, 56 Hun, 99, aff'g judg't for pl'ff.

A man of sixty-one years, after looking both ways, started to cross a horse railroad with a car fifty feet away. After crossing two tracks and a part of the third he was struck by the horses of the car and was injured. The car was going at full speed and was not slackened with the man in full view. Question of plaintiff's negligence should have been submitted to the jury. *Wells v. Brooklyn City R. Co.*, 58 Hun, 389, rev'g nonsuit.

It does not constitute negligence *per se* that a person crossing a street

fails to observe that a car is moving at more than twice the usual rate of speed of horse cars on the street along which it was proceeding, nor is it negligent for him to assume that the driver thereof will obey the customary signal of a person desiring to ride in such car.

It cannot be inferred from section 1902 of the Code of Civil Procedure that the legislature intended to give the right of action only in case the person killed was a citizen of the state of New York or left property therein.

Section 1902 of the Code of Civil Procedure is not covered by the express terms of section 2702 thereof, but by the broad powers conferred by the latter section upon ancillary representatives, it is evident that the legislature intended to give them every right of action conferred upon executors or administrators except those specially excepted. *Lang v. The Houston, West Street and Pavonia Ferry R. Co.*, 75 Hun, 151; s. c. aff'd, 144 N. Y. 717.

As to looking for street cars, see *Van Patten v. Schenectady St. R. Co.*, 80 Hun, 494; *Campbell v. Union R. Co.*, 9 Misc. 483.

It was negligent to cross in front of an electric car without looking for its approach. Plaintiff slipped on the track. *Curry v. Rochester R. Co.*, 90 Hun, 230.

It was not *per se* negligent to cross immediately behind a car after alighting from it where plaintiff looked and heard nothing; motorman having failed to signal. *Dobert v. Troy City R. Co.*, 91 Hun, 28.

Though a woman is 72 years old, she was not held negligent *per se* in crossing a track at the time a car is from 90 to 100 feet away. *Walls v. Rochester R. Co.*, 92 Hun, 581.

Driver was not negligent *per se* in walking his horses over a street car track at a street crossing when the car is 150 yards away. *Zimmermann v. Union R. Co.*, 3 App. Div. 219.

Where he had waited for two cars to pass, plaintiff was not negligent *per se* in attempting to pass in front of a third because of its nearness; their close headway necessitating such course. Motorman was negligent in increasing his speed as he approached the crosswalk. *Fandel v. Third Ave. R. Co.*, 15 App. Div. 426.

It was not negligent *per se* for a driver to attempt to cross a street car track where the car is at the time 100 feet away. *Cass v. Third Ave. R. Co.*, 20 App. Div. 591.

Failure of a motorman to give warning of his approach, did not charge defendant with the injury where the driver of a vehicle had seen the car when it was 300 feet away. *Huber v. Nassau Electric R. Co.*, 22 App. Div. 426.

That plaintiff had looked for a car did not relieve her of negligence in

failing to look again before crossing after the lapse of two minutes where the car track turned in from a cross street only a short distance away. *Healey v. Brooklyn &c. R. Co.*, 18 App. Div. 623.

Plaintiff held contributorily negligent, where without paying attention to his surroundings, he walked toward the track and around the end of a car thereon, over onto the next track colliding with a car thereon. *Martin v. Third Ave. R. Co.*, 27 App. Div. 52.

A driver of a vehicle is not negligent in attempting to cross a track, where he has a reasonable opportunity of being successful, even though it may require the gripman to slacken the speed of the car to secure his safety. *Kennedy v. Third Ave. R. Co.*, 31 App. Div. 30.

Negligence of a driver of a vehicle was for the jury where it appeared that he had seven seconds in which to turn off the track and avoid collision, and that up to the last second, there was ample time for him to do so. The rule as to looking and listening before crossing as applied to steam railroads is not applicable to street railways. *Read v. Brooklyn &c. R. Co.*, 32 App. Div. 503.

Plaintiff saw a north bound car standing a block away, and assumed a position between the tracks at a street crossing, for the purpose of boarding a south bound car. He was not negligent *per se* though he did not look again. The driver of the former car had a full view of the situation, but instead of reducing his speed, increased it. *Boentgen v. New York &c. R. Co.*, 36 App. Div. 460.

Party injured testified that she walked fast after leaving the sidewalk. It was held not to be negligent *per se* to fail to look again after leaving the curb. *Hickman v. Nassau Electric R. Co.*, 41 App. Div. 629.

Driver was approaching a street car track on one street along that intersecting it from another. He looked in one direction, along the line of the former, from which an uptown car should have been coming, and saw none. He was not charged with a failure to see a car which was coming up on the downtown track, without a headlight and without signals. It was dark and there were three sides from which he might expect danger, and which he had to pay attention to also. *Stevens Co. v. Brooklyn Heights R. Co.*, 59 App. Div. 23.

A girl of thirteen was negligent where she had looked up and down the avenue for cars before starting to cross without seeing any, but failed to look again while crossing, which she did leisurely and after waiting for a covered vehicle to pass before her. Her view was unobstructed, it was light enough to see and a shawl over her head only prevented her hearing. *Biederman v. Dry Dock &c. R. Co.*, 54 App. Div. 291.

Negligence and contributory negligence was for the jury where driver started on after waiting for cars to pass, without seeing whether others

were following, where nothing obstructed his view. The following car approached without signal or check in its speed. *Morris v. Metropolitan Street R. Co.*, 63 App. Div. 78; s. c. aff'd, 170 N. Y. 592.

Driver of a police patrol wagon hurrying in response to a call and sounding its gong, was not negligent in whipping up his horses to get ahead of a car from 30 to 100 feet away. *Decker v. Brooklyn Heights R. Co.*, 64 App. Div. 430.

Driver may assume that a car will be under control in approaching a street crossing. *Reilly v. Brooklyn Heights R. Co.*, 65 App. Div. 453.

Plaintiff's negligence was for the jury where she paid no attention to the car while crossing ahead of it after seeing it 100 feet off and after her son had signaled it to stop. *Copeland v. Metropolitan Street R. Co.*, 67 App. Div. 483.

Pedestrian was negligent in failing to see a car approaching in plain view, though he states he looked twice before reaching the track. *Madigan v. Third Ave. R. Co.*, 68 App. Div. 123.

Negligence of a girl of nine was for the jury where she started to walk briskly across the track upon seeing a car about 170 feet away. *Dorsch v. Brooklyn Heights R. Co.*, 68 App. Div. 222.

Plaintiff was not negligent in relying on a car going in one direction 300 feet away when first seen, slowing up as it approached the crossing, so as to make it safe to cross behind a car coming from the opposite direction. *Bertsch v. Metropolitan Street R. Co.*, 68 App. Div. 228.

Plaintiff started on across the opposite track immediately after a truck which followed the car he alighted from, and immediately in front of a car on the other track. No recovery was allowed. *Johnson v. Third Ave. R. Co.*, 69 App. Div. 247.

When plaintiff held negligent.—A person was knocked down by a street car while crossing the track. He himself was negligent. *Jarnett v. Brooklyn St. R. Co.*, 49 Supr. Ct. 185.

An attempt to pass with a wagon in front of a cable car forty feet away, approaching at speed of ten miles an hour, is *per se* negligent. *Hamilton v. Third Ave. R. Co.*, 6 Misc. 382, rev'g judg't for pl'ff. (N. Y. Common Pleas).

Citing *Belton v. Baxter*, 54 N. Y. 245; *Woodard v. Railroad Co.*, 106 id. 369-374; *Wendell v. Railroad Co.*, 91 id. 420-428; *McClain v. Railroad Co.*, 116 id. 459, 465; *Davenport v. Railroad Co.*, 100 id. 632; *McPhillips v. Railroad Co.*, 12 Daly, 365.

Plaintiff's driver undertook to cross defendant's tracks when one of its cars was but twenty-five feet distant, without looking to see whether a car was approaching, and the wagon was struck by the car. The driver

could not recover as he was negligent. *Reynolds v. Third Ave. R. Co.*, 8 Misc. 313. (New York Common Pleas.)

To drive across a track at a dog trot upon seeing when five yards therefrom a car approaching only 200 yards away. *Shanley v. Union R. Co.*, 14 Misc. 442.

In walking against a moving car at a crossing in plain sight. *McQuade v. Metropolitan Street R. Co.*, 17 Misc. 154.

See, also, *Canedo v. New Orleans &c. R. Co.*, 52 La. Ann. 2149; *Walsh v. Hestonville &c. R. Co.*, 194 Pa. St. 570; *McCauley v. Philadelphia T. Co.*, 13 Pa. Super. Ct. 354.

In a bicyclist to ride slowly across only a few feet in front of a car moving rapidly. *Laurie v. Metropolitan Street R. Co.*, 18 Misc. 81.

To drive along a car track under an elevated railroad and go diagonally across the former in front of a car only "2½ pillars" away. *May v. Metropolitan Street R. Co.*, 26 Misc. 748.

In attempting to drive across without looking. (Obstruction of his view of his carriage top was no excuse.) *Lang v. Metropolitan Street R. Co.*, 26 Misc. 754.

In a pedestrian crossing in front of a horse car, not shown to be far enough away to make it safe, without looking. *Balla v. Metropolitan Street R. Co.*, 27 Misc. 775.

In starting to cross when a car was but 100 feet away, and upon discovering his mistake whipping up his horses and going over. *Reiss v. Metropolitan Street R. Co.*, 28 Misc. 198.

To attempt to drive across when it cannot be done safely unless the motorman changes his rate of speed or stops. *Williamson v. Metropolitan Street R. Co.*, 29 Misc. 324.

In being on the seat with the driver of an ice wagon going at a slow walk and not jumping or giving the alarm to the driver upon seeing a car coming only 30 feet off below the crossing of the street he was on. *Anderson v. Metropolitan Street R. Co.*, 30 Misc. 104.

To drive across 45 to 50 feet in front of a car coming at full speed. *Mason v. Metropolitan Street R. Co.*, 30 Misc. 108.

In driving on at an eight-mile-an-hour gait upon seeing a car 150 to 200 feet away without looking out again. *Reilly v. Metropolitan Street R. Co.*, 30 Misc. 110.

Where he could have stopped, but miscalculating the distance, drove on. *Petri v. Third Ave R. Co.*, 30 Misc. 254.

Where car was in plain sight when he started to cross though he testified he did not see it upon looking and made no attempt to look again till on the track. *Newcomb v. Metropolitan Street R. Co.*, 36 Misc. 787.

In attempting to cross where a car was coming rapidly and only 20

feet off on the farther track, when his horse had just reached the nearer track. *Manhattan Pie Baking Co. v. Metropolitan Street R. Co.*, 36 Misc. 855.

Where a driver could have stopped in time to avoid injury had he looked. *Highland Ave & B. R. Co. v. Sampson*, 112 Ala. 425.

See, also, *Borschall v. Detroit R. Co.*, 115 Mich. 473; *Smith v. Electric T. Co.*, 6 Pa. Dist. 471.

Right of way did not excuse reckless driving. *Birmingham Railway & Electric Co. v. Baker*, 126 Ala. 135.

Where, while looking for a car in one direction she unnecessarily steps back on to the track of a car coming in the opposite direction (and only 10 or 15 feet away) without looking in that direction. *Bailey v. Market Street Cable R. Co.*, 110 Cal. 320.

Where, upon signaling a car she ran directly in front of it to reach the crossing where it usually stopped to receive her. *Griffith v. Denver Consol. T. Co.*, 14 Colo. App. 504.

Where his servant was contributorily negligent. *Brown v. Wilmington City R. Co.*, 1 Penn. (Del.) 332.

In driving over a crossing without looking for cars in plain view. *Adams v. Wilmington Street R. Co.*, (Del.) 52 Atl. Rep. 264; *Farley v. The same*, Id. 543.

In a pedestrian crossing when cars were so near that he had barely time to go in front of the first and had not time to get by the second. *Hurdle v. Washington &c. R. Co.*, 8 App. D. C. 120.

In assuming that a motorman will move at lawful speed and give him his right of way, gained by first arrival. *Metropolitan R. Co. v. Hammett*, 13 App. D. C. 370.

In driving over a crossing where the car is moving at about 20 miles an hour and but 75 feet away. *Chicago North Shore Street R. Co. v. McCarthy*, 66 Ill. App. 667.

Where, after each had stopped for the other, she started without looking for the car which had already started. *West Chicago Street R. Co. v. Boecker*, 70 Ill. App. 67.

In a pedestrian passing behind a car going in one direction without looking for cars which might be coming behind it in the other. *Thorsell v. Chicago City R. Co.*, 82 Ill. App. 375.

See, also, *Chicago City R. Co. v. Fennimore*, 78 Ill. App. 478; *Stowers v. Citizen's Street R. Co.*, 21 Ind. App. 434; *Baltimore T. Co. v. Heims*, 84 Md. 515; s. c., 36 L. R. A. 215; *McCarthy v. Detroit Citizens' Street R. Co.*, 120 Mich. 400; *Doty v. Detroit Citizen's Street R. Co.*, (Mich.) 88 N. W. Rep. 1050; *Smith v. City &c. R. Co.*, 29 Or. 539; s. c., 29 Or. 546; *Blaney v. Electric T. Co.*, 184 Pa. St. 524; *McLeod v. Graven*, 73 Fed. Rep. 627.

Where, hearing some one call, he stopped and stepped back on the track

immediately in front of an approaching car. *Webb v. Chicago City Ry. Co.*, 83 Ill. App. 565.

In driving over with a sprinkling cart upon seeing car coming, thinking he could get over in time. *De Lon v. Kokomo City Street R. Co.*, 22 Ind. App. 377.

In attempting to cross knowing a car was coming without stopping to observe its proximity. *Citizens' Street R. Co. v. Helvie*, 22 Ind. App. 515.

In driving on where he sees a headlight about 300 feet away but by reason of darkness, cannot tell how fast it is coming. *Metropolitan Street R. Co. v. Slayman*, 64 Kan. 722.

Negligence in driving across knowing a car was coming without looking precluded recovery for accident which the motorman was powerless to prevent. *Kelly v. Louisville R. Co.*, (Ky.) 46 S. W. Rep. 688.

To drive across a track without looking except at a place where nothing could be seen. *Snider v. New Orleans &c. R. Co.*, 48 La. Ann. 1.

In a pedestrian attempting to cross at night without looking or listening when the car was so near that it must have been visible and its noise apparent. *Hoelzel v. Crescent City R. Co.*, 49 La. Ann. 802; s. c., 38 L. R. A. 708.

Where, having stopped his team to allow a car to pass, suddenly started on again when it was not more than 225 feet away. *Hemmingway v. New Orleans City &c. R. Co.*, 50 La. Ann. 1087.

In driving upon the track without looking and listening; or if having looked or listened, in failing to perceive; or if having seen, in failing to try and avoid injury. *Dieck v. New Orleans City &c. R. Co.*, 51 La. Ann. 262.

In a pedestrian crossing immediately in front of a car sounding an alarm. *Webster v. New Orleans City &c. R. Co.*, 51 La. Ann. 299.

In a bright boy of eleven waiting at night on a downtown track for an uptown car without looking for the approach of a downtown car only 12 or 15 feet away. *O'Rourke v. New Orleans City &c. R. Co.*, 51 La. Ann. 755.

In a pedestrian standing near the track without apparent intention of crossing, suddenly going in front of a rapidly approaching car, when it is too late for the motorman to avoid injury. *Knoker v. Canal &c. R. Co.*, 52 La. Ann. 806.

Drivers must look before crossing an electric car track. *Conden v. Shreveport Bell R. Co.*, 106 La. 236.

Deafness held no excuse where he had good eyesight and failed to look. *Hall v. West End Street R. Co.*, 168 Mass. 461.

Where he looked beyond the point of obstruction but did not look again

before driving upon the track for a car which might have been at the time he looked, within the obscured portion. *Kelley v. Wakefield &c. Street R. Co.*, 175 Mass. 331.

In alighting from a car and starting to pass behind it though it covered a portion of the cross walk, causing her to fall upon a projecting fender. *Gargan v. West End Street R. Co.*, 176 Mass. 106; s. c., 49 L. R. A. 421.

In a pedestrian, upon seeing a car in close proximity starting to cross through snow. *Mathes v. Lowell &c. Street R. Co.*, 177 Mass. 416.

In driving across tracks heedless of a car's approach. *Hurley v. West End &c. R. Co.*, 180 Mass. 370.

Where without looking or listening he starts to cross in front of one car, and finding himself unable to succeed, turns round in front of another. *Graff v. Detroit Citizens' Street R. Co.*, 109 Mich. 77.

In a pedestrian, not looking when within two or three feet from the track where, when he looked, about twelve feet therefrom, his view was obstructed. *Doherty v. Detroit Citizens' Street R. Co.*, 118 Mich. 209.

In plaintiff, a bicyclist, going at about four to six miles an hour, starting to cross without looking for a car nearby. *Bennett v. Detroit Citizens' Street R. Co.*, 123 Mich. 692.

In plaintiff, a driver, not looking again when he had a clear view and plenty of time to stop. Where he first looked, he could only see nine rods down it, by reason of an obstruction. *Merritt v. Foote*, 128 Mich. 367.

In a driver's not looking until within forty or fifty feet of the track, and then whipping up his horse and starting on over. *Hilts v. Foote*, 125 Mich. 241.

In walking upon a track so close to a car that the motorman could not avoid injury, caused by his not looking again upon finding his view obstructed the first time he looked. *Terien v. St. Paul City R. Co.*, 70 Minn. 532.

In plaintiff, a boy of sixteen, aware of his surroundings, heedlessly walking over switch tracks leading out of a car barn. *Downs v. St. Paul City R. Co.*, 75 Minn. 41.

To walk across though the car is only running at seven miles an hour, when it is only a few feet distant. *Watson v. Mound City Street R. Co.*, 133 Mo. 246.

Where if she looked at all, she did not do so long enough to prevent her mistaking an approaching car for a receding one. *Hauselman v. St. Louis &c. R. Co.*, 88 Mo. App. 123.

A driver has the right to cross where proceeding at reasonable speed, the car will not reach him before he can do so, or can be stopped in time to

avoid injury if necessary. *New Jersey Electric R. Co. v. Miller*, 59 N. J. L. 423.

In driving across a track at night without looking or listening for cars known to pass frequently. *Schausten v. Toledo Consol. Street R. Co.*, 18 Oh. C. C. 691.

In unexpectedly driving across a track in front of a car but fifteen feet off. *Cincinnati Street R. Co. v. Jenkins*, 20 Oh. C. C. 256.

Looking and listening before crossing held not to excuse turning or backing a wagon while on the track. *Rauscher v. Philadelphia T. Co.*, 176 Pa. St. 349.

In a pedestrian failing to look, when except for a short space twelve feet from the track, a car was continually visible. *Nugent v. Philadelphia T. Co.*, 181 Pa. St. 160.

In driving on under the impression that if he reached the crossing first the approaching car was bound to stop for him. *Smith v. Electric T. Co.*, 187 Pa. St. 110.

Where after stopping about twelve feet from the track, and looking so as to see about a quarter of a mile, he backed about ten or twelve feet and then drove on without again taking a look. *Kern v. Second Ave. T. Co.*, 194 Pa. St. 75.

In a pedestrian failing to see a car well lighted and with a good headlight. *Watkins v. Union T. Co.*, 194 Pa. St. 564.

Where he steps directly in front of a car which he had ample time to see and avoid. *Sullivan v. Consolidated T. Co.*, 198 Pa. St. 187.

In driving across a track only a few feet in front of a rapidly approaching car. *Bornscher v. Consolidated T. Co.*, 198 Pa. St. 332.

In plaintiff, a cyclist, crossing in front of a car fifty to seventy-five feet away where he had seventeen and a half feet to go. *McCracken v. Consolidated T. Co.*, 201 Pa. St. 378.

In plaintiff, driving covered wagon, taking a hasty look sixty or seventy feet down the track and paying no further attention. *Piper v. Union T. Co.*, 202 Pa. St. 100.

See, also, *Keenan v. Union T. Co.*, 202 Pa. St. 107; *Brown v. Pittsburg & C. T. Co.*, 14 Pa. Super. Ct. 594.

In driving at a walk across a track after seeing a car rapidly approaching on a down grade. *Smith v. Electric T. Co.*, 6 Pa. Dist. Rep. 471.

Driver could not excuse his failure to stop and look before crossing by alleging that the only place he could do so was so near a foot path which he had no right to obstruct. *Manayunk & C. Co. v. Union T. Co.*, 7 Pa. Super. Ct. 104.

Where knowing the danger of the crossing he failed to look until his

horse was on the track. *Trout v. Altoona &c. R. Co.*, 13 Pa. Super. Ct. 17.

That a boy of fourteen was deaf and dumb held no excuse for his failure to look. *Thompson v. Salt Lake Rapid-Transit Co.*, 16 Utah, 281; s. c., 40 L. R. A. 172.

In not looking in one direction again before driving on after looking at a point twenty or thirty feet from the track. *Potter v. Scranton R. Co.*, 19 Pa. Super. Ct. 444.

In driving across a track without paying any attention to car known to be about due. *Helber v. Spokane Street R. Co.*, 22 Wash. 319.

Plaintiff was held not negligent.—In driving over a crossing where a car was seventy-five feet away. *Schoener v. Metropolitan Street R. Co.*, 76 N. Y. Supp. 157.

A fireman, in jumping from a hose cart about to collide with a trolley car. *Geary v. Metropolitan Street R. Co.*, 77 N. Y. Supp. 54.

In passing behind the car from which she had alighted on one track when struck by a car proceeding on the other without signals, when concealed by the first. *Pelletreau v. Metropolitan Street R. Co.*, 77 N. Y. Supp. 386.

See, also, *Buckley v. New York &c. R. Co.*, 77 N. Y. Supp. 128.

In attempting to cross in a crowded street with the car twenty feet away. *Coyle v. Third Ave. R. Co.*, 17 Misc. 282; s. c., rev'd, 18 id. 9, on another point.

In a pedestrian standing still by a track when passage was suddenly blocked by vehicles. *Hernandez v. Metropolitan Street R. Co.*, 36 Misc. 793; rev'g s. c., 35 id. 853.

In crossing in reliance on a car's stopping before crossing a street, in observance of an ordinance. *Oliver v. Denver Tramway Co.*, 13 Colo. App. 543.

In a driver, about thirty-five feet from a car track, relying on the motorman having his car under control, upon seeing it 233 feet off. *Chicago General R. Co. v. Carroll*, 91 Ill. App. 356; s. c., 189 Ill. 273.

In not stopping where the track was only fifteen and one-half feet from the cross street and he looked and listened, though his view was obstructed, till his horse was on the track. *McCoy v. Kokomo R. &c. Co.*, 158 Ind. 662.

In driving from a point eighty feet from the track where he could see 300 to 350 feet, but saw nothing, at from four to five miles an hour, on over the intervening space, obscured till he was almost on top of the track. *Kelly v. Wakefield &c. Street R. Co.*, 180 Mass. 542.

In plaintiff, a fireman, attempting to cross without having his horses

under control where he had a right to rely on the motorman's duty to try and avoid a collision. *Garrity v. Detroit Citizens' Street R. Co.*, 112 Mich. 369; s. c., 37 L. R. A. 529.

In plaintiff, a motorman, after making the required stop before crossing an intersecting railway, starting on when the other car is from 150 to 200 feet away. *Becker v. Detroit Citizens' Street R. Co.*, 121 Mich. 580.

In an old lady of seventy-five failing to look or listen, though knowing of the approach of a car where she had no reason to suppose that her driver was not exercising proper care. *Johnson v. St. Paul City R. Co.*, 67 Minn. 260; s. c., 36 L. R. A. 586.

In driving over when a car was coming at great speed when it was 300 feet away, and he had a right to rely on the motorman's duty of reducing it to the legal rate. *Consolidated T. Co. v. Lambertson*, 59 N. J. L. 297.

In not looking a second time where he was driving four miles an hour and when within 100 yards from the track the car was 200 to 250 yards from the crossing. *Citizens' Rapid-Transit Co. v. Seigrist*, 96 Tenn. 119.

Where he could have crossed safely had the motorman exercised ordinary care. *Saunders v. City &c. R. Co.*, 99 Tenn. 130.

In passing behind a car from which he alighted on to the adjoining track without looking, where he was a stranger to our ways. *Bass v. Norfolk &c. R. Co.*, (Va.) 40 S. E. Rep. 100.

In proceeding where his view of the farther track was shut off by a car on the nearer, but for sixty feet, permitting a view for 100 feet beyond its furthest end and for forty feet past its nearest end. *Tesch v. Milwaukee Electric R. Co.*, 108 Wis. 593.

Snow on the track sloped eleven to fourteen inches in one and one-half feet. Did not make it negligent to cross. *Gerrard v. La Crosse &c. R. Co.*, 113 Wis. 258.

It was held not negligent per se.—To assume that he can drive across a street car track twenty-eight feet distant before a trolley car 500 feet away can reach him. *Mackie v. Brooklyn City R. Co.*, 10 Misc. 4.

To cross with a heavily loaded wagon with no car in sight at the time. *Kilvane v. Westchester Electric R. Co.*, 19 Misc. 184.

To cross a track in a two-wheeled cart where a car is eighty feet away when the horse's head touched the track. *Reilly v. Third Ave. R. Co.*, 16 Misc. 11; aff'g s. c., 14 id. 445.

So, to cross a track when within five feet of the nearest track a car is

seen 150 feet away on the furtherest. *McDonald v. Third Ave. R. Co.*, 16 Misc. 52.

To drive across at an eight-mile gait upon seeing five feet from the nearest track a car coming, three-fourths of a block away on the furtherest. *Hunter v. Third Ave. R. Co.*, 21 Misc. 1; aff'g s. c., 20 id. 432.

In leaving the sidewalk after looking where the view was unobstructed. *Curtin v. Metropolitan Street R. Co.*, 22 Misc. 83.

To start to drive across where nearest car is 150 feet away. *Dise v. Metropolitan Street R. Co.*, 22 Misc. 97; aff'g s. c., 21 id. 790.

To pass around the end of a street car from which plaintiff had alighted across the other track. *Wallen v. North Chicago Street R. Co.*, 82 Ill. App. 103.

To cross ahead of a car. *Schneider v. Market Street R. Co.*, 134 Cal. 482.

Where the car was standing when plaintiff stepped on the track to cross and where although intoxicated, he was able to walk. *West Chicago Street R. Co. v. Ranstead*, 70 Ill. App. 111.

In a pedestrian failing to look or listen where the car's headlight was dim and it gave no signal. *North Chicago Street R. Co. v. Nelson*, 79 Ill. App. 229.

In a pedestrian to cross without looking; *a fortiori* where he did look. *West Chicago Street R. Co. v. Huhnke*, 82 Ill. App. 404.

Where the failure to look and listen does not materially contribute to the accident. *Citizens' Street R. Co. v. Albright*, 14 Ind. App. 433; s. c., 14 id. 438.

In a girl of eleven and a half, familiar with the cars and crossing, going upon the track without looking. *Consolidated &c. R. Co. v. Wyatt*, 59 Kan. 772.

To walk across a track alone because eyesight and hearing are impaired. *Robbins v. Springfield Street R. Co.*, 165 Mass. 30.

In driving by the side of a street railway. *Brooks v. Lincoln &c. R. Co.*, 22 Neb. 816.

In a pedestrian not looking both ways before crossing. *Cincinnati Street R. Co. v. Snell*, 54 Oh. St. 197; s. c., 32 L. R. A. 276.

To attempt to drive across a track with a car 250 feet distant which could have been safely done had it not suddenly increased its speed. *Calahan v. Philadelphia T. Co.*, 184 Pa. St. 425.

Where it appeared that plaintiff looked before crossing, and the circumstances as to the distance of the car, its rate of speed, and what happened before she reached the track, did not clearly appear. *McGovern v. Union T. Co.*, 192 Pa. St. 344.

To cross across a track on a dark and windy night after stopping, and

looking and listening. *Tompkins v. Scranton T. Co.*, 3 Pa. Super. Ct. 576.

Where plaintiff was halted by a car in front on the farther track and was struck by one on the nearer track, while crossing back over it. *Burim v. Seattle Electric Co.*, 26 Wash. 606.

In driving over a crossing at dusk immediately after a car has passed in one direction, when the car which struck him was, just prior to such passage of the other, standing in the middle of the block. *Thoresen v. La Crosse City R. Co.*, 94 Wis. 129.

When the question of plaintiff's negligence was held to be a question for the jury.—Plaintiff attempted to cross a street in the rear of a car and was injured by the car suddenly moving backwards as the driver released the brakes. *Lundy v. Second Ave. R. Co.*, 1 Misc. 100.

Plaintiff attempted to cross a street on which defendant's road was operated, at a time when he saw a car about sixty feet distant, but before he could cross the track, a distance of about twelve feet, he was struck and injured by the car. The driver of the car testified that when he saw the plaintiff, about thirty-eight feet distant, he called out to him and applied the brakes, but on account of the steep grade and the brakes not taking hold he was unable to stop the car until it reached the plaintiff. *Mills v. Brooklyn City R. Co.*, 10 Misc. 1.

The plaintiff testified that before attempting to cross defendant's tracks he looked up the avenue to see if any car was approaching, but saw none; that when he had crossed the first track he saw a car rapidly approaching on the other track, and stepped back to avoid it, when he was struck by a car on the first track, which was going rapidly and without warning. The motorman on the car in question testified that the track was clear in front of him, and that he did not see the plaintiff. *McCormick v. Brooklyn City R. Co.*, 10 Misc. 8.

Whether a person was negligent in attempting to cross a street car track when an approaching car was some ninety or one hundred feet away, and whether the motorman was negligent in failing to slow down the car upon seeing him at that distance. *Kerr v. Atlantic Ave. R. Co.*, 10 Misc. 264.

Where a truckman seeing a car standing 100 feet away drove on, not seeing it thereafter. *Lowy v. Metropolitan Street R. Co.*, 30 Misc. Rep. 775.

Where he drove across on tracks on a filled-in narrow road, when notwithstanding care he could not see a car until nearly on the track, but could have crossed safely had the cars slackened speed. *Clark v. Bennett*, 123 Cal. 275.

Where his view was obstructed until within fifteen feet of the track when he looked and saw and heard nothing, slowed up just before reaching the track, and when upon it urged his horses over. *Lahti v. Fitchburg &c. Street R. Co.*, 172 Mass 147.

In attempting to pass around the car he was about to take, upon seeing another approaching, which would not have struck him had it been going at ordinary speed. *Fonda v. St. Paul City R. Co.*, 71 Minn. 438.

Where he saw the car half a block off when he started to walk across; and supposed that it would stop for parties waiting at the crossing to take it. *Kostuch v. St. Paul City R. Co.*, 78 Minn. 459.

Where a car was 220 feet away when plaintiff approached, and he would have crossed in safety had it been going at ordinary speed. *Hamilton v. Consolidated T. Co.*, 201 Pa. St. 351.

Negligence in failing to stop, look and listen before crossing, depends on the surrounding circumstances, and is a question for the jury. *Tacoma R. &c. Co. v. Hays*, 110 Fed. Rep. 496.

See, also, *Cook v. Los Angeles E. R. Co.*, 134 Cal. 279.

Care required by cars and laborers on street toward each other:

Plaintiff standing on one side of a car track, signalled the motorman, who had stopped about twenty-five feet from him and was looking his way, not to start on and started to cross the track to remove a plank which was lying partly upon the track. It was for the jury to say whether the motorman should have seen or apprehended that after the plaintiff had crossed the track there was an obstruction he was going to attend to, and whether plaintiff was justified upon giving the signal to start to fix the plank. *Morrissey v. Westchester Electric R. Co.*, 18 App. Div. 67.

It was for the jury to say whether plaintiff was negligent in failing to look again upon seeing a car 1500 feet away, after beginning to work between the tracks, pouring hot tar into the cracks between the stones thereof, relying on warnings by the car. The work required a stooping attitude, and completion as far as possible before the tar cooled. The motorman was not relieved from giving appropriate warnings because plaintiff was in the habit of remaining on the track until the car was almost upon him. *Lewis v. Binghamton R. Co.*, 35 App. Div. 12.

It was for the jury to say whether plaintiff engaged in repairing a street by placing shovelfull of hot asphalt between the rails, was negligent in relying upon the cars giving signals and not looking after one had passed, for another that might be immediately following. A verdict in favor of plaintiff was sustained as the motorman was required to use extreme care toward one in his position. *Bengiveinga v. Brooklyn Heights R. Co.*, 48 App. Div. 515.

A city street sweeper whose duty requires him to be on the tracks between cars running with but a half minute headway, is not bound by the same strict precautions as ordinary pedestrians. *Diapalo v. Third Ave. R. Co.*, 55 App. Div. 566.

Motorman must use reasonable care toward street sweepers. *O'Connor v. Union R. Co.*, 67 App. Div. 99.

Ordinary care does not compel street sweeper to be on the lookout constantly. *O'Connor v. Union Street R. Co.*, 67 App. Div. 99.

An employé of a gas company, laying a pipe along a track, held bound to the same degree of care as an ordinary traveler. *Young v. Citizens' Street R. Co.*, 148 Ind. 54.

A laborer working near a track, held negligent in so placing a plank that a car struck it and threw it against him. *Eddy v. Cedar Rapids &c. R. Co.*, 98 Iowa, 626.

Plaintiff, while filling a trench about three feet from the track, was struck by a conductor on the running board of a passing car. Negligence not shown. *United R. &c. Co. v. Fletcher*, 95 Md. 533.

Deaf street sweeper held negligent in not seeing a car in plain sight for at least 2000 feet. *Lyons v. Bay Cities Consol. R. Co.*, 115 Mich. 114.

Stepping into an excavation next to a track to adjust a plank over it without looking for an approaching car prevented recovery. *Hafner v. St. Paul City R. Co.*, 73 Minn. 252.

City employes engaged in flushing the street were permitted to recover where defendant's car in passing caught a part of their apparatus by the track to which they were attached and hurled them to the ground. *Laschinger v. St. Paul &c. R. Co.*, 84 Minn. 333.

Care required by cars toward drivers along streets:

The plaintiff tried to cross a street greatly obstructed by the defendant's cars, and was obliged to wait some time; he crossed one track and then looked both ways and was injured by a car drawn from the switch by horses. The driver urged the horses on and made no attempt to stop. It was for the jury. If the plaintiff used reasonable care it was immaterial that he made a mistake. The plaintiff had the right to cross the street anywhere. *McClain v. B. C. R. Co.*, 116 N. Y. 459, aff'g judg't for pl'ff.

From opinion.—"The plaintiff was somewhat familiar with the situation in that locality, and knew something of the extent of street car service there. He was, therefore, able to appreciate the necessity of careful observation in going upon the street to keep out of the way of moving cars, and to see that his course was clear. For that purpose it was incumbent upon him to use due care. His precautionary duty in that respect, for his protection, may not have

been so great as that imposed upon one crossing a steam-car railroad, because a train on the latter is not subject to control as is, to some extent, the team drawing a street car. But, as a street car must continue on the rails of its track, persons otherwise traveling on the street are required to use care to keep out of its way, yet for their protection the duty rests upon the driver to keep his horses reasonably within his control upon the public streets. *Adolph v. C. P. N. & E. R. R. Co.*, 76 N. Y. 530; *Moebus v. Herman*, 108 id. 349. If by the exercise of reasonable care the plaintiff could have seen the approaching car, and ought to have apprehended the danger of the situation, he was chargeable with negligence, for he was not at liberty to take even doubtful chances of the consequences of crossing the track in the face of danger, or in reliance upon the successful attempt of the driver to slack the speed of the horses. *Barker v. Savage*, 43 N. Y. 191; *Belton v. Baxter*, 54 id. 245; *Davenport v. Brooklyn City R. R. Co.*, 100 id. 632."

Negligence and contributory negligence was for the jury where deceased, while driving along a street in a covered wagon, started to cross the tracks of a street railway and was struck by a car coming from behind at the rate of eight to ten miles an hour. Deceased's failure to look in the right direction was not negligence contributing to the injury, where he was at such a distance as might justify his crossing had he seen the car. *Brozek v. Steinway R. Co.*, 10 App. Div. 360.

Evidence that a motorman resumed the motion of his car when he saw that a cumbersome ice wagon not more than 133 feet away was turning preparatory to crossing the track, shows negligence. *McCormack v. Nassau Electric R. Co.*, 16 App. Div. 24.

Where a car is 125 feet away when a wagon turns upon the track, in front of it, a motorman is negligent in failing to stop his car, it being within his control, in time to avert a collision. *Schron v. Staten Island Electric R. Co.*, 16 App. Div. 111.

Where there was testimony tending to show that a car was 100 feet away when a wagon appeared on the track, the court held that negligence might be ascribed to the gripman in running his car at such a speed as to prevent his stopping it in time to avoid collision. *Cass v. Third Ave. R. Co.*, 20 App. Div. 591.

Where a car was proceeding at about ten or twelve miles an hour, evidence that a child fell upon the track, eighty feet ahead of it and was run over without being perceived by the motorman in time to avoid injury justifies a finding of negligence, it being light enough to see three blocks. *Kitay v. Brooklyn &c. R. Co.*, 23 App. Div. 228.

It was for the jury to say whether defendant was negligent in not stopping the car in time where it appeared that when plaintiff started to drive across he was from seventy-five to two hundred feet away. *Meyer v. Brooklyn &c. R. Co.*, 47 App. Div. 286.

It was for the jury to say whether it was negligent to run a car past a vehicle on a bridge, where the space left for the wagon was very small, though sufficient, had not the horse swerved slightly toward the track. *Reilly v. Troy City R. Co.*, 32 App. Div. 131.

Where a heavily loaded truck starts to cross the track fifty feet ahead of a car along a street in plain view, the latter is bound to give him a reasonable opportunity to do so, though it has the right of way and it necessitates the slackening of its speed to do so. *Lawson v. Metropolitan Street R. Co.*, 40 App. Div. 307.

Dismissal of complaint was error where it appeared that the condition of the street necessitated plaintiff's driving along defendant's track, and that while so driving, sight and sound being impaired by the covering of his wagon, a car came up rapidly and without warning from behind and collided with him. *Warren v. Union R. Co.*, 46 App. Div. 517.

Though plaintiff may have been negligent in being on the track, he may nevertheless recover where the car ran on 100 feet where it could have been stopped so as to prevent injury within thirty to thirty-five. *Green v. Metropolitan Street R. Co.*, 65 App. Div. 54; s. c. rev'd for error in the exclusion of testimony, 171 N. Y. 201.

When motorman held negligent.—Negligence in being on the track held not to prevent recovery where the motorman could have prevented injury after discovering his peril. *Lee v. Market Street R. Co.*, 135 Cal. 293; see *Schneider v. Market Street R. Co.*, 134 id. 482; *Citizens' Street R. Co. v. Hamer*, (Ind. App.) 62 N. E. Rep. 658; *Id.* 63 id. 778; *Louisville R. Co. v. Blaydes*, (Ky.) 52 S. W. Rep. 960; *Wilkins v. Omaha &c. R. Co.*, 96 Iowa, 668; *Vincent v. Norton &c. R. Co.*, 180 Mass. 104; *Kansas City &c. R. Co. v. Sweeney*, 150 Mo. 385; *Redford v. Spokane Street R. Co.*, 15 Wash. 419; *Hutchinson v. St. Louis &c. R. Co.*, 88 Mo. App. 376; *McAndrews v. St. Louis &c. S. R. Co.*, 88 Mo. App. 97; *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199; *Parkinson v. Concord Street R. Co.*, 71 N. H. 28.

So, in case of plaintiff's violation of duty not to obstruct car tracks. *Consolidated T. Co. v. Haight*, 59 N. J. L. 577.

Motorman ran into a wagon stuck on the track, and within fifty feet of an electric light. Driver gave repeated yells when it was 300 feet away. *Saffer v. Westchester Electric R. Co.*, 22 Misc. 555.

Motorman ran into a wagon which had turned onto his track to go round an obstruction, maintained by the company, on the other track. *West Chicago Street R. Co. v. O'Connor*, 85 Ill. App. 278.

A motorman may not assume that a vehicle will turn off, where after

crossing the track to pass around a vehicle it has to recross to get back upon the proper side of the street. *White v. Worcester Consol. Street R. Co.*, 167 Mass. 43.

See, also, *Harper v. Philadelphia T. Co.*, 175 Pa. St. 129.

A head-on collision on a single track is *prima facie* negligent. *Peterson v. Seattle Traction Co.*, 23 Wash. 615.

When motorman was held not negligent.—There must be actual knowledge of plaintiff's danger, not simply ignorance through lack of ordinary care, to establish wilfulness. *Johnson v. Stewart*, 62 Ark. 104.

Siek v. Toledo &c. R. Co., 9 Oh. C. D. 51; *Austin &c. R. Co. v. Goldstein*, 18 Tex. Civ. App. 704.

Motorman may assume up to the last moment that a bicyclist will get out of the way. *Everett v. Los Angeles Consol. &c. R. Co.*, 115 Cal. 105; aff'd in 46 Pac. Rep. 889.

Not knowing of the latter's deafness. *Nein v. La Crosse City R. Co.*, 92 Fed. Rep. 85.

Motorman is not bound to the absolute protection of a careless driver who knows of his approach. *Morrissey v. Bridgeport T. Co.*, 68 Conn. 215.

But need exercise only ordinary care. *North Chicago Street R. Co. v. Allen*, 82 Ill. App. 128.

Vehicle turned unexpectedly on the track only thirty or forty feet in front of the car, when it was impossible to do more than was done. *Kessler v. Citizens' Street R. Co.*, 20 Ind. 427.

A heavy sprinkler attempted to cross the track when the car was less than 250 feet away. Motorman did all he could after discovering that the sprinkler could not get over in time. *De Lon v. Kokomo City Street R. Co.*, 22 Ind. App. 377.

In maintaining the usual speed where a bicyclist paid no attention to the signal, but suddenly turned onto the track in front of the car. *Gagne v. Minneapolis Street R. Co.*, 77 Minn. 171.

See, also, *Sauers v. Union T.*, 193 Pa. St. 602.

No liability where driver suddenly turns directly in front of a car, and the motorman does his best to stop. *Kane v. People's Pass. R. Co.*, 181 Pa. St. 53.

Plaintiff's horse suddenly sprang across the track in front of the car, making an accident inevitable. *McManigal v. South Side Pass. R. Co.*, 181 Pa. St. 358.

Motorman suddenly called upon to alleviate plaintiff's distress, cannot be charged because his actions in fact result in further injury. *Trussel v. United Traction Co.*, 31 Pittsb. Leg. J. (N. S.) (Pa.) 15.

An unintentional mishap in operating a car after discovering driver's

danger was not allowed to be set up against contributory negligence. *Lockwood v. Belle City Street R. Co.*, 92 Wis. 91.

Motorman may assume that a driver seen driving toward the track will turn back on hearing the gong. *Cawley v. La Crosse City R. Co.*, 106 Wis. 239.

When the question of negligence was held to be for the jury.—If a driver, as a matter of necessity, must turn his truck on a track, the motorman on an electric car must exercise care to avoid a collision.

Plaintiff, who was driving a heavily loaded truck, from which pieces of iron projected, made a long sweep to avoid striking a standing car, which brought the truck upon the other track. As the truck was leaving that track and was almost out of it, the front wheel was struck by an electric car, and plaintiff was thrown off and injured. *Heffran v. Brooklyn Heights Railroad Co.*, 8 Misc. 41.

Whether motorman had time to see that plaintiff did not intend to leave the track, in time for him to prevent injury. *Floyd v. Paducah R. &c. Co.*, (Ky.) 64 S. W. Rep. 653.

Evidence as to how far ahead plaintiff's buggy was when she suddenly turned on the track to pass a vehicle was conflicting. *Boetcher v. Detroit Citizens' Street R. Co.*, (Mich.) 91 N. W. Rep. 125.

Where the first car slipped back in going up a grade, causing a following car to back against plaintiff's wagon. *Campbell v. Consolidated T. Co.*, 201 Pa. St. 167.

Jury should consider plaintiff's disputed claim that a car ran him down while trying to get off the track. *Byrne v. Montgomery &c. R. Co.*, 19 Pa. Super. Ct. 531.

When motorman was held not negligent per se.—To run a north bound car on a south bound track. *North Chicago Street R. Co. v. Irwin*, 82 Ill. App. 146.

In increasing speed by a wagon loaded with bales so close that they rubbed on contact. *Blakeslee v. Consolidated Street R. Co.*, 112 Mich. 63.

In failing to stop upon seeing the wheels of a heavily loaded truck slip, while getting off the track. *Bush v. St. Joseph &c. Street R. Co.*, 113 Mich. 513.

In failing to stop his car before reaching a wagon on the track some distance away. *Lenkner v. Citizens' T. Co.*, 179 Pa. St. 486.

Care required by drivers toward cars along streets:

Driver was negligent in attempting to drive diagonally across street car tracks when a car was but 150 feet away without giving any indica-

tion of his intention to do so. The motorman was not bound to anticipate under such circumstances that he would do so. *Mayer v. Brooklyn Heights R. Co.*, 9 App. Div. 79.

Plaintiff was not negligent in riding a bicycle along the cable slot of a street railway or in failing to look back for the approach of a car, as he has a right to expect that the usual warning will be given him. *Rooks v. Houston &c. R. Co.*, 10 App. Div. 98.

Negligence and contributory negligence were for the jury where plaintiff was driving along the track in a covered wagon, having looked before going upon the track, but not having looked for two or three blocks thereafter; and defendant was going at but five or six miles an hour, but had failed to discover the wagon in the dark, until within fifteen to eighteen feet of it. *Fishbach v. Steinway R. Co.*, 11 App. Div. 152.

Negligence and contributory negligence were for the jury where plaintiff turned across the defendant's track to enter the gate to his employer's premises and waited, with his wagon resting on the track, for the gate to be opened. and the defendant, notwithstanding repeated halloosings failed to stop in time, there being some doubt as to how far the motorman could have seen in the dark. *McGrane v. Flushing &c. R. Co.*, 13 App. Div. 177.

A driver of an ice wagon was not negligent *per se* in starting to cross a street railway when an electric car was at the time standing still 133 feet away. The question was for the jury. *McCormack v. Nassau Electric R. Co.*, 16 App. Div. 24; s. c., 18 App. Div. 333.

A driver going westward to pass a cart standing in the street was obliged to drive upon the east bound track of a street railway. To avoid a car thereon he drove upon the west bound track and continued thereon some distance another car following on the east bound track, when suddenly there approached around the corner a west bound car which collided with him before he could recross to the east bound track. He was not chargeable with contributory negligence. *Murphy v. Nassau Electric R. Co.*, 19 App. Div. 583.

Contributory negligence in failing to get out of the way of a car will not prevent recovery where defendant could by the exercise of due care have avoided injury after seeing his danger. *McKeon v. Steinway R. Co.*, 20 App. Div. 601.

Where the distance from the point in front of where plaintiff was engaged in excavating a cellar, and the corner around which cars might come was sixty-five feet, he was not negligent in starting to drive out of the cellar with a load of dirt after looking for a car and seeing none. *Walsh v. Atlantic Avenue R. Co.*, 23 App. Div. 19.

Driver of a wagon standing in the street so close to the track of a

street railway that the wheel hub is within ten inches, was negligent *per se* in attempting to dismount by stepping on such hub with a car approaching rapidly and only fifty feet away. *Crowley v. Metropolitan Street R. Co.*, 24 App. Div. 101.

Bicyclist familiar with his surroundings, was negligent in suddenly turning out from behind a car going in one direction, as it stopped before rounding a curve, and rode around in front of it and upon the other track in front of a car coming in the opposite direction, when the latter was only twenty-five feet from him. *Cardonner v. Metropolitan Street R. Co.*, 38 App. Div. 597. See same case, 26 id. 8.

Where plaintiff was riding in the dark along defendant's track, he was not entitled to place sole reliance on the latter's discovering him in time to give him warning without himself exercising any care to discover a car's approach. *Bossert v. Nassau Electric R. Co.*, 40 App. Div. 144.

Plaintiff was familiar with the surroundings himself, but did not attempt to look back for the approach of a car though he had ridden for a mile on the track. *Johnson v. Brooklyn Heights R. Co.*, 34 App. Div. 271.

Plaintiff was not negligent *per se* where he looked for the approach of a car, and drove to a point about 100 feet farther on, where he stopped to deliver packages, it being dark. But it was for the jury to say. *Black v. Staten Island Electric R. Co.*, 40 App. Div. 238.

Plaintiff was negligent in attempting to cross a street car track diagonally without looking behind him, for the approach of a car thereon. *Quinn v. Brooklyn City R. Co.*, 40 App. Div. 608.

Driver of a vehicle between cross streets was not negligent in crossing over the track where a car, though coming at full speed, was at the time beyond one of such cross streets; and where even with the speed of the car, unabated he succeeding in nearly clearing the track. *Blate v. Third Ave. R. Co.*, 44 App. Div. 163.

Plaintiff by driving a heavy cumbersome drag drawn by three span of horses, took the risk of driving along defendant's tracks without necessity, knowing that cars came along with but a minute's headway. Whether or not he saw the car coming was immaterial. *Schlitz v. Nassau Electric R. Co.*, 44 App. Div. 542.

It was for the jury to say whether plaintiff was negligent in attempting to drive diagonally across a car track when the car is seventy-five to two hundred feet away. *Meyer v. Brooklyn &c. R. Co.*, 47 App. Div. 286.

Where a driver in a covered vehicle, but having good eyesight and hearing, comes from a cross street and looks both ways before entering the intersecting street, and sees nothing, he is not chargeable with neg-

ligence *per se*, because he fails to look behind him while driving but a single block. *Schilling v. Metropolitan Street R. Co.*, 47 App. Div. 500.

Charge that "if by the exercise of reasonable care (the deceased) could have seen the approaching car and ought to have apprehended the danger of the situation, he was chargeable with negligence, for he was not at liberty to take even doubtful chances from being too near the track, in the face of danger, and in reliance on the successful attempt of the motorman to slacken the speed of the car," held proper. (The car was approaching from the rear.) *McCann v. New York &c. R. Co.*, 56 App. Div. 419.

Where it appeared that a car could not be stopped within twelve feet, it was error to charge that it was not negligent to drive across tracks of a street railway at a slow trot before an approaching car, in plain sight, from ten to fifteen feet away, as it permits the inference that it would not be negligence to do so at the least figure. *Reed v. Metropolitan Street R. Co.*, 58 App. Div. 87.

Driver's negligence in not turning off besides backing as far as he could, to avoid being struck by the rear end of a car ahead in swinging out around a curve was for the jury. *Fay v. Brooklyn Heights R. Co.*, 69 App. Div. 563.

Push cartman called to the car driver to stop instead of himself turning onto the sidewalk as he had already done once. *Thal v. Metropolitan Street R. Co.*, 76 N. Y. Supp. 918.

Plaintiff was negligent.—Where he drove on the track of a road which was an electric one, but made no observations in the rear to see if cars were approaching until he heard a bell ring, and then seeing a car within some thirty yards of him, he tried to get out of the track, but the wagon was struck before it could clear the track; the bell had been rung several times before and the motorman commenced to stop when within five or six yards of the wagon, but did not entirely do so. *Winter v. Crosstown Street Railway of Buffalo*, 8 Misc. 362. (Superior Court of Buffalo.)

In driving upon the track immediately from behind a car which conceals him from a car approaching behind it. *Boston &c. Co. v. Metropolitan Street R. Co.*, 14 Misc. 25; s. c., 14 id. 571.

And being on the lookout was no excuse, as his view was obstructed. *Baumann v. Metropolitan Street R. Co.*, 21 Misc. 658.

In turning onto a track in front of a car so near that the motorman had no time to avoid collision. *Lefkowitz v. Metropolitan Street R. Co.*, 26 Misc. 787.

See, also, *McHugh v. North Jersey Street R. Co.*, (N. J. L.) 46 Atl. Rep. 782; *Hannon v. North Jersey Street R. Co.*, (N. J. L.) 47 Atl. Rep. 803; *Boehmer v.*

Pittsburg &c. T. Co., 194 Pa. St. 313; *Cawley v. La Crosse City R. Co.*, 101 Wis. 145; *Austin Dam &c. R. Co. v. Goldstein*, 18 Tex. Civ. App. 704.

In driving along tracks in front of an approaching car for half a block without giving any heed. *Bryant v. Metropolitan Street R. Co.*, 28 Misc. 532.

For two hundred and fifty feet. *Pechesky v. Metropolitan Street R. Co.*, 30 Misc. 432.

For 300 feet at night. *Hill v. Metropolitan Street R. Co.*, 30 Misc. 440.

In going off and leaving his wagon, painted white, like its snow covered surroundings, standing on the track, before sunrise, exposed to collision with passing cars. *New York Condensed Milk Co. v. Nassau Electric R. Co.*, 29 Misc. 127.

In failing to see an approaching car, well lighted, as well as the street. *McFarland v. Third Ave. R. Co.*, 29 Misc. 121.

In waiting on the downtown track for the uptown car to pass, knowing the downtown car to be approaching not far off. *Voghts v. Metropolitan Street R. Co.*, 36 Misc. 799.

Where woman driving on street railway track did not observe approaching car, which came upon her with usual speed. *Citizens' &c. R. Co. v. Stern*, 42 Ark. 221.

Where up to the last moment a bicyclist could have prevented accident by turning off, his failure to may be regarded as the proximate cause of his injury. *Everett v. Los Angeles &c. R. Co.*, 115 Cal. 105.

In a driver upon seeing a car approaching at a faster rate than himself and only 125 feet away, attempting to make a long turn to get off the track. *Morrissey v. Bridgeport T. Co.*, 68 Conn. 215.

In a driver seeing a car coming rapidly from the rear continuing upon the track for nearly 100 feet to a street crossing before turning off. *South Covington &c. Street R. Co. v. Enslin*, (Ky.) 38 S. W. Rep. 850.

In one unaccustomed to a bicycle to ride it in the street. *Louisville R. Co. v. Blaydes*, (Ky.) 52 S. W. Rep. 960; mod'g 51 id. 820.

In a bicyclist suddenly turning onto a track immediately before an approaching car, heedless of its signals. *Gagne v. Minneapolis Street R. Co.*, 77 Minn. 171.

In a bicyclist suddenly turning onto the adjoining track from the rear of a car going in his own direction. *Metcalf v. St. Paul City R. Co.*, 82 Minn. 18.

In continuing on his course diagonally across a track 50 feet away when he saw a car coming 250 feet in the rear. *Jewett v. Paterson R. Co.*, 62 N. J. L. 424.

In starting to drive diagonally across tracks 20 feet away seeing a

car coming at an excessive speed 320 feet away. *Cupps v. Consolidated T. Co.*, 13 Pa. Super. Ct. 630.

In driving slowly into the street and along the track when the car was only three-fourths of a block off when he could easily keep clear of it. *McPhillips v. Union T. Co.*, 19 Pa. Super. Ct. 223.

In a bicyclist turning upon a track and riding about 140 feet before the car without attempting to avoid it. *Bacon v. Consolidated T. Co.*, 30 Pittsb. Leg. J. (N. S.) (Pa.) 431.

A deaf bicyclist held grossly negligent in riding between track of cars permitted to run 20 miles an hour without keeping a lookout to the rear. *Nein v. La Crosse City R. Co.*, 92 Fed. Rep. 85.

In not looking beyond a short distance before driving upon and along a track to pass a team, when he could not hear. *Cawley v. La Crosse City R. Co.*, 106 Wis. 239.

Plaintiff was held not negligent.—In driving on the tracks for some distance in front of a car approaching from the rear, relying on the observance of reasonable care by the motorman. *Cohen v. Metropolitan Street R. Co.*, 34 Misc. 186.

A driver of a sprinkling cart frequently turned and listened and received no warning from the car until it was within 700 feet of him. *Abrahams v. Los Angeles T. Co.*, 124 Cal. 411.

Driving on street car track without looking back to see whether a car was coming. *Wood v. Detroit &c. R. Co.*, 52 Mich. 402.

To turn on a track 50 feet ahead of a car running only 6 miles an hour, in order to pass another vehicle. *Blakeslee v. Consolidated Street R. Co.*, 112 Mich. 63.

In not turning off in time where had the wheels not slipped he would have succeeded. *Bush v. St. Joseph &c. R. Co.*, 113 Mich. 513.

In continuing along the highway next to the track knowing that cars only ran every half hour, and that one passed shortly before, and that she would be in sight of one for a considerable distance. *Manor v. Bay Cities Consol. R. Co.*, 118 Mich. 1.

In failing to keep a constant watch back of him. *Tunison v. Weadock*, (Mich.) 89 N. W. Rep. 703.

Driver unable to turn off for a car behind to the right or go ahead on account of an obstruction was not negligent in turning to the left in front of a car ahead which had ample time to avoid injury. *Lenkner v. Citizens' T. Co.*, 179 Pa. St. 486.

In turning out from before a car in the rear and continuing on up a hill on the adjoining track while the other car is passing instead of stopping for it to pass and then turning back though a car could not be seen

coming up the opposite side of the hill on such adjoining track. *Cannon v. Pittsburg &c. T. Co.*, 194 Pa. St. 159.

In leaving horse backed across tracks, the only way to deliver goods where there was no reason to apprehend that a car would come before he could get away again. *Fenner v. Wilkesbarre &c. T. Co.*, 202 Pa. St. 365.

In stooping down momentarily to protect an article in his wagon where on arising he immediately tries to correct the swerve his horse had taken in the interval. *Davidson v. Schuylkill Traction Co.*, 4 Pa. Super. Ct. 86.

Plaintiff was not negligent per se.—In driving upon a street so narrow as to produce a collision by a car by a slight swerve when there was no reason to suppose one was approaching. *Tarler v. Metropolitan Street R. Co.*, 21 Misc. 684.

In necessarily turning over to the right side of a bridge to avoid a car on the left, where the car on the right is at a safe distance behind. *Laufer v. Bridgeport T. Co.*, 68 Conn. 475; s. c., 37 L. R. A. 533.

So, in turning to the left on seeing a car approaching where the street to the right is obstructed. *North Chicago Street R. Co. v. Allen*, 82 Ill. App. 128.

In driving through a narrow covered bridge, when the car first seen was 800 feet from the end of the bridge. *Marion City R. Co. v. Dubois*, 23 Ind. App. 342.

In driving on the street in a covered wagon, preventing a view behind. *Vincent v. Norton &c. R. Co.*, 180 Mass. 104.

In not jumping from a carriage on being approached by a rapidly moving car, when his horse stumbled and was floundering around in an effort to arise. *Edwards v. Foote*, (Mich.) 88 N. W. Rep. 404.

In hurrying on diagonally ahead and off the track where, when he first saw the car approaching 50 feet off, his horse was about on the track. *Hoas v. Chester Street R. Co.*, 202 Pa. St. 145.

To drive along tracks in the direction in which the cars are running, though it increases the degree of care required. *Smith v. Philadelphia T. Co.*, 3 Pa. Super. Ct. 129.

To ride on top of a load of hay along a street on which there is a street railway. *Citizens' R. Co. v. Hair*, (Tex. Civ. App.) 32 S. W. Rep. 1050.

It was for the jury to say whether or not plaintiff was negligent.—Where a person in street was trying to avoid a street car. *Orange R. Co. v. Ward*, 37 N. J. L. 560.

Whether plaintiff could have seen or heard the car approaching toward the bridge (at excessive speed) had he looked and listened and

should not have proceeded. *Jones v. Greensburg &c. Street R. Co.*, 9 Pa. Super. Ct. 65.

Care required by cars toward pedestrians along streets:

One of the defendant's street cars struck a sewer pipe, which was a part of the barrier of a trench, in the street, in which the plaintiff was working. When the car approached the excavation, the driver stopped and the conductor surveyed the situation; the foreman in charge of the excavation signaled the driver to "come on." As he did so the car struck a piece of pipe throwing it into trench and injuring plaintiff working there. The previous car had just passed safely. The defendant was not negligent. *Schmidt v. Steinway & H. R. Co.*, 132 N. Y. 566, rev'g judg't for pl'ff.

From dissenting opinion.—"I dissent upon the ground that it was for the jury to say whether the driver exercised the care required by the circumstances when, after coming to a full stop, he drove on 'pretty fast—at a good gait,' standing in the middle of the platform, without looking to see or getting in a position where he could see whether his car would strike the section of sewer pipe, or whether there was anyone in the trench who might be injured, or taking any precaution to prevent injury to those engaged in making the excavation."

In an action brought to recover damages for injuries sustained by a person who was struck by a car running at a considerable rate of speed, while lawfully engaged in work upon a street near a track over which horse cars ran, the questions of negligence are for the jury. *McCooley v. The Forty-second Street and Grand Street Ferry Railroad Co.*, 79 Hun, 255.

Where it appeared that as soon as the driver of a street car discovered a man lying on the track in the shadow of adjoining trees he applied the brakes and stopped the car, there was not sufficient evidence of negligence to go to the jury. *Murray v. Forty-Second Street &c. R. Co.*, 9 App. Div. 610.

Failure to stop a car going nine miles an hour in time to avoid injury to a boy of about eight standing on the track (in the middle of the block) where pedestrians were not expected about 60 or 75 feet ahead of the car to look at it, held not negligence. *Griffith v. Metropolitan Street R. Co.*, 32 Misc. 289.

See, also, *Ryan v. La Crosse City R. Co.*, 108 Wis. 122.

But the negligence of a boy standing on the track with his back to an approaching car held not a defense to a charge of unnecessarily running him down. *Baltimore City &c. R. Co. v. Cooney*, 87 Md. 261.

See, also, *Gutierrez v. Laredo &c. R. Co.*, (Tex. Civ. App.) 45 S. W. Rep. 310. See further, "Duty to Children," *ante*, p. 2290.

Motorman should stop upon seeing the pedestrian near the track,

apparently heedless of his signals. *Buttelli v. Jersey City &c. R. Co.*, 59 N. J. L. 302.

Wire used to control cars on an incline known to be defective, injured pedestrian on the highway. Due diligence was not shown, as a matter of law. *Musser v. Lancaster City Street R. Co.*, 176 Pa. St. 621.

Failure to signal at a crossing held not to give recovery where plaintiff suddenly ran in front of the car some distance therefrom. *Kline v. Electric T. Co.*, 181 Pa. St. 276.

Getting in front of a car, held not to prevent recovery where failure to prevent injury after discovering danger was the proximate cause of the accident. *Roberts v. Spokane Street R. Co.*, 23 Wash. 325.

Care required by pedestrians toward cars along streets:

Deceased was negligent *per se* in crossing diagonally in front of a car so close that as he ran he was struck immediately upon reaching the track. The vicinity was well lighted, as well as the car, and he could have seen it had he looked. *Dollar v. Union R. Co.*, 7 App. Div. 283.

A woman of mature age and unimpaired faculties was negligent in crossing a street at a place elsewhere than at a street crossing, wearing a large sun bonnet, without looking after she left the sidewalk, where the car could have been seen for several blocks, and heard for more than half a block, the bell being sounded with great violence when within 30 feet of her. *Hickman v. Nassau Electric R. Co.*, 36 App. Div. 376.

Where one marching in a procession is run into by a street car, the same rule of contributory negligence applies as in the case of a single traveler. *Brown v. Binghamton R. Co.*, 50 N. Y. S. C. 106.

Plaintiff was negligent in crossing in the middle of the block so near the car that she could not avoid being struck. *Lawson v. Metropolitan Street R. Co.*, 36 Misc. 824.

See, also, *Sweeny v. Scranton T. Co.*, 5 Lack. Leg. N. 86.

Member of a large crowd, standing so near a track as to be hit by cars without paying any attention to them, held negligent. *Washington &c. R. Co. v. Wright*, 7 App. D. C. 295.

In walking in the narrow space between two tracks of a street railway. *Giles v. New Orleans &c. R. Co.*, 33 La. Ann. 154.

Plaintiff was not required to look and listen where he was about to board a car from a platform erected between two tracks for the purpose when struck by a car on the other track owing to the narrowness of the platform. *Conway v. New Orleans City &c. R. Co.*, 51 La. Ann. 146.

Plaintiff was negligent, where as he lay in a drunken stupor near a track he threw his feet on the rails, which a motorman could not be ex-

pected to see in time to avoid injury. *Kramer v. New Orleans City &c. R. Co.*, 51 La. Ann. 1689.

See, also, *Stelk v. McNulta*, 99 Fed. Rep. 138.

Pedestrians are not required to avoid such missiles as a stick flying from the hands of of trolley conductor while using it. *Manning v. West End Street R. Co.*, 166 Mass. 230.

Plaintiff held not negligent in walking in the only available path near the tracks though on a dark night upon taking proper precaution by looking back. *Carlson v. Lynn &c. R. Co.*, 172 Mass. 388.

Plaintiff's negligence was for the jury where after a car had passed, he walked about 400 feet (200 on the track) without looking back. *Quirk v. Rapid R. Co.*, (Mich.) 90 N. W. Rep. 673.

It was held negligent in a pedestrian to attempt to cross in the middle of the block immediately behind one car going in one direction where he was struck by a car going in the other direction. *Greengard v. St. Paul City R. Co.*, 72 Minn. 181; *Burgess v. Salt Lake City R. Co.*, 17 Utah, 406; *McLeod v. Graven*, 73 Fed. Rep. 627.

Plaintiff was negligent, while engaged in unloading a wagon which required him to be on the track, when he only had to step aside or turn half way around to avoid a known danger from passing cars, in failing to pay any attention to them whatever. *Davies v. People's R. Co.*, 159 Mo. 1.

It was not negligent to walk along the only available path next to the track in the direction the cars were running, though one is slightly deaf. *Buttelli v. Jersey City &c. R. Co.*, 59 N. J. L. 302.

In walking behind a wagon on one track and suddenly stepping on to the other without looking. *Bethel v. Cincinnati Street R. Co.*, 15 Oh. C. C. 381.

In running in front of a car a few feet away without looking, and upon hearing a shout stopping and looking in the wrong direction. *Pletcher v. Scranton T. Co.*, 185 Pa. St. 147.

In a deaf person unnecessarily walking upon a track knowing that a car is coming behind her. *Gilmartin v. Lackawanna Valley Rapid-Transit Co.*, 186 Pa. St. 193.

In attempting to cross the tracks between two approaching cars, the danger of which must have been apparent. *Meyer v. Pittsburg &c. T. Co.*, 189 Pa. St. 414.

In walking on the track at night to avoid a muddy pavement. *Penman v. McKeeseport &c. Street R. Co.*, 201 Pa. St. 247.

In walking along the narrow space between the tracks and stooping to pick up a horse shoe without looking for cars. *Dix v. Ridge Ave. Pass. R. Co.*, 15 Pa. Super. Ct. 350.

In a bright boy of nine, familiar with his surroundings, crossing in the middle of the block without paying any attention to the cars. *Ryan v. La Crosse City R. Co.*, 108 Wis. 122.

Construction and maintenance of tracks:

In case the municipality is obliged to pay for injury received by failure of railway company to perform its duty to keep the street in order, it may recover over against the company. *City of Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, ordering judg't for pl'ff.

See, also, p. 1858.

The railway company's right to lay tracks in the street, is coupled with the duty to repair, and no notice of patent defects is necessary, and if injury follows from such defects, the presumption of negligence is complete, and it is for the company to show that it had not time to repair. *Worster v. Forty-second St. & G. St. R. Co.*, 50 N. Y. 203, aff'g judg't rev'g nonsuit.

Citing *Fash v. Third Ave. R. Co.*, 1 Daly, 148; *Cumberland &c. R. Co. v. Hughes*, 11 Penn. St. 141.

An obligation to keep a street in repair requires that it shall be kept in such condition as that the ordinary and expected travel of the locality may pass with reasonable ease and safety.

Where a railway company contracts with a municipality to perform in its stead the duty of repairing the street, and by neglect of the duty a cause of action arises against the municipality, it may be brought by the party injured directly against the company.

A railway company may also become liable by voluntarily interfering and undertaking to make the way safe, and so ineffectually doing it as to leave it unsafe, and at the same time so as to permit and tempt passage over it. *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231, aff'g 11 Hun, 347, and judg't for pl'ff.

Citing *Manley v. St. Helens Canal Co.*, 2 H. & N. 840; *Drew v. New River Co.*, 6 Carr. & Payne, 754; *Beach v. Crain*, 2 N. Y. 86.

See, on the subject, *Lowery v. Brooklyn City &c. R. Co.*, 76 N. Y. 28; *Carpenter v. Central Park R. Co.*, 11 Abb., (N. S.) 416; *Fash v. Third Ave. R. Co.*, 1 Daly, 150; *Conroy v. Twenty-third St. R. Co.*, 52 How. Pr. 49; *People v. Fort St. R. Co.*, 41 Mich. 413; *Fort Wayne &c. R. Co. v. City of Detroit*, 34 id. 78; 39 id. 543; *Pittsburg &c. R. Co. v. City of Pittsburg*, 80 Penn. St. 72; *City of Detroit v. Detroit City R. Co.*, 37 Mich. 558; *Wooley v. Grand St. R. Co.*, 83 N. Y. 121.

A railway company, running its cars over a bridge extending over a canal, and erected and under the control of the state, does not thereby make the bridge an appliance of its own, and its liability respecting the bridge is none other than that resting on it while traversing the rest of

the street. *Birmingham v. Rochester City & Brighton R. Co.*, 137 N. Y. 13, rev'g judg't for pl'ff.

Defendant was not liable for injuries received in driving over a paving block in the street near its tracks on plaintiff's evidence that defendant was at the time engaged in paving between its tracks, where it appeared that the stone in question was not similar to those used by defendant in paving but was like those used by the city and others in paving in the vicinity, and which had been carted along such place. *Ruppert v. Brooklyn &c. R. Co.*, 154 N. Y. 90; rev'g s. c., 90 Hun, 604.

Defendant laid its tracks, by permission, over a bridge constructed by the state over the Erie canal; a portion of the structure fell and injured one of the defendant's passengers. Held, that the defendant was liable for defects in the appliances of the bridge, however arising, to the same extent as if it had constructed and maintained the same. *Birmingham v. Rochester &c. R. Co.*, 59 Hun, 583, rev'g nonsuit.

Defendant was not negligent in respect to the repair of its tracks where the track was well laid four years before and had an ordinary life of ten years. It appeared to be in good condition to its inspector at 10:30 A. M., (the accident happened at noon); but upon his return at eleven, he noticed two spikes had been drawn from the rail, as if by the flange of a truck wheel, whereupon he sent immediate notice to the track master who repaired the defect before 1 P. M. *Casper v. Dry-Dock &c. R. Co.*, 23 App. Div. 451.

It was error to instruct the jury that if the defendant were not reasonably warranted in apprehending that a pedestrian might cross the street elsewhere than at a street crossing, the latter took the risk in doing so, and it was not liable for the dangerous projection of its rail, above the surface of the street. *Wiley v. Smith*, 25 App. Div. 351.

Where defendant is sued for failure to perform its covenant with the township to light, guard and keep the street in good condition during the construction of its road, proof of the continuance of the work is essential to the maintenance of the cause of action. *Sullivan v. Staten Island Electric R. Co.*, 50 App. Div. 558.

Company is liable for injury in removing snow and ice from track. *Prime v. Twenty-third St. R. Co.*, 1 Abb. N. C. 63; *Short v. Baltimore City R. Co.*, 50 Md. 73.

See *Peard v. Mt. Vernon*, 83 Hun, 250; *Dickson v. R. Co.*, 100 N. Y. 170.

Attempting to drive over rails of a railway switch knowing the danger of his horse catching his hoof in them, held to show an assumption of risk of injury. *Watson v. Brooklyn City R. Co.*, 14 Misc. 425.

Where the defect in its rail was caused by the act of another and there was no opportunity to discover and repair it, defendant was not responsi-

ble for the damage. *Kelly v. Metropolitan Street R. Co.*, 25 Misc. 194.

Street railway company was not liable for non-repair where the ordinance imposing duties on the company only related to original construction. *Calumet Electric Street R. Co. v. Nolan*, 69 Ill. App. 104.

Liability arose where the operation of an elevated road caused plaintiff's building to so vibrate as to *materially* depreciate its value. *Lake Street El. R. Co. v. Brooks*, 90 Ill. App. 173.

A street railroad held bound to keep its tracks safe regardless of an ordinance. *Citizens' Street R. Co. v. Ballard*, 22 Ind. App. 151.

Though the danger arises through the wearing away of the street by use. *Groves v. Louisville &c. R. Co.* (Ky.) 58 S. W. Rep. 508.

See, also, *Houston City Street R. Co. v. Medienka*, 17 Tex. Civ. App. 621.

Defendant should guard a joint in its tracks just welded until it has cooled off. *Kane v. West End Street R. Co.*, 169 Mass. 64.

The statutory duty of a street railway to repair between its tracks only arises where the required notice to repair has been given. *Dobbins v. West End Street R. Co.*, 168 Mass. 556; *Maloney v. Natick &c. Street R. Co.*, 173 Mass. 587.

Such requirement is to keep the street in repair to the satisfaction of the street commissioner, and evidence of his assistant's satisfaction is admissible. *Maloney v. Natick &c. Street R. Co.*, 173 Mass. 587.

The duty does not apply in respect to an excavation below the surface made by another under authority of the city. *Leary v. Boston El. R. Co.*, 180 Mass. 203.

Defendant was liable for failure to refill a ditch dug by it under its tracks. *Kearns v. South Middlesex Street R. Co.*, 181 Mass. 587.

An ordinance prohibiting the use of salt on tracks except at curves, was reasonable where slight expense would have obviated the necessity. *State v. Elizabeth*, 58 N. J. L. 619.

Construction of a double trolley track held not *per se* negligent. *State v. Trenton Pass. R. Co.*, 58 N. J. L. 666; s. c., 33 L. R. A. 129.

Statutory duty to keep trackways in proper condition, gave recovery for failure to replace a fence guarding a ditch, removed for purposes of construction. *Call v. Portsmouth &c. R. Co.*, 69 N. H. 562.

Plaintiff was not prevented from recovering where his team came in contact with the defect while momentarily out of his control. *Farmer v. Findlay Street R. Co.*, 60 Oh. St. 36.

Defect caused by the location of a rail gave recovery. *McLaughlin v. Philadelphia T. Co.*, 175 Pa. St. 565.

As to liability for failure to make trackway safe under a contract with the city, see *Ft. Worth Street R. Co. v. Allen*, (Tex. Civ. App.) 39 S. W. Rep. 125.

The purchaser of a street railway defectively constructed is not relieved where he has not obliged the vendor in possession, with an option to repurchase, to repair. *Schaefer v. Fond du Lac*, 99 Wis. 333; s. c., 41 L. R. A. 287.

Car tracks projecting above the level of a street and not a runaway horse, held the proximate cause of the wagon overturning. *Gray v. Washington Water Power Co.*, 27 Wash. 713.

Digging snow out of its tracks and piling it at the side thereof produced a dangerous condition sufficient to give recovery. *Gerrard v. La Cross C. R. Co.*, 113 Wis. 258.

(c). DUTY AND DEGREE OF CARE BY THE PUBLIC TO RAILWAYS.*

One using a team on a street whereon there is a street railway must use reasonable care not to obstruct the same. *O'Neil v. Third Ave. R. Co.*, 3 Misc. 521. (New York Common Pleas.)

Citing *Whitaker v. Eighth Ave. R. Co.*, 51 N. Y. 295; *Fenton v. Second Ave. R. Co.*, 126 id. 625; *Hegan v. Eighth Ave. R. Co.*, 15 id. 380.

A driver is bound where his view is obstructed, to look out for the cars, and is negligent in injuring a motorman by his failure to do so in time. *Price v. Charles Warner Co.*, 1 Penn. (Del.) 462.

Whether a truckman was sufficiently careful in turning off from a track in time to avoid a collision with a car standing on a spur track, held a question for the jury. *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88.

Driver of a heavy wagon was negligent in driving over car tracks in a covered wagon, without looking. Injuring a motorman. *McCorkle v. Anheuser-Busch Brewing Ass'n*, 107 La. 461.

III. Steam Railroads.†

Running a train backwards through a street at night without lights or signals is negligent. When a train so backing has nearly stopped so as to be apparently still, it is not negligence to pass in the rear of it. *Maginnis v. N. Y. C. & H. R. R. Co.*, 52 N. Y. 215, aff'g judg't for pl'ff.

The plaintiff and "M" in a common employment, were riding on a street, on which were two railway tracks. To avoid a team, "M," who was driving, turned from the right track into the left track, although

*NOTE.—Subdivision (b) represents the positive duty of the railway company—negligence, including the negative duty of the public—contributory negligence. Subdivision (c) represents the positive duty of the public toward railway company—negligence of drivers as defendants.

†NOTE.—This subdivision comprises accidents occurring along streets, caused by railroads running upon them. "Crossings," ante p. 733, embraces accidents occurring at the intersection of a railroad's right of way with streets crossing it.

there was a good and sufficient dirt road to the right. An approaching train hit the wagon before it could get back into the right track. The driver was negligent, and also the plaintiff, as he did not remonstrate, and the defendant was not negligent in not giving signals, as it was not a crossing. *Donnelly v. Brooklyn City R. Co.*, 109 N. Y. 16, rev'g judg't for pl'ff.

From opinion.—"We think the plaintiff was chargeable with the neglect of his comrade. He was conscious of the danger and apparently made no objection or effort to avoid it. He was engaged in a common employment with McNally. He had full control of his own actions, and, though on the safe track, did not object when, after telling McNally to turn out, they turned upon the dangerous track.

No decision cited conflicts with our view. The present case differs from that where a person accepts a gratuitous ride, as in the cases of *Robinson v. New York Central & Hudson River Railroad Co.*, 66 N. Y. 11; *Dyer v. Erie Railway Co.*, 71 id. 228; *Masterson v. New York Central & Hudson River Railroad Co.*, 84 id. 247."

Defendant's tracks ran along a street, but the rails were left above the surface of the street, and in consequence of a failure to restore the surface of the street in this regard, the driver of a team was killed by the horses becoming scared by an approaching engine and backing against the train. Defendant liable.

It seems that the wagon could not be easily extricated from its position of peril on account of the height of rails.

The failure of the defendant to comply with the terms of a city ordinance prohibiting railroad companies from blowing off steam from their locomotives so as to annoy teams or foot passengers should also have been submitted to the jury as tending to establish negligence.

The question as to whether or not the plaintiff was guilty of contributory negligence in failing to jump from the wagon upon the approach of the train, should, under the circumstances of the case, have also been submitted to the jury. *Bell v. N. Y. C. & H. R. R. Co.*, 29 Hun, 561, rev'g nonsuit.

Evidence of experts to show the distance in which a train could be stopped should be admitted, as bearing upon the question of negligence on the part of the defendant, it being possible that had the engineer made proper efforts to do so he could have stopped the train in the distance between the place where he was when he first saw the child upon the track and the spot where the child was. *Meagher v. The Cooperstown & Charlotte Valley Railroad Co.*, 75 Hun, 455.

Plaintiff, with her husband and children, was driving upon the avenue whereon were laid the tracks for the defendant's railroad, cars on which are propelled by steam dummies. They drove upon the right hand track, according to custom, until they saw a train approaching, and, as the

right hand side of the highway was obstructed, they turned to the left to cross the defendant's other track. No train was visible and no signal was heard, and the view of an approaching train was obstructed by a hill. As soon as they attempted to cross the track the headlight of a train became visible, and before they could avoid it they were hit by the train. and the plaintiff injured. *Hennessy v. Brooklyn City R. Co.*, 73 Hun, 569; s. c. aff'd, 147 N. Y. 721.

Where the street has never been abandoned but is frequently used, pedestrians are entitled to more care than that due trespassers. *St. Louis &c. R. Co. v. Neely*, 63 Ark. 636; s. c., 37 L. R. A. 616.

A person unnecessarily walking on a switch track on a public thoroughfare was guilty of contributory negligence. *Louisville &c. R. Co. v. Yniestra*, 21 Fla. 701.

Moore v. Penn. R. Co., 99 Pa. St. 301.

Running through a village street requires greater care than through ordinary localities. *Florida &c. R. Co. v. Foxworth*, 41 Fla. 1.

A pedestrian held not to be a trespasser in crossing such tracks though in the middle of a block. *Id.*

Baltimore &c. R. Co. v. Cumberland, 176 U. S. 232; aff'g s. c., 12 App. D. C. 598; *Toledo &c. R. Co. v. Chisholm*, 83 Fed. Rep. 652; though he be a child, *Smith v. Pittsburg &c. R. Co.*, 90 Fed. Rep. 783.

Defendant held within reach of an ordinance as to speed in running along the city side of a street forming its boundary line. *Lake Erie &c. R. Co. v. Norris*, 60 Ill. App. 112.

Speed limit of six miles per hour held reasonable along the one side of a square. *Lake Erie &c. R. Co. v. Noblesville*, 15 Ind. App. 697.

Adoption of other effective measures held no defense to non-compliance with a statutory duty to stop an engine within 100 yards of a team in the highway. *State v. Kowolski*, 96 Iowa, 346.

Railroad running along a street maintained the rails of its track in such a condition as was calculated to cause pedestrian's foot to catch therein while using the street. It was liable for injuries sustained from such an accident. *Goodrich v. Burlington &c. R. Co.*, 103 Iowa, 412.

A resident in the vicinity of a street through which a railroad runs may rely on the observance of the ordinance speed. *Missouri P. R. Co. v. Chick*, 6 Kan. App. 480.

An engineer must not allow his attention to be diverted even momentarily while keeping a lookout in passing along a populous city street. *Louisville &c. R. Co. v. Creighton*, 106 Ky. 42.

Running a railroad along a street without authority constitutes a nuisance. *Burlington v. Pennsylvania R. Co.*, 56 N. J. Eq. 259.

Deceased left a place of safety between tracks and stepping on one of

them when it was so dark that he could not see a car move which he knew was liable to. *McIlhaney v. Southern R. Co.*, 120 N. C. 551.

Failure to stop and look or listen did not prevent recovery where defendant's speed and failure to signal violated not only the city ordinance but common prudence. *Cincinnati &c. R. Co. v. Murphy*, 17 Oh. C. C. 223.

Turnpike company held liable for the act of those in charge of its railroad in recklessly increasing the fright of horses it has taken toll for. *Hanlon v. Philadelphia &c. R. Co.*, 182 Pa. St. 115.

Acquiescence in the use of a right of way as part of a public road for upward of ten years held to impose the duty of using ordinary care to look out for persons driving thereon. *Missouri &c. R. Co. v. Bellew*, 22 Tex. Civ. App. 264.

A railroad undertakes a like duty by operating its trains in a city street. *Fletcher v. Baltimore &c. R. Co.*, 168 U. S. 135.

Railroad ran cars down a grade in a public street without control or caution though small children were liable to be on the track. It was properly held negligent in so doing. *Smith v. Pittsburg &c. R. Co.*, 90 Fed. Rep. 783.

IV. Vehicles and Pedestrians.

(a). RIGHTS AND DUTIES.

1. IN GENERAL.

A pedestrian, in this case a child, has the right to cross a city street at any point, and a driver of a team must be watchful at the sidewalk and every other point, and if he sees a person in danger and fails to stop, or does not see him at all, he is negligent, and his master is liable. The pedestrian is not as a matter of law obliged to look both ways. *Moebus v. Herman*, 108 N. Y. 349, aff'g 38 Hun, 370, and judg't for pl'ff. See *Thompson v. Buffalo R. Co.*, 145 N. Y. 196.

Wendell v. Railway Co., 91 N. Y. 420; *Chicago City R. Co. v. Robinson*, 127 Ill. 9; *Lynam v. Union R. Co.*, 114 Mass. 83; *Simons v. Gaynor*, 89 Ind. 165; *Raymond v. Lowell*, 6 Cush. 524.

As to looking both ways, see, also, to same effect, *Williams v. Gready*, 112 Mass. 79; *Shapleigh v. Wyman*, 134 id. 118; *Stringer v. Frost*, 116 Ind. 477.

Requiring parties meeting to pass to the right of the center of the road does not apply to vehicles meeting pedestrians. The latter have no greater rights of way over a street crossing than the former. *Savage v. Gerstner*, 36 App. Div. 220.

Plaintiff was not deprived of the rights of a traveler in a street by stopping a reasonable length of time to water his horse and adjust the cover to his cart. *Nead v. Roscoe Lumber Co.*, 54 App. Div. 621.

That plaintiff had assumed the position at a cab stand defendant was entitled to, did not justify the latter's backing his vehicle against the former's horse. *Curley v. Electric Vehicle Co.*, 68 App. Div. 18.

An ambulance is entitled to the right of way in a street, and it is the duty of the owners or drivers of other vehicles, upon seeing it approaching on the tracks of a railway, to deviate from their course sufficiently to enable it to turn out of the track to avoid collision with an approaching car on the same track.

In an action for damages occasioned by a collision with defendant's ambulance, it appeared that the ambulance was going uptown, and, to avoid a car which obstructed it, turned into the west track; that, at this time, plaintiff's wagon was coming down-town and about three feet from said track; that the ambulance was in full view of plaintiff's driver, who kept on his course; that to avoid an approaching car when near plaintiff's wagon, the driver of the ambulance attempted to turn out of the track, but one of the wheels caught in the rail and swung the ambulance against plaintiff's wagon. Held, that the collision was the fault of the plaintiff's driver, and not of the driver of the ambulance. *Smith v. The American Society for the Prevention of Cruelty to Animals*, 7 Misc. 158.

In *Morse v. Sweeney*, 15 Bradw. 486, it was held that the fire department had not rights in the street superior to those of the ordinary citizen, which is properly doubted in *Elliott's Roads & Streets*, p. 625.

A street railway has no greater rights for its repair wagon in a street than any other person. *Northridge v. Atlantic Ave. R. Co.*, 15 Misc. 66.

An owner of vehicle substantially like a steam automobile, held not bound by the provisions of the statute as to vehicles propelled by steam without advance warnings. *Nason v. West*, 31 Misc. 583.

That the negligence is that of an ambulance driver is no defense where it is a private ambulance. *Green v. Eden*, 24 Ind. App. 583.

As to the rights of a bicyclist and a vehicle on the street, see *Peltier v. Bradley & Co.*, 67 Conn. 42.

Plaintiff was kicked while playing about a friend's horse. The fact that the accident may have happened in the street did not entitle him to set up that he was injured in violation of his rights as a traveler therein. *Bowler v. O'Connell*, 172 Mass. 189.

By contributing to the expenses of hiring a team defendant became jointly liable for the negligence and incompetence of the driver. *Adams v. Swift*, 172 Mass. 521.

Driver of team and pedestrian must each use care to avoid injury to the latter. *Meyer v. Lindell R. Co.*, 6 Mo. App. 27.

Philadelphia & c. R. Co. v. Henrice, 92 Pa. St. 431.

Failure of a pedestrian to use ordinary care in crossing the streets, does

not obviate the necessity of a driver's using ordinary care to discover his danger and avoid injury. *Dieter v. Zbaren*, 81 Mo. App. 612.

But it has been held that to render a driver chargeable he must actually have seen the pedestrian, not simply failed to see him. *McGhee v. West*, (Tex. Civ. App.) 57 S. W. Rep. 928.

A bicyclist, though having the right of way by an ordinance, must not persist in his rights until it was too late to avoid a collision. *Taylor v. Union T. Co.*, 184 Pa. St. 465.

A driver has not the right to go over a crossing irrespective of the question of speed upon the assumption that pedestrians will protect themselves. *Burke v. Citizens' Street R. Co.*, 102 Tenn. 409.

2. OF DRIVERS TOWARD EACH OTHER.

Along streets:

Meeting.—It is a general rule that persons meeting in a street must, for the purposes of passage, turn towards the right.

Elliott's Roads & Streets, p. 619; Shear. & Red. Laws of Neg., sec. 649.

In New York it is provided that "persons so meeting shall seasonably turn their carriages to the right of the center of the road, so as to permit such carriages to pass without interference or interruption." N. Y. R. S. (Bank's 6th ed.) 982. The "center of the road" is the center of the *worked* part of the road, and not the center of the *smooth or most traveled* part.

Earing v. Lansingh, 7 Wend. 184; *Clark v. Commonwealth*, 21 Mass. (4 Pick.) 125.

This is the usual interpretation of similar statutes. Shear. & Red., sec. 649; Elliott's Roads & Streets, p. 619. But under a statute of Massachusetts, that travelers meeting shall, under a penalty, drive their carriages to the right of the middle of the traveled part of the road, it was held, in an action for the penalty, that the penalty could not be avoided by seasonably turning to the right of the *wrought* part of the road, though sufficient room for the opposite traveler to pass with convenience and safety be left in the use of ordinary care and skill. But it was said that a very different question would have arisen in a civil action if the injured traveler might have avoided the collision by the exercise of ordinary care and diligence.

Commonwealth v. Allen, 52 Mass. 403.

Where the wrought part of the road is obscured by snow, parties must drive to the right of the center of the way beaten and traveled in the snow.

Smith v. Dygert, 12 Barb. 613; *Jaquith v. Richardson*, 8 Met. (Mass.) 213; Elliott's Roads & Streets, p. 619.

That a person is on the wrong side of the road, at the time of the passage of and collision with an opposite vehicle, raises a presumption of negligence on the part of the former.

Burdick v. Worrall, 4 Barb. 596; *Elliott's Roads & Streets*, p. 620; *Shear. & Red. Neg.*, sec. 650, citing *Brooks v. Hart*, 14 N. H. 307; *Kenard v. Burton*, 25 Me. 39; *Randolph v. O'Riordan*, 155 Mass. 331, 336.

But the presence or use of the wrong side of the road may be justified by circumstances. *Strouse v. Whittesey*, 41 Conn. 559, where a person passing another team standing in the road, collided with a third team approaching. *Shear. & Red. Neg.*, sec. 652; *Elliott's Roads & Streets*, p. 619; *Wrinn v. Jones*, 111 Mass. 360, where a person with a light wagon meeting a heavily loaded vehicle on a bridge, attempted to pass in a narrow space between the team and the side of the bridge, and a collision occurred, and the question was for the jury; but the mere roughness of the road to the right does not excuse unless its use is dangerous; *Earing v. Lansingh*, 7 Wend. 184, and see *Donnelly v. Railroad Co.*, 109 N. Y. 16.

A person may be liable for carelessly or recklessly colliding with a vehicle or horse, although it be on the wrong side of the road, for it is his duty to use reasonable care under the circumstances to avoid injury. *Spofford v. Harlow*, 85 Mass. 176, citing as involving analogous principles, *Welch v. Wesson*, 6 Gray, 505; *Boardman v. Merrimack Ins. Co.*, 8 Cush. 586; *Baker v. Portland*, 58 Me. 199; *Parker v. Adams*, 12 Met. 415; *Schimpf v. Sliter*, 64 Hun, 464; *Elliott's Roads & Streets*, p. 620; *Beckerle v. Wyman*, 12 Mo. 354; *Lind v. Brick*, 37 Ill. App. 430; *Randolph v. O'Riordan*, 155 Mass. 331. But person may presume that traveler will yield road. *Schimpf v. Sliter*, 64 Hun, 464; *Cadwell v. Arnheim*, 81 id. 39.

The law of the road is not necessarily applicable to a building in course of its removal through a street. *Graves v. Shattuck*, 35 N. H. 257. Nor in some cases to a light vehicle meeting a loaded one. *Winne v. Jones*, 111 Mass. 360; *Grier v. Sampson*, 27 Pa. St. 183; *Shear. & Red. on Neg.*, sec. 652; *Elliott's Roads & Streets*, p. 619. And so as to a pedestrian or person on horseback meeting a loaded team. Text writers last cited; *Beach v. Parmeter*, 23 Pa. St. 196. And a horseback rider is not governed by the law of the road, but must use due prudence to avoid collision with a vehicle. *Dudley v. Boltes*, 24 Wend. 464, 471.

Nor does the rule apply to railways. *Ante*, p. 2323; nor to person crossing the road or turning therein. *Fales v. Dearborn*, 1 Pick. 345; *Smith v. Gardner*, 11 Gray, 418; *Lovejoy v. Dolan*, 10 Cush. 495; *Bierback v. Goodyear &c. Co.*, 14 Fed. Rep. 826; *Elliott's Roads & Streets*, p. 620; *Sher. & Red. Neg.* sec. 652; nor to horses running away and unmanageable. *Caldwell v. Arnheim*, 81 N. Y. 39.

A person on the wrong side of the road assumes the risk of so using it, as regards the opposite traveler using ordinary care, but this does not justify any intentional or unnecessary damage to the first offender. *Burdick v. Worrall*, 4 Barb. 596; *Wood v. Luscomb*, 23 Wis. 287; *Brooks v. Hart*, 14 N. H. 307; *Shear. & Red. Neg. sec. 651*; *Elliott's Roads & Streets*, p. 620.

The plaintiff, lawfully riding at the rate of three miles per hour on a bicycle upon the right side of a driveway in a public park, was run into by the defendant who was driving a buggy at the rate of six miles per hour on the same side of the driveway. The plaintiff was not negligent in not turning to the left in the hope of allowing the defendant to pass, as he had the right to suppose that the defendant would do his duty in yielding the road. *Schimpf v. Sliter*, 64 Hun, 463, modifying judg't for pl'ff.

Plaintiff was driving on the left side of the street as the right side was impassable, when a meeting truck without necessity, having ample room, made a sudden turn in his direction and ran into him. Plaintiff was not negligent *per se* in being on that side of the way under the circumstances; and the violation of the provisions of the Highway Law, requiring meeting vehicles to pass to the right of the center, while constituting evidence of negligence, did not preclude recovery. *Quinn v. O'Keefe*, 9 App. Div. 68.

Defendant's driver mounted his carriage, which had been standing at the right curb of the street, and drove off, unexpectedly turning his horses across the street in front of the plaintiff, who was riding a bicycle along the middle thereof at a moderate speed, in spite of his warnings. Facts held to support a charge of negligence on the part of the defendant. *Hill v. Moebus*, 56 App. Div. 354, rev'g s. c., 63 N. Y. S. 1109.

One driving on a street car track must turn to the right to avoid colliding with other vehicles coming toward him. *Diehl v. Roberts*, 134 Cal. 164.

Plaintiff in meeting a vehicle along a street in going north, was not negligent in acting on the assumption that the latter would use reasonable care in turning off at a cross street; that is, instead of turning sharply at the upper crossing to proceed more southerly before turning. *Henning v. Rothschild*, 68 N. Y. Supp. 840.

Ambulance and fire wagons.—*Smith v. America Soc.*, 7 Misc. 158, (*ante*, p. 2344).

Statute as to turning to the right held to apply only to vehicles carrying persons. *Peltier v. Bradley & Co.*, 67 Conn. 42; s. c., 32 L. R. A. 651.

Bicyclist not allowed to recover for injury by a wagon where he was not himself using reasonable care. *Lord v. Lamonte*, 72 Conn. 37.

Defendant's team was driven diagonally across the street toward its store on the left side of the street as the driver approached and was within four feet of the curb on that side when plaintiff on his bicycle slipped in endeavoring to pass to the right through such space. Plaintiff claimed that a very high degree of care was required from defendant on the wrong side the road. This claim was overruled and recovery denied. *Peltier v. Bradley & Co.*, 67 Conn. 42; s. c., 32 L. R. A. 651.

From opinion.—"The plaintiff's main contention is that whoever drives a team upon what to him is the left side of the road, thereby assumes the responsibility of exercising an unusual and the highest degree of care to avoid a collision with any other vehicle which he may have occasion to pass, and which is being kept on what to it is the right-hand side of the road. Such is not the law. It is necessary and proper for any driver, who is about to start for the purpose of going upon land or into buildings on what to him is the left-hand side of the road to shape his course in that direction; and he is bound simply to exercise ordinary and reasonable care with reference to such teams as he may encounter. Whether such care was exercised by the defendant's driver, under the circumstances of the case, was a pure question of fact, the finding of the court below is conclusive. *Wrinn v. Jones*, 111 Mass. 360; *Fiske v. Forsythe Dyeing Co.*, 57 Conn. 118.

It is equally conclusive in charging the plaintiff with contributory negligence. He, too, was bound to exercise the same degree of care which the law required of Scoville, the defendant's driver. It was not his absolute right to pass between the defendant's team and the southern curb of the street, or to assume Scoville must and would turn out for him. The defendant's right to use its elevator and to place its truck as close to it as it could, was as perfect as that of the plaintiff to ride through the street. Each party was equally bound to use his rights so as not to injure the other."

Being on the wrong side of the track held not to preclude recovery, in view of a custom to drive there to avoid the unsafe condition of the other side. *Loyacano v. Jurgens*, 50 La. Ann. 441.

Violation of statutory duty to turn to the right on meeting a bicyclist, held to show *prima facie* negligence. *Cook v. Fogarty*, 103 Iowa, 500; s. c., 39 L. R. A. 488.

But a loaded team ought to use due care, and if it cannot sufficiently deflect from its course to allow passage, it should stop. *Kennard v. Burton*, 25 Me. 39.

Driving on the wrong side of the street is evidence of negligence. *Randolph v. O'Riordan*, 155 Mass. 331.

A charge relieving defendant of liability if he had not the opportunity of seeing plaintiff suddenly coming from behind another vehicle in time to avoid injury, was deficient where it omitted the disputed facts as to whether defendant or plaintiff was complying with the rule of the road, and whether or not defendant was proceeding at excessive speed. *Jones v. Shattuck*, 175 Mass. 415.

That plaintiff was driving at the extreme right of the highway when collided with sufficiently shows negligence in defendant. *Perlstein v. American Exp. Co.*, 177 Mass. 530.

Person turned out in the dark to avoid a rapidly approaching team. He was held not negligent. *Flower v. Witkovsky*, 69 Mich. 371.

One was not *per se* negligent although driving on the left side of the road. *Beckerle v. Wyman*, 12 Mo. App. 354.

One driver was on the wrong side of the street, the other was collecting a fare. Question of negligence as to both was for the jury. *Baylis v. Diamond Street Omnibus Co.*, 173 Pa. St. 378.

Driver of a buggy held not negligent in attempting to trot past four equestrians abreast, where the road was thirty-nine feet wide. *Miller v. Cohen*, 173 Pa. St. 488.

Bicyclist may assume that a team turning in from a cross street will continue toward the right side of the street. *Foote v. American Product Co.*, 195 Pa. St. 190; s. c., 49 L. R. A. 764.

Bicyclist collided with a team in descending a steep hill with a sharp turn in it. He was held negligent. It was immaterial which side he was on so long as there was room to pass. *Rowland v. Wanamaker*, 193 Pa. St. 598.

Plaintiff was forced to the curb by a team turning in from a side street, thrown and injured. Verdict for plaintiff sustained. *Foote v. American Product Co.*, 201 Pa. St. 510.

Defendant collided with plaintiff on the right side of the road while he was trying to pass in the dark and at eight or nine miles an hour, a vehicle on his own side. Recovery was allowed. *Angell v. Lewis*, 26 R. I. 391.

Where teams are meeting in the street there is a mutual duty to proceed carefully. *Shaeber v. Osterbrink*, 67 Wis. 495.

Plaintiff seeing a vehicle coming, was negligent in proceeding into a cut in the road where it was too narrow to turn out without being liable to upset. *Seaver v. Union*, 113 Wis. 322.

Overtaking.—A traveler is not bound to give way for another traveling in the same direction, who desires to pass him, save in case there be not room enough on either hand for the other to pass, and then only upon request. Nor is he bound to look back or listen for one coming. *Adolph v. Central Park &c. R. Co.*, 76 N. Y. 530, aff'g 11 J. & S. 199, and judg't for pl'ff.

Elliott's Roads & Streets, p. 621; *Shear. & Red. Neg.*, sec. 652; *Clifford v. Tyman*, 61 N. H. 508.

Subject to this statement one traveler may pass another in such manner

as he prefers, at the risk of any injury inflicted or received in so doing, to which the leading traveler does not contribute. *Burnham v. Butler*, 31 N. Y. 485; *Adolph v. Central Park &c. R. Co.*, 76 N. Y. 530; *Elliot's Roads & Streets*, pp. 621-2: *Shear. & Red. Neg.*, sec. 652; *Ferguson v. Ehret*, 10 Misc. 217.

Truckman was not negligent in driving to the curb to his right and alighting to pick up an object in the street. Was struck by a passing team as he was about to remount his wagon. *Kettle v. Turl*, 162 N. Y. 255; rev'g s. c., 13 Misc. 156.

A person on a road is not bound if he wants to change his course in front of one who is attempting to pass him, to "see to it" that he does not precipitate a collision, and it is error to so charge as he is only bound to use reasonable care in doing so. *Crabtree v. Otterson*, 22 App. Div. 393.

The law of the road in New York does not oblige one coming from the rear of a person to pass to his left. *Savage v. Gerstner*, 36 App. Div. 220.

Where a person in advance is aware of the approach from the rear of another who is attempting to pass, he is bound to use reasonable care not to give rise to an accident while the latter is attempting to do so. *Brennan v. Richardson*, 38 App. Div. 463.

Defendant's driver was negligent in driving a truck so sharply around a corner as to strike plaintiff's cart from the rear, standing by the side of the street about twenty-six feet from the cross street. *Nead v. Roscoe Lumber Co.*, 54 App. Div. 621.

While driving along Hudson street, between Duane and Reade streets, just in the rear of the defendant's team and truck, plaintiff turned out for the purpose of passing by and in front of defendant, having more than enough room to do so, and which he had a right to do. Defendant then, without warning, and when plaintiff's horses were at his front wheel, suddenly turned his horses against plaintiff's horses, forcing them against an engine which was standing near the curb, held them there as if in a vise, then driving his horses ahead. His hind wheel passed over the right hind hoof of plaintiff's horse, so injuring him as to cause his death. For jury. *Lonegran v. Martin*, 4 Misc. 624, rev'g nonsuit. (New York City Court.)

Plaintiff left his bicycle resting against the curb in front of his house while he went in, when the driver of one of defendant's wagons drove to the curb and over the bicycle. The facts showed negligence on the part of the driver, and defendant was liable. *Johnson v. Parker*, 7 Misc. 685. (New York Common Pleas.)

While plaintiff was driving a single horse and wagon on the right-hand side of Eighth avenue, near the curb, and another wagon was being driven alongside, the horse of the latter conveyance was violently struck,

by defendant's team, which was being driven at a gallop in the same direction and endeavored to cross in front of the others, and was thereby forced against plaintiff's horse and upset his wagon, injuring the plaintiff. The defendant was the primary cause of the injury and was guilty of negligence; plaintiff was free from negligence and a nonsuit was error. *Ferguson v. Ehret*, 10 Misc. 217.

As one of defendant's wagons was about to pass the plaintiff's horse, which was being led across the street by a boy, one of the front wheels sank into a hole in the pavement, causing the shafts to swerve towards and pierce the flank of plaintiff's horse to such a depth that he was ordered to be destroyed. The wagon was in plain sight for over half a block, and the defect in the pavement was patent to both the boy and driver. If driver was negligent, so was the boy. *Westchester Hardwood Co. v. Manhattan El. Light Co.*, 10 Misc. 415.

The defendants, other than appellant, kept one of their carts, when not in use, stored upon the sidewalk in front of their place of business, and another in the street about three feet from it and near the car track. While plaintiff's intestate, in charge of an older brother, was playing near the first cart, appellant's driver, in trying to pass a street car, ran into the other cart and drove it against the one on the sidewalk, wedging the child between it and a tree, and causing injuries from which he died. Negligence of driver was the proximate cause of the injury. *Engelbach v. Ibert*, 10 Misc. 535.

Turning off to a side street held not negligence though hearing defendant's repair wagon approaching rapidly from the rear. *Northridge v. Atlantic Ave. R. Co.*, 15 Misc. 66.

Defendant, in attempting to pass, carelessly swung his wagon against another's, so as to throw it against plaintiff's. His acts permitted recovery. *Ferguson v. Ehret*, 14 Misc. 454.

Accident cannot be set up as the cause of injury where defendant drove so close behind another vehicle as to make it inevitable. *Ewald v. American News Co.*, 18 Misc. 468.

A driver after passing another vehicle was suddenly confronted by a car, and run into by the other vehicle. Circumstances gave rise to no right of action. *Maas v. Fauser*, 36 Misc. 813.

Wheels of wagon slipped and struck a car as driver was turning off the track. Driver's negligence was for the jury. *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88.

Passing "on a gallop" another vehicle, causing the team of the latter to run away, is a "wrongful act," giving a right of action for death caused thereby. *Thomas v. Royster*, 98 Ky. 206.

Driving into a vehicle was without excuse where there was plenty of room to pass. *Odom v. Schmidt*, 52 La. Ann. 2129.

A horse stepped on a chain dragging behind a team ahead of it. Question of negligence was for the jury. *Bueck v. Lindsey*, 65 Mich. 105.

A passenger in a carriage allowed recovery for the negligence of the driver of a meeting vehicle, though his own driver was negligent in attempting to avoid it. *Crampton v. Ivie*, 124 N. C. 591.

Plaintiff's being on the side vehicles from the rear are entitled by statute to pass on, did not justify defendant's attempting to make an unsafe passage on that side when there was plenty of room on the other. *Young v. Cowden*, 98 Tenn. 577.

A team turning around collided with another. Question of negligence for the jury. *Bierbach v. Goodyear & Co.*, 14 Fed. Rep. 826; 15 id. 490.

Attempting to pass through a space between vehicles too narrow for passage gave recovery for the injurious consequences. *Wolf v. Hemrich Bros. Brewing Co.*, 28 Wash. 187.

At cross streets:

Deceased was struck as he drove across a street by one of two parties racing thereon, which he could not see on account of an obstruction to his view. The one who actually passed him was held to be as liable for the accident for his participation therein, as the one who in fact collided with him. *Hanrahan v. Cochran*, 12 App. Div. 91.

Plaintiff started to drive across a street after waiting for a car to pass in front going in one direction when defendant's wagon which collided with him was some distance away coming in the other direction. It was about dark and a train passing overhead, made considerable noise. Defendant's driver was asleep with the lines tied to the wagon cover and his horses going at about six or seven miles an hour. Negligence and contributory negligence was for the jury. *McDonnel v. Henry Elias Brew. Co.*, 10 App. Div. 223.

3. TOWARD PEDESTRIANS.

In case of fog driver should use greater precautions. *McManus v. Wolverton*, 19 N. Y. Supp. 545.

Plaintiff's intestate, a boy, while running across the street, fell and was run over by an express wagon which approached at an unusual rate of speed. In an action for his death, the court, after charging that there was no law requiring express wagons to have brakes, or the use of curb bits on horses, and that the general rule is that vehicles shall be used that are safe for ordinary purposes, such as men of common sense habitually use, was asked to charge that the company was bound to use every

appliance which is generally known and in use for the safety of passage of persons walking upon the street, and replied, "I will say that they are bound to use such appliances as are commonly used by men of common judgment and prudence in the city of New York." Held, no error; that the question of brakes and bits was properly submitted thereby to the jury.

The court refused to charge, on request, that although plaintiff's intestate was negligent at the time he was running across the street, if that was the proximate cause of the injury and defendant could have avoided it with due care, plaintiff was entitled to recover. Held, no error; that negligence on the part of the person injured, when a proximate cause of the injury, is contributory and fatal to recovery. *Rattagliata v. Hubbell*, 7 Misc. 103.

Mere breakage of the wagon or harness is not presumptive of negligence. *Doyle v. Wragg*, 1 F. & F. 7.

Care required of a vehicle is in proportion to the difficulty in managing it. *Ford v. Charles Warner Co.*, 1 Marv. (Del.) 88.

The time and known condition of the place of accident as well as the probability of danger from careless driving are elements in determining the care required. *Ford v. Whiteman*, (Del.) 45 Atl. Rep. 543.

The owner of a vehicle is not bound to furnish appliances which will render an accident impossible, but only such as are commonly used by men of common judgment and common prudence. *Smith v. Smith*, 2 Pick. 621; *Murdock v. Warwick*, 4 Gray, 178.

Violation of ordinance requiring passage on the right held a matter of evidence only. *Foote v. American Product Co.*, 195 Pa. St. 190; s. c., 49 L. R. A. 764.

Reasonable control of horse is such as will enable one to avert a collision. *Young v. Cowden*, 98 Tenn. 577.

Use of due care "immediately" before collision, held no defense in view of controlling negligence before that. *McGhee v. West*, (Tex. Civ. App.) 57 S. W. Rep. 928.

Whether it was negligent to permit a boy of twelve years to drive a team in the night time was for the jury. *Parish v. Eaton*, 62 Wis. 272. See *Frazer v. Kilmer*, 2 Hun, 574.

To children and defective people:

Evidence that a driver drove through a space in a street left by obstruction of building materials, just wide enough for a single team to pass through it, at a rapid rate, when the street was full of children and his view beyond such space shut off by such obstruction, was sufficient to support a finding of negligence. The degree of care required of the boy (of

five) run over, was only such as an ordinarily prudent person of his age would have used. *Keller v. Haaker*, 2 App. Div. 245.

A driver of a cart having on it a steel election booth was not negligent in failing to observe boys running by the side of the wagon with their hands upon it, and warn them against falling under the wheels. Driver sat in the doorway of the booth on the wagon while driving. *Rice v. Buffalo Steel-House Co.*, 17 App. Div. 462.

It was for the jury to say whether a driver loading ashes in a street which was at the time crowded with children, was negligent in starting his horse without looking to see if any children might be in the way. *Schoenblum v. New York*, 58 App. Div. 285.

Operator of a vehicle is chargeable with extra care toward small children. *Thies v. Thomas*, 77 N. Y. Supp. 276.

Boy of five failed to recover for being run over by an ice cart at half past eight in the evening, for lack of proof as to whose negligence it was. *Lowery v. New York Ice Co.*, 26 Misc. 163.

Fright of a horse ahead and its backing was the proximate cause of injury to a boy in the rear of the wagon struck by the pole of a following wagon. *Gibbons v. Vanderhoogt*, 75 Ill. App. 106.

The fall of a cake of ice from the rear of a wagon, injuring a child, raised a presumption of negligence. *Cook v. Piper*, 79 Ill. App. 291.

Driver held negligent in failing to see a child of four in turning off the car track. *Heldmaier v. Taman*, 88 Ill. App. 209; s. c. aff'd, 188 Ill. 283.

Driver held not bound to look back to see that children are not attempting to get on behind. *Hebard v. Mabie*, 98 Ill. App. 543.

Driver's being on the inside of the wagon held no ground for recovery where he could not have seen the child had he been on the seat. *McNamara v. Beck*, 21 Ind. App. 483.

Defendant need not be absolutely faultless to exempt him from liability for running over a child. *Joseph Schlitz Brew. Co. v. Duncan*, 6 Kan. App. 178.

Child suing in its own behalf held not chargeable with the negligence of its parents. *South Covington &c. Street R. Co. v. Hernklotz*, 104 Ky. 400.

Child of five was allowed to go into a busy street, unattended. No negligence was shown on the part of the driver. No recovery. *Clinton v. Boston Beer Co.*, 164 Mass. 514.

Driver held negligent where he could have seen the child in time to avoid injury. *Brown v. Schellenburg*, 19 Pa. Super. Ct. 286.

No recovery where defendant's horse became unmanageable through the act of another. *Trow v. Thomas*, 70 Vt. 580.

At street crossings:

A cart load of lumber, which extended behind the wagon, swept around as it was turning the corner and hit a woman on the sidewalk. It was for the jury. *Sheehy v. Burger*, 62 N. Y. 558, rev'g nonsuit.

The plaintiff, while crossing an avenue, stopped to let a truck pass, when the defendant's wagon was driven diagonally across the avenue and struck and injured him. The defendant was liable. *Sheehan v. Edgar*, 58 N. Y. 631, aff'g judg't for pl'ff.

The driver of a team is bound to anticipate a foot passenger at a crossing, and if he fails to look for them, or if he sees them and fails to avoid them so far as he may, then he is negligent.

A team, walking, knocked down a child of three years at crossing. The driver did not stop; he said he did not see the child. The defendant was liable. *Murphy v. Orr*, 96 N. Y. 14, aff'g judg't for pl'ff.

It is the duty of the driver of a vehicle when turning around a street corner in a city to give the people who are crossing the street some opportunity of escape from a vehicle which they have no reason to suppose is going to interfere with them; he must see that the crosswalks are clear before he turns into the street, and must not ruthlessly ride down any pedestrian. *Scotti v. Behsmann*, 81 Hun, 604.

Evidence that a driver, drove upon a pedestrian walking in the street in plain sight, in the day time without warning and while his horse was entirely under his control, warrants a finding of negligence. The degree of care required of a driver is that degree of diligence and care that would be expected of a person of ordinary prudence and capacity. *Murphy v. Weidman Cooperage Co.*, 1 App. Div. 283.

Evidence that defendant drove suddenly and rapidly around a corner and over a crosswalk of an intersecting street and struck plaintiff, who was at the time attempting to cross over such crosswalk, is sufficient to sustain a verdict for plaintiff. *Cook v. Standard Oil Co.*, 9 App. Div. 105.

Boy of six years, upon a crosswalk, was injured by the swerving of defendant's team upon him while the driver was looking in another direction. Nonsuit was error. *Elze v. Baumann*, 2 Misc. 72. (New York Superior Court.)

An infant negligently running down a person on crossing is liable. *Stringer v. Frost*, 116 Ind. 477.

Defendant held negligent in turning from one street into another at high speed with a bar of iron projecting six or eight feet beyond the rear of the wagon. *Van Camp Hardware &c. Co. v. O'Brien*, 28 Ind. App. 152.

Statutory requirement as to the passage of teams does not make one

negligent in being on the left side of a street on meeting a pedestrian. *Yore v. Mueller Coal &c. Co.*, 147 Mo. 679.

Defendant held negligent in driving a heavy ice wagon rapidly around a corner close to the curb. *Kleinert v. Rees*, 6 Pa. Super. Ct. 594.

So, in driving rapidly and without looking, running down plaintiff on a crossing. *Schweinfurth v. Dover*, 91 Ill. App. 319.

See, also, *Streitfield v. Shoemaker*, 185 Pa. St. 265.

In backing his ice wagon up to the curb without looking to see if his way was clear. *McCloskey v. Chautauqua Lake Ice Co.*, 174 Pa. St. 34.

In riding a bicycle out of a gate over a sidewalk so close to the gate post as to have his view thereof shut off until it was too late to avoid injury. *Nelson v. Breman*, 22 R. I. 283.

On sidewalks:

Plaintiff, a telegraph repairer, was on a pole. The defendant's servant, driving their team in the street, ran against the pole, and, although warned to stop, drove on and tightened the wire about the plaintiff so as to injure him. Defendant was held liable for injury caused after the driver had notice of the peril in which he placed the plaintiff. *Clark v. Koehler and another*, 46 Hun, 536, aff'g judg't for pl'ff. But see *Banks v. Highland &c. R. Co.*, 136 Mass. 485.

In an action for personal injuries caused as alleged by negligence the plaintiff testified that while he was shoveling sand into a coal hole in the sidewalk, with his back to the street, a driver of the defendants backed his team, without warning, so that the wagon struck him and ran over his leg, and two witnesses testified that defendant Brooks said that the driver had come near running over him and he was going to discharge him. This was denied by said defendant. Verdict for the plaintiff was sustained. *Sullivan v. Brooks*, 8 Misc. 532. (City Court of New York.)

Where runaway horse injured gates on the sidewalk it is no defense that the ordinance forbade such gates to be there. *Gannon v. Nelson*, 69 Cal. 541.

One may disobey an ordinance against going on sidewalk with a pushcart to avoid a horse running away. *Dennison v. Minor*, 1 Cent. 927.

Along streets:

The plaintiff and some other children were playing near a wall joining a street with no sidewalk intervening between them and the street. A person drove a truck very rapidly about three feet from the wall, without turning out, and one of the horses struck and injured the plaintiff. The question of the driver's negligence was for the jury. *Barrett v. Smith*, 128 N. Y. 607, rev'g judg't of nonsuit.

A woman with a baby in her arms preceded by her child and plaintiff, a child of her sister, seeing nothing but defendant's wagon coming, which was proceeding along the street and diagonally across it in one direction, started to cross over the crosswalk ahead of it. When within ten or fifteen feet of her, the driver, who it appeared was drunk, dazed and sleepy, changed his course, and ran over plaintiff, in spite of warnings given him, making no effort to avoid injury. He was sufficiently negligent to take the question of his liability to the jury. But the woman (plaintiff's guardian) was not chargeable with negligence *per se* in crossing under the circumstances as she had no reason to apprehend the danger caused by the driver's unexpected change of course. *Healey v. Ehrey*, 42 App. Div. 27.

In an action for personal injuries the evidence for the plaintiff, who was about six years old, was that the street was one in which but few wagons passed; that the plaintiff slipped from the sidewalk into the gutter and was unable to get up; that defendant's wagon then turned the corner of the street, some sixty feet distant, and ran over his head, &c.; that the driver sat looking forward; that the horse was going fast, but that he could have been stopped within twenty feet. Although the driver testified that plaintiff fell behind the horse and just in front of the wheel, a verdict in plaintiff's favor was not disturbed. *Eckensberger v. Amend*, 7 Misc. 452. (City Court of New York.)

Running down pedestrian from behind without excuse, see *Stanfield v. Anderson*, (Ariz.) 43 Pac. Rep. 221.

The fact that defendant drove on the wrong side of the street, does not make him liable to a boy injured by him, if the boy was negligent. *Lind v. Bick*, 37 Ill. App. 430.

A boy suddenly jumped off a sleigh and was run over by the defendant. He could not recover. *Messenger v. Devine*, 130 Mass 197.

Driver recklessly ran over boy, though warned by bystanders; though the latter was also negligent in putting himself in a dangerous position. *Post v. Olmstead*, 47 Neb. 893.

One driving along a highway ran into and injured a person repairing the street. He was liable therefor. *Riley v. Farnum*, 62 N. H. 42.

4. TOWARD BOTH PEDESTRIANS AND DRIVERS.

As to speed:

Driving at a lively trot in a city is not *per se* negligence. One is simply bound to use proper care not to injure one on the street. *Crocker v. Knickerbocker Ice Co.*, 92 N. Y. 652, aff'g judg't for def't.

Deceased, a man of sixty-five or seventy, while crossing a street in the evening was stopped by a car and while waiting for it to pass, was run

into by defendant's wagon which was proceeding at such a speed as prevented his avoiding injury should he have seen it. The latter was negligent in failing to keep a special lookout while driving at such a speed and at such an hour. *Canton v. Simpson*, 2 App. Div. 561.

Defendant and another were racing on a street in violation of statute and city ordinance. Deceased was driving across from a cross street, his view being somewhat obstructed, when he was struck. Defendant was liable for participating in the accident by urging his horse on after seeing the decedent's attempt to cross ahead. *Hanrahn v. Cochran*, 12 App. Div. 91.

Mere rapid driving in the street held not *per se* negligence. *Campbell v. Wood*, 22 App. Div. 599.

Violation of an ordinance regulating speed does not constitute negligence *per se*; but it is an element for the jury to consider in determining whether under the evidence a driver proceeding through a thickly populated street where there were many children, some having on roller skates, at a rapid rate, with a slack rein, was guilty of negligence. *Scaffer v. Baker Transp. Co.*, 29 App. Div. 459.

Where the defendant was driving at a dangerous rate of speed, but the accident would have happened had the speed been less. No recovery allowed. *Dudley v. Westcott*, 18 N. Y. Supp. 130.

Negligence of a driver in driving ten to twelve miles an hour, next to the sidewalk, and of a boy of eight remaining near the edge while it was passing was for the jury. *Connaughton v. Line Printing &c. Ass'n*, 76 N. Y. Supp. 755.

Automobilist must use some care along streets between crossings, though the fact of his being elsewhere than at a crossing may be considered. *Thies v. Thomas*, 77 N. Y. Supp. 276.

Failure to look before driving across a street car track is no defense to an action for driving at excessive speed thereon. *Dater v. Fletcher*, 14 Misc. 288.

Driving was at a reckless rate of speed where it was such as to prevent the avoidance of a team ahead which had turned slightly to go down a side street. *Northridge v. Atlantic Ave. R. Co.*, 15 Misc. 66.

Where a person was driving rapidly through a public street. Plaintiff's negligence was for the jury. *Carter v. Chambers*, 79 Ala. 223.

Excessive speed was negligence at a place where the condition of the highway prevented sounds arising. *Stanfield v. Anderson*, (Ariz.) 43 Pac. Rep. 221.

Excessive speed of an ambulance to save life held no defense to a charge of negligence. *Green v. Eden*, 24 Ind. App. 583.

A person, although not driving rapidly, negligently injured another. Judgment for plaintiff. *Robbins v. Diggins*, 78 Iowa, 521.

Charge that riding beyond seven miles an hour was not the exercise of due care held to be in conflict with Mass. St. 1894, ch. 479. *Jones v. Shattuck*, 175 Mass. 415.

Plaintiff racing met defendant driving on a gallop on the wrong side of the street. Negligence and contributory negligence was for the jury. *Meeney v. Kehoe*, 181 Mass. 424.

Where injury arose from careless and rapid driving in conjunction with a defective bridge. No recovery was allowed. *Albernethy v. Van Buren*, 52 Mich. 383.

Racing horses on the street was *per se* negligent. *Potter v. Moran*, 61 Mich. 60; *Mittelstadt v. Morrison*, 76 Wis. 265.

See, also, *Ford v. Whiteman*, 2 Penn., (Del.) 355.

A team was driven rapidly upon a road in the absence of special prohibition. But did not raise any liability. *Denman v. Johnston*, 85 Mich. 387.

Negligence was for the jury upon evidence that coasting sled was going at high speed. *Burt v. Staffield*, 121 Mich. 390.

Violation of ordinance as to speed held only evidence of negligence. *Bell v. Pistorius*, 18 Oh. C. C. 73.

One driving at an excessive speed over a crossing, struck a boy of thirteen who was in the act of passing over it. His act was inexcusable. *Streitfield v. Shoemaker*, 185 Pa. St. 265.

A person was driving too fast over a narrow place in street. It prevented his recovery. *Landa v. McDermott*, (Tex.) 16 S. W. Rep. 80.

Animals loose and unattended:

A horse permitted to go loose and unattended on the sidewalk of a populous city street kicked a passerby. The owner was negligent and liable. It is not necessary to allege that the animal is vicious, except when the owner would not otherwise be liable. *Dickson v. McCoy*, 39 N. Y. 400, aff'g judg't for pl'ff.

See "Domestic Animals," p. 1009.

A competent person was driving a cow through a city, dogs seized on and frightened her, whereupon she got away and injured the plaintiff. No *scienter* was proved and the defendant was not liable. Laws of 1872, chap. 776 explained. *Moynehan v. Wheeler*, 117 N. Y. 285, rev'g judg't for pl'ff.

Citing *Van Leuven v. Lyke*, 1 N. Y. 515. See "Domestic Animals," p. 1009; see, also, *Linnehan v. Sampson*, 126 Mass. 506 (person gored by bull).

A horse, accustomed to run away, left standing in charge of a boy, incompetent to control him, ran away and killed another horse. Owner liable. *Frazer v. Kilmer*, 2 Hun, 514, aff'g judg't for pl'ff.

Boy of fourteen or fifteen years, assisted by a boy of sixteen or seventeen, was leading a cow along a road and the cow and plaintiff's carriage collided. Plaintiff had no action against defendant, boy's master, on the theory that it was negligent to let a boy of that age lead a cow along a highway. *Smith v. Matteson*, 41 Hun, 216, rev'g judg't for pl'ff.

It is negligence to allow horses to be in a public street unattended, and where they are so found the inference is that it was permitted, and it is not incumbent upon a party claiming damages caused by reason thereof to prove the existence of negligence on the part of the party charged with the care of the horse.

The burden is upon the party seeking to avoid the results arising from such a state of facts to show that he has used all proper means to prevent the same. *Doherty v. Sweetser*, 82 Hun, 556.

It was for the jury to say whether defendant's servant was negligent in leading prancing horses in a street without keeping them a sufficient distance from a passing vehicle to avoid collision. *Crozier v. Read*, 10 App. Div. 626.

It was for the jury to say whether a violation of an ordinance as to leaving horses in a street unsecurely hitched and unattended, was negligence, it not being *per se* so. *McCambley v. Staten Island M. R. Co.*, 32 App. Div. 346.

Plaintiff was negligent in leaving a horse, though quiet and gentle, untied and unattended in a narrow street on a dark night at a point where cars are liable to approach with bright headlights, and at high speed. *Hoffman v. Syracuse &c. R. Co.*, 50 App. Div. 83.

Evidence that while defendant's servant was riding one horse and leading another through a street as he was accustomed to do daily, the latter was struck by a passing vehicle, and in consequence thereof backed on to plaintiff by the wayside, in spite of the servant's efforts to control him, held insufficient to show that the servant's acts constituted negligence, the horse being ordinarily gentle. *Haines v. Keahon*, 46 App. Div. 164.

It is negligence to leave a horse unattended and alone in a street. *Kelly v. Adermann*, 72 App. Div. 590; *Manthey v. Ranenbuehler*, 75 N. Y. Supp. 714.

Gives rise to a presumption of negligence. Which is not necessarily rebutted by proof that the wagon wheels were fastened and that boys unfastened them. *Howley v. Kraemer*, 36 Misc. 190.

One driving a steer along a city street must exercise ordinary care and prudence. *Matson v. Maupin*, 75 Ala. 312.

Breach of an ordinance against horse being at large held to be the proximate cause of injury to a mare whose colt had been chased by such horse. *Kitchens v. Elliott*, 114 Ala. 290.

Allowing horse to run loose on the street contrary to ordinance, held *prima facie* negligence. *Maxwell v. Durkin*, 86 Ill. App. 257; s. c. aff'd, 185 Ill. 546.

Horses unhitched and unattended. The negligence of the driver in leaving a horse unattended or unhitched in the street, may be so negligent as to prevent recovery for injury caused by frightening them. *Southworth v. Railway Co.*, 105 Mass. 342; *Western Union Tel. Co. v. Greene*, 56 Ill. 319; *Denville v. So. Pac. R. Co.*, 50 Cal. 383; *Voak v. North. Cent. R. Co.*, 75 N. Y. 320; *Gray v. Railway Co.*, 65 N. Y. 561.

The question of defendant's negligence in leading a bull along a street was for the jury. *Linnehan v. Sampson*, 126 Mass. 506.

A person did not turn aside for an approaching team or animals in the road. Question was for the jury. *Kendell v. Kendell*, 147 Mass. 482; *Barnum v. Tarpenning*, 75 Mich. 557.

A horse, unattended in the driveway of a ferry, ran from fright into the slip, the guard chain not being up. No recovery. *Hoboken &c. Co. v. Lally*, 48 N. J. L. 604.

Liability attaches for injuries from a mule left unattended in the street. *Bowen v. Flanagan*, 84 Va. 313.

Hitching horses: *

It is the usual rule that it is not negligence *per se* to leave a horse, unattended by a competent person unhitched on a street or highway, but the question is usually for the jury. It is for the jury to say whether ordinances requiring horses to be tied, when left in the street applied to peddlers and vendors. *Wasmer v. D., L. & W. R. Co.*, 80 N. Y. 212; *Southworth v. Old Colony R. Co.*, 105 Mass. 342; *Park v. O'Brien*, 23 Conn. 576; *Dexter v. McCready*, 54 id. 171, 173-4; *Crowley v. Palen*, 65 How. Pr. 435; *Albert v. Bleeker Street R. Co.*, 2 Daly, (N. Y.) 389; *Elliott's Roads and Streets*, p. 628, citing *Bigelow v. Reed*, 51 Me. 325; *Bott v. Pratt*, 33 Minn. 325, and other cases; *Benoit v. Railroad Co.*, 77 Hun, 576; *Rolipillon v. Abbott*, 17 N. Y. St. Rep. 107. But it would be negligence to leave a horse, known to be liable to run away or unsafe and

*NOTE.—In New York it is provided by statute, title 13, chap. 20, part 1, 1 R. S. 695 (present Highway L., sec. 16), it shall not be lawful to leave horses attached to a carriage used for conveying passengers for hire, while the passengers remain therein, without first tying the horses, or by placing the lines in the hands of some other person, so as to prevent their running, and provision is made against the employment of drivers addicted to drunkenness and also that the owners of every carriage running or traveling upon any turnpike road or public highway for the conveyance of passengers shall be liable, jointly and severally, to the party injured in all cases, for all injuries and damages done by any person in the employment of such owner or owners as a driver, while driving such carriage, to any person, or to the property of any person; and that whether the act occasioning such injury or damage be willful or negligent or otherwise, in the same manner as such driver would be liable, but the above does not affect laws or ordinances concerning or regulating hackney coaches or carriages in cities. These provisions seem to be invokable by any other than a passenger, but not applicable to a street railway. *Whitaker v. Eighth Ave. R. Co.*, 51 N. Y. 295.

unmanageable, unhitched or unattended by a competent person. *Frazer v. Kimler*, 2 Hun, 514; *Wasmer v. D., L. & W. R. Co.*, 80 N. Y. 217; and see *Phillips v. Dewald*, 79 Ga. 732; and the fact that a horse hitched did get loose and run away was some evidence of negligence. *Strup v. Edens*, 22 Wis. 432.

Damages.—The owner of a horse, running away, on account of the negligence of such owner or his servants, or of a horse improperly used on the street is liable for the damages proximately resulting therefrom, although the injury was not caused by physical contact with such horse or vehicle connected with it. *Lowery v. Man. R. Co.*, 99 N. Y. 158, and cases thus considered; *Ferguson v. Ehret*, 10 Misc. (N. Y.) 217; *McDonald v. Snelling*, 96 Mass. (14 Allen) 290; *Powell v. Deveny*, 3 Cush. 300. See, also, *Newcomb v. Van Zile*, 34 Hun, 275; *Lee v. Union R. Co.*, 12 R. I. 383; *Engelbach v. Ibert*, 10 Misc. 555; “Domestic Animals,” *ante*, p. 1002; *Elliott’s Roads and Streets*, p. 629; consult *Wharton on Negligence*. Causal Connection, secs. 73-155, where the subject is considered on principle and authority. On proximate cause as related to horses running away, see, also, *Rolipillon v. Abbott*, 17 St. Rep. 107; *Stacy v. Phelps*, 47 Hun, 54; *Putnam v. N. Y. C. R. Co.*, *id.* 439.

The defendant used the track of another company, under a lease, the rails of which were laid by the defendant. The track was in a public street, and, through lack of filling, the street was not restored. A peddler left his horse unhitched, and it was frightened so that it ran and the wheel slid along on the projecting rail; the peddler tried to stop the horse by seizing a part of the harness. Just then the engine struck the wagon and the peddler was thrown on the track and killed. A recovery was sustained and it was held that it was not *per se* negligence to leave a horse unhitched, and such act was not the proximate cause. *Wasmer v. D., L. & W. R. Co.*, 80 N. Y. 212, *aff’g* judg’t for pl’ff.

It was proper to charge that “if the boys (who had teased and tantalized defendant’s horse, ordinarily gentle and docile, till it broke loose and ran away), were the sole cause of the horse running away, find for defendant. If the wrongful act of the boys would not have caused the running away of the horse, if the horse had been properly tied, the defendant is liable. If the wrongful act of the boys and the negligent manner of tying the horse, together combined, caused the injury, the defendant is liable.” *Thompson v. Plath*, 44 App. Div. 291.

By leaving a horse unhitched and unattended, defendant took the risk of its starting of its own accord. *Wagner v. New York Condensed Milk Co.*, 21 Misc. 62.

Defendant’s team, left unattended and unsecured in a public street, ran away colliding with plaintiff’s buggy. But plaintiff was estopped to

complain as his wagon was in the street contrary to ordinance. *Davis v. Kailfelz*, 22 Misc. 602.

Defendant held liable for the consequences of leaving a horse unhitched and out of reach. *Higgins v. Wilmington &c. R. Co.*, 1 Marv. (Del.) 352.

It was not *per se* negligent to leave a high-spirited horse unhitched. *Dexter v. McCready*, 54 Conn. 171.

Driver held not necessarily negligent in leaving his team unattended in the street in the dark, with the end of the wagon projecting beyond the middle thereof. *Nesbitt v. Crosby*, 74 Conn. 554.

Owner was liable for injury from horse untied in busy street, with owner six feet away watching him, running away, although fright was caused by third person trying to stop him, by throwing up hands and other demonstration. *Phillips v. Dewald*, 77 Ga. 732.

Moulton v. Aldrich, 28 Kan. 300; *Griggs v. Fleckenstein*, 14 Minn. 81; *McDonald v. Snelling*, 14 Allen, 292; *Lynch v. Merdin*, 1 Ad. & El., (N. S.) 29.

Horses hitched by lines within ten feet of a railroad ran away from fright and did damage. Owner liable. *Wagner v. Goldsmith*, 78 Ind. 517.

Leaving a gentle horse accustomed to being unhitched alone in the street a short distance from its driver, held not to raise a presumption of negligence. *Belles v. Kelner*, 67 N. J. L. 255.

Horses running away or uncontrollable:

The mere fact that horses being driven through a street run away raises no presumption of negligence. *Gottwald v. Bernheimer*, 6 Daly, 212, citing *Quinlan v. Sixth Ave. R. Co.*, 4 id. 487; *Rex v. Timmins*, 7 C. & P. 499; *Sullivan v. Scripture*, 3 Allen, 564; *Dressler v. Davis*, 7 Wis. 527; *Albert v. Bleecker St. R. Co.*, 2 Daly, 389; *Griggs v. Frankenstein*, 14 Minn. 81; *Colton v. Woods*, 8 Com. B. (N. S.) 566; *Hammock v. White*, 11 id. 588; *Goodman v. Taylor*, 5 C. & P. 410; *Cox v. Burbridge*, 13 C. B. (N. S.) 430; *Bigelow v. Reed*, 51 Me. 325. In this case the statement is not approved in *Unger v. Forty-Second Street R. Co.*, 51 N. Y. 500, that "the fact that the horses were unattended and unfastened in the street was unexplained evidence of negligence." It is stated in *Elliott's Roads and Streets*, p. 627, that if no explanation is given, the fact that a horse is running away imputes negligence, citing *Hummell v. Wester*, Bright (Pa.) 133; *Unger v. Railway Co.*, *supra*, and *Dickson v. McCoy*, 39 N. Y. 400, but the last case was that of a horse turned into the street, which would be regarded as a nuisance, and the doctrine of negligence would not be involved. *Doherty v. Sweester*, 82 Hun, 556. See "Domestic Animals," *ante*, p. 1009, also *Baldwin v.*

Ensign, 49 Conn. 113, 118; Goodman v. Gay, 15 Pa. St. 188; Fallon v. O'Brien, 12 R. I. 518; Decker v. Gammon, 44 Me. 322; Barnes v. Chapin, + Allen, 444; Cox v. Burbridge, 13 C. B. (N. S.) 430; Lee v. Riley, 18 id. 722; Moak's Underhill on Torts, pp. 296-7; but where without negligence of the driver a horse traveling upon the highway runs away and does damage, on the land of another, no liability arises. Brown v. Collins, 53 N. H. 442. And a person using the highway for the purposes of travel is only liable for damages for injury, caused by his horse running away thereon, where it is affirmatively shown that it was caused by his negligence. Quinlan v. Sixth Ave. R. Co., 4 Daly, 487; Gottwald v. Bernheimer, 6 id. 212; McCahill v. Kipp, 2 E. D. Smith, (N. Y.) 413, and cases above cited.

A driver's duty in restraining horses is not absolute, but only for the exercise of reasonable care. *Cadwell v. Arnheim*, 152 N. Y. 182.

That a pair of ordinarily gentle horses ran away through the act of boys in throwing snow balls, naturally calculated to cause their fright, was not sufficient evidence of a vicious disposition as to charge defendant with negligence in again using them. Nor was it negligence to run them from the right to the left side of the street in an effort to guide them, whereby the vehicle drawn was thrown in contact with the curbing. The driver in such emergency is only bound to exercise his best judgment, and negligence cannot be imputed from a mere error therein. *Benoit v. Troy &c. R. Co.*, 154 N. Y. 223; rev'g s. c., 9 App. Div. 622.

In an action to recover for injuries received from a runaway team of horses, the burden is upon the plaintiff to show his freedom from contributory negligence, but the fact that he continues on the right-hand side of the road, while the runaway team is approaching him on that side, does not establish contributory negligence on his part.

It is the duty of the driver of a runaway team of horses, when he finds that he cannot stop them, to guide them if possible to the right side of the road, in order to pass a vehicle going in the opposite direction, without a collision.

The driver of a vehicle on a road has a right to expect that the driver of a runaway team, traveling in the opposite direction, will make an effort to guide his horses to the right.

Where horses are running away and are beyond the control of the driver, and the driver uses due diligence and the best of his ability as a skillful driver to control the horses, and cannot control them, the law of the road as to which side the horses run on after they take fright does not apply. *Cadwell v. Arnheim*, 81 Hun, 39.

Horse ran away without negligence on the part of the owner. He was not liable. *Gray v. Thompkins*, 15 N. Y. Supp. 953.

A horse having run away on one day, on the following day did the

same, causing injury. Plaintiff's negligence was for the jury. *Wiley v. Palen*, 65 How. (N. Y.) Pr. 435; *Benoit v. R. Co.*, 77 Hun, 576.

While the plaintiff was crossing the street a horse, driven by defendant's servant, frightened by an elevated railway train, reared and shied in the direction of the plaintiff, throwing him violently against an elevated railway pillar. A verdict for the plaintiff was sustained on the ground that the jury may have found negligence on the part of the driver in controlling the horse or in the rate of speed in which he was driving, etc. *Van Houten v. Fleischman*, 1 Misc. 130.

Horse was unmanageable, but became so through careless driving. Held no defense. *Ford v. Whiteman*, 2 Penn. (Del.) 355.

It was not negligent *per se* to use a young and unbroken horse in a team. *Dunville v. Makensom*, 32 Ill. App. 112.

A vicious horse was driven into a place where several vehicles were gathered at a fair, and lashed with a whip. Recovery allowed. *Clore v. McIntire*, 120 Ind. 262.

Driver of a runaway team was not negligent where though unable to stop them, he succeeded in keeping them on the right side of a street until they came to a cross street where they collided with plaintiff emerging therefrom. *Holliday v. Gardner*, 27 Ind. App. 231.

Where one did not look behind to discover a runaway team in time to avoid it. His negligence was for the jury. *Moulton v. Aldrich*, 28 Kas. 300; *Undlejen v. Hastings*, 38 Minn. 485.

Defendant held not liable for a runaway not shown to have been started through his negligence. *Cunningham v. Belknap*, (Ky.) 60 S. W. Rep. 837.

The charge that if the plaintiff's horse was fractious, or he was physically unable to control it, he could not recover, was error. *Baltimore & C. R. Co. v. Cassell*, 66 Md. 419.

Where negligence in the management of a team was charged. Question was for the jury. *Tuttill v. Farington*, 58 N. H. 13.

A horse taken from the defendant without his knowledge ran away. Recovery denied. *Thorp v. Minor*, 109 N. C. 152.

By driving a dangerous and unmanageable horse, its owner takes the risk of the consequences. *Short v. Bohle*, 64 Mo. App. 242.

Defendant had not proper control of a green horse liable to shy at passing electric cars, driven in the dark at a twelve to fifteen mile an hour gait. *Flening v. Anawonscott Mills*, 22 R. I. 211.

An unlighted projecting pole in the middle of a road which set a horse to running, held the proximate cause of injury, and not the pole against which it ran. *Watts v. Southern Bell Teleph. & C. Co.*, (Va.) 40 S. E. Rep. 107.

Defendant held not negligent where his horse became unmanageable through the act of another. *Fron v. Thomas*, 70 Vt. 580.

If viciousness of plaintiff's horse contributed to the accident there may be no recovery. *Huntoon v. Trumbull*, 2 McCreary C. C. 314.

Frightening horses:

A person entitled to use the street for the purposes of travel, or for any other purpose, should observe care not to take or leave thereon objects calculated to frighten horses of ordinary gentleness, or if it be necessary to have or convey such objects on the highway due care should be taken to prevent injury from horses frightened thereby, by warnings of danger, assisting the driver of such horses to make a safe passage by the object, etc. It would often happen that a person would be entitled to notice that objects were calculated to frighten horses, but they might be of such appearance or nature as to justify the conclusion that the person exposing them, or from the manner of his exposing them on a street, was negligent. *Eggleston v. Columbia Turnpike Co.*, 82 N. Y. 281, rev'g 18 Hun, 146, on question of notice; *Stewart v. Porter Man. Co.*, 13 St. Rep. 220; *Champlin v. Village of Penn Yan*, 102 N. Y. 680, aff'g 34 Hun, 33, (*ante*, p. 1912); *Clinton v. Howard*, 42 Conn. 294, (pile of stones, witness may state what objects usually make horses shy, and how the frightened horse previously had been affected by objects in the way. The action is for nuisance). *Jones v. Railway Co.*, 107 Mass. 261, derrick projecting over highway; *Rowe v. Young*, 16 Ind. 312, reckless driving of another horse; *Riollet v. Summers*, 106 Penn. St. 95, must be horses of ordinary gentleness; *Gray v. Second Ave. R. Co.*, 65 N. Y. 561, horses frightened by snow plow, while driver was standing near by not holding; *Wasmer v. D., L. & W. R. Co.*, 80 id. 212, horse frightened by train caused injury on account of the projecting rails of the railroad track; *Bell v. Railway Co.*, 29 Hun, 561, horse scared by engine did damage by failure of defendant to restore street; *Seiber v. Amunson*, 7 Wis. 679, horses frightened by persons yelling at them; *Lake v. Milligan*, 62 Me. 240, horses driven on boards on highway were frightened; *Parker v. Union Co.*, 42 Conn. 399, whistle of factory cannot be blown so as to frighten horses; *Lawless v. Detroit &c. R. Co.*, 65 Mich. 292, drawbar of car; *Huntoon v. Trumbull*, 2 McCreary, (U. S.) 314, traction engine not in motion. For additional instances, see "Municipality," *ante*, p. 1912.

Plaintiff drove his horse up near defendant's steam roller in the street and began to unload his wagon when steam suddenly began to escape from its automatic safety valve, which frightened plaintiff's horse. Recovery was denied. *Rector v. Syracuse Rapid-Transit R. Co.*, 66 App. Div. 395.

Defendant was liable for leaving unguarded in the highway a roller which had broken down while being delivered to a city. Plaintiff's team took fright. *Mulholland v. McKeever*, 64 App. Div. 617.

The defendant drove his horse upon the towing path of a canal, where it was frightened at a boat rising in a canal lock, and ran away, coming in contact with the plaintiff's team on the highway and causing them to run away and injure themselves. In an action to recover damages for injuries there was evidence to show that the defendant's horse was newly owned by him and young, and that he was driven near to the lock in which the boat was rising, with full knowledge by the defendant of the danger. Held, that the court erred in refusing the plaintiff's request to charge the jury as follows, viz.: "That although the defendant was rightfully upon the towing path of the canal, so far as incurring a penalty to the state was concerned, yet he assumed the risk in driving there, and the question, whether or not it was negligence in driving there, is a question for the jury upon the proof." *Smith v. Clark*, 3 Lansing, 208, granting new trial after verdict for def't, for error in charge.

Proprietors of a factory are not allowed to use steam whistles in such a manner as is calculated to frighten horses. *Parker v. Union Co.*, 42 Conn. 399.

Boys removed a carcass from a safe place to the roadside whereby horse was frightened. Owner of the dog was notified of the removal. No recovery. *Davis v. Williams*, 4 Ind. App. 487.

Necessity to get an engine out of a place it was unnecessarily in was no defense to a violation of a statute requiring it to stop within 100 feet of a team. *State v. Kowolski*, 96 Iowa, 346.

Where plaintiff's horse, which, frightened by noise and hallooing in the street, slipped, fell and was killed, had escaped into the street through defendant's negligence, the latter was entitled to an instruction that he was not liable unless his negligence was the proximate cause of injury. *Lockridge v. Fesler*, (Ky.) 37 S. W. Rep. 65.

A person was liable for negligently placing boards in the highway whereon horses were driven and frightened. *Lake v. Milligan*, 62 Me. 240.

Defendant held negligent in leaving a hay cap calculated to frighten horses of ordinary docility, on the side of the road. *Lynn v. Hooper*, 93 Me. 46; s. c., 47 L. R. A. 46; id. 752.

Noises and spectacles calculated to do injury by frightening horses upon the highway made liable a person causing the same for such fright and subsequent injury. *Judd v. Fargo*, 107 Mass. 264.

Cole v. Fisher, 11 Mass. 137.

If a vehicle propelled by steam is lawfully on a highway, liability for

frightening horse therewith depends upon negligence in its use. *Macomber v. Nichols*, 34 Mich. 212; *Bennet v. Lovell*, 12 R. I. 166.

Bridge timbers removed in the course of repairs, piled along the highway, caused fright and permitted recovery. *Golden v. Chicago &c. R. Co.*, 84 Mo. App. 59.

Business was itself lawful, but was conducted in a manner calculated to frighten horses along the highway. Company held liable. *Valley v. Concord &c. R. Co.*, 68 N. H. 546.

The fact that defendant's traction engine frightened plaintiff's horse does not fix responsibility upon defendant. *Huntoom v. Trumbull*, 2 *McCreary* (U. S.) 314.

A person frightened horses by yelling at them and caused them to run away. He was negligent in so doing. *Sieber v. Amunson*, 78 Wis. 679.

5. BY PEDESTRIANS TOWARDS DRIVERS.

By children and defective people:

It is not negligence *per se* for the parents of a bright child, four and one-half years old, living in a crowded part of a city, with no other place of amusement, to permit the child, with proper instructions against going into the street, to play upon the sidewalk. The child ran into the street and was run over by defendant's wagon, heavily loaded and on a descending grade. It was the driver's duty to be vigilant in looking out for pedestrians in the street, and particularly at crossings, so as not to injure them. *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, aff'g 41 Hun, 404, and judg't for pl'ff.

As to children playing in the street, see "Contributory Negligence," *ante*, pp. 712, 722.

See, also, "Defective Persons," p. 701, and, see, also, *Neff v. Inhabitants, &c.*, 148 Mass. 487, where a blind man collided with a team on a quiet street and recovered; *Smith v. Wildes*, 143 Mass. 556, where a blind man fell into an unguarded hatchway in a walk and recovered; *Sleeper v. Sandown*, 52 N. H. 244, where a blind man walked off an unguarded bridge and recovered.

As to duty of driver, see *Murphy v. Orr*, 96 N. Y. 14; *Barker v. Savage*, 45 id. 191; *Mentz v. Railway Co.*, 3 Abb'ts App. Dec. 274; *Moebus v. Herrmann*, 108 N. Y. 349; *Belton v. Baxter*, 54 id. 245; *Baxter v. Second Ave. R. Co.*, 30 How. Pr. 219; *Farris v. Cass Ave. R. Co.*, 8 Mo. App. 588.

Negligence of a boy of six while playing in the middle of the street, was for the jury. *Thies v. Thomas*, 77 N. Y. Supp. 276.

So was the negligence of a boy of eleven, playing with others about a sprinkling cart without looking out for the approach of other vehicles. *Glickson v. Shannon*, 88 Ill. App. 240.

A child suing in its own behalf cannot be charged with the negligence of its parents. *South Covington &c. Street R. Co. v. Merrklotz*, 104 Ky. 400.

Act of boy of twelve in standing in the street four or five feet from the curb, knowing that teams were liable to pass at high speed, held not *per se* diligent. *Bresnehan v. Gove*, 71 N. H. 236.

As to keeping a lookout:

A person was knocked down while crossing a street upon alighting from a car. The plaintiff was not chargeable with notice that the street in that locality was one where it was customary to test the speed of fast horses, although her residence was near and she was accustomed to ride up and down in the cars. The defendant was held liable by the jury. *Moody v. Osgood*, 54 N. Y. 488.

While one who is mixing mortar in the street under a permit to his employer to deposit building materials therein adjacent to the premises, is not negligent *per se* in being there, he is bound to use diligence in avoiding danger, especially in looking out for teams. *Lyon v. Avis*, 5 App. Div. 193.

Pedestrian was negligent in stepping into the street at dusk, to look for a car from one direction without looking for vehicles in the other. Was struck by a runaway horse. *Kelley v. Adehmann*, 72 App. Div. 590.

The rights and duties of pedestrians and drivers upon a street are correlative, and each owes a duty to the other to avoid an accident.

Plaintiff was run over and injured by a wagon belonging to the defendant. In an action to recover for such injuries plaintiff testified that the wagon came around the corner and ran over him, while the driver of the wagon testified that he drove along the street and in plain view of plaintiff for some distance. Held, error to refuse to charge that if the view was unobstructed and the wagon in plain sight, it was evidence of negligence if plaintiff did not see it approaching. *Eckensberger v. Amend*, 10 Misc. 145. (See *ante*, p. 760.)

A woman crossing the street in a sun-bonnet assumed that she would not be struck by wagon back of her. Her negligence was for the jury. *Shea v. Reams*, 36 La. Ann. 966.

It was not *per se* negligent if pedestrian, in crossing, did not look up and down street. *Bouser v. Wellington*, 126 Mass. 391.

Negligence in failing to look before crossing was for the jury, where it was known that coasting was practiced on the street, though not that it might be uncontrollable. *Burt v. Staffeld*, 121 Mich. 390.

As to running ahead of vehicles:

The plaintiff saw a car on the street and behind it a cart moving more rapidly; he calculated that he could cross safely and ran ahead of the

car, but the cart turned out, and, going past the car, hurt the plaintiff. Plaintiff should have been nonsuited. *Belton v. Baxter*, 54 N. Y. 245, rev'g judg't for pl'ff.

After trial it was held that the evidence did not exclusively establish, nor was it necessary to be inferred therefrom, that the plaintiff knew or had reason to believe, at the time of his attempt to cross, that the cart had turned off and was passing the car, and that the question of contributory negligence was one of fact for a jury. *Id.* 58 N. Y. 411, rev'g a nonsuit.

Deceased was not negligent in running ahead of a wagon suddenly come upon him to get out of the way, instead of stepping backward, acting as he did in a sudden emergency. *Canton v. Simpson*, 2 App. Div. 561.

See, also, *Healey v. Ehret*, 42 App. Div. 27, *ante*, p. 2345, "Care by Drivers Along Streets."

Not negligent to make a prudent attempt to stop a horse to save the lives of small children. *Manthey v. Ravenbuehler*, 75 N. Y. Supp. 714.

The fact that a person crossing a street fails to observe an approaching wagon by which he is injured does not impute contributory negligence to him as matter of law, as the duty of looking both ways is not imposed by law upon him. (*Moebus v. Herrman*, 108 N. Y. 349) *Reens v. The Mail &c. Co.*, 10 Misc. 122.

Plaintiff, frequently warned, was knocked down while walking in front of a team of horses in charge of experienced teamster, frightened at a passing train. Held negligent. *Wolfskill v. Los Angeles R. Co.*, 129 Cal. 114.

Plaintiff seeing a runaway coming attempted to cross the street to avoid it, but got stuck on defective rails. She then got out to ward off the blow. The defective rails were held to be the proximate cause of her injury. *Rock Falls v. Wells*, 169 Ill. 224; aff'g s. c., 65 Ill. App. 557.

In moment of confusion injured person ran in front of team driven on a trot. Recovery not allowed. *Perrin v. Devendorf*, 22 Ill. App. 284.

Plaintiff was not negligent in stepping in front of his own team to prevent its taking fright at a runaway team where there was no apparent danger until the latter were unexpectedly swerved toward him by some one running in front of them. *Hall v. Huber*, 61 Mo. App. 384.

V. Navigable Highways.

"E.," plaintiff's intestate, with "J.," her husband, was crossing Buffalo river in the night time, in a small scow which "J." was sculling, when the scow was struck and sunk by a steam-tug belonging to defendant, and "E." was drowned. In an action to recover damages, plaintiff's evidence

tended to show that "J." was nearly blind, and able-bodied and familiar with the management of small boats; that he had been accustomed to cross the river daily, with his wife, at that place and hour, he sculling and she giving directions; that it was usual for persons to be on the water in that kind of water craft; that the night was not so dark but that an object the size of the scow could be seen one hundred feet away, also that there was a lighted lantern in it; that "J." called to those on defendant's tug, it was not stopped or its speed slackened, but it sheered from its course towards the scow; that if it had kept on in a straight course the collision would not have happened.

The evidence justified a finding of negligence on the part of those managing the tug, it was their duty to keep a lookout ahead, and it was inferable from the evidence that this was not done; also the facts that deceased was upon the water in the night time, and in the scow, or that she was with a blind man to propel and turn the scow did not establish contributory negligence, as a matter of law; but the question was properly submitted to the jury. *Harris v. Uebelhoer*, 75 N. Y. 169, aff'g judg't for pl'ff.

From opinion.—"We must assume that the creek, across which the plaintiff's intestate was moving, was a public highway. As such, it was as much open to the use of a blind man as one having eyesight. A public highway is liable to use, and may be of right used in the darkest night; a night so dark as that the keenest and clearest vision would not be able to detect obstacles and defects. In such case, every man traveling upon it is practically a blind man. Yet if he be injured by an obstacle or defect, without the absence of what, in the circumstances, are ordinary prudence and care on his part, he is not remediless."

SUNDAY—INJURY RECEIVED ON.

The mere fact that a person receives an injury *during the time* that he is disobeying a penal statute, as for instance statutes intended to preserve the tranquillity and repose of the Sabbath, does not necessarily and under all circumstances preclude him from recovery therefor, if otherwise entitled to do so. If, however, the injury arise while the injured person is doing an act prohibited on Sunday, and the injury results in part directly from the doing of the penal act, no recovery can be had against one whose negligence contributed thereto. Mere presence at the place where the injury was received, whereby opportunity is afforded for independent agencies to produce the injury, has been held in New York not to be such a tortious contribution to the injury as would prevent a recovery, but there has been much uniform decision to the contrary in New England, as applied to injuries while traveling on railways or a highway. If recovery be sought on the ground that the offending person omitted some duty springing from and depending upon contract, a recovery cannot be had if the contract be void and illegal on account of its involving the doing of an act prohibited to be done on Sunday. It has been held in New England that a passenger on a train of cars, not traveling for purposes of charity or necessity, could not recover for injury done on Sunday by his own carrier or another. But the court of appeals of New York has held that the duty of a common carrier, to use due care to safely convey its passengers, does not arise out of any contractual duty to the passenger, but from a duty owing to the public, and hence the mere violation by the passenger of the law against traveling on Sunday, is not a defense to an action based on a breach of the public duty, and that the mere presence of the passenger in the cars, not participating in doing the act from which the injury arose, but while he was in a passive and powerless condition, whereby an opportunity was furnished for the reception of the injury, did not constitute such contributory wrong as to prevent recovery. Other considerations influenced the decision. The same difference of judgment exists as to injuries received from defective streets while unlawfully traveling on Sunday, the New York holding being to the effect that the public duty to keep the street in repair must be observed, although some travel thereon in disobedience of the Sunday law.

In the case of master and servant it is held, but not uncontradictedly, that if the master and servant contract for doing an act by the latter forbidden on Sunday, and the doing of the act itself is a causative force in producing the injury, no recovery can be had. This is a necessary conclusion, (1) because the master is not chargeable for the nonperformance of duties growing out of and dependent upon a void and unlawful contract of hiring; (2) because the servant cannot recover for injury arising from the performance by himself of an act which it is a crime to do. In the case of injury arising from a pure tort, it is not a defense that an opportunity was given by the plaintiff to commit it on Sunday, as where property is hired on that day, and the bailee converts it. The rule seems to be that when the illegal act is entirely separate from the act which did the injury, it should have no influence upon the remedy for the injury, and to

this extent some of the earlier decisions are modified. *Spafford v. Harlow*, 3 Allen 176; *Chester v. Burkhardt*, 104 Mass. 69; *Keans v. Saunders*, 105 id. 63; but the decisions are very conflicting.

The acts regulating the observance of the Sabbath, are remedial statutes, and to be construed liberally in respect to the mischiefs to be remedied. *Smith v. Wilcox*, 24 N. Y. 354; *Northrup v. Foot*, 14 Wend. 249.

Cases pertaining to this topic may be distributed into five classes.

(1). The first class embraces cases where a passenger, or property, on a railway is injured while traveling, or being transported or shipped, on Sunday.

Falling under this class is *Carroll v. S. I. R. Co.*, 58 N. Y. 26, where a passenger riding upon a railing on Sunday was allowed to recover. This opinion, as well as the others in the state of New York should be studied, if one would have a correct knowledge of the attitude of the court towards this question.

The Court said:

"But the defendant had a right to carry him, and to enforce the payment of the usual compensation, if payment was refused, notwithstanding the illegal purpose of the plaintiff in going, if it was unknown to the defendant. This, I think, results necessarily from the character of the defendant's business. It exercises a franchise granted by the state to maintain and operate a ferry between New York and Staten Island. It is not prohibited by its charter from running it on Sunday. Indeed, the public convenience requires that ferries between cities, or places densely populated, separated by rivers or narrow water channels, should be run on Sunday. The statute authorizes travel on that day in cases of necessity and charity, and in going to and from church, and for other purposes; and for these permitted purposes large numbers of persons travel on Sunday. Contracts to carry persons who are permitted to travel must be valid. The proprietors of ferries cannot know the purpose of those who seek conveyance on Sunday, and it would be impracticable to require that they should ascertain it before receiving persons as passengers. The defendant, therefore, is entitled to demand compensation for the carriage of passengers on Sunday, although, in fact, they may be traveling illegally. There is no evidence that the defendant, when it received the plaintiff as a passenger, knew that he was traveling in violation of the law." * * *

"The contract (of carriage) between the parties was not, in a broad or general sense, illegal or void. Can the defendant, under such circumstances, having entered into a contract which he might lawfully make, escape liability for a negligent performance on account of the motive and purpose of the other parties in making it? But we deem it unnecessary to decide the question, which was argued with great ability by counsel, touching the liability of the defendant in the case, and treating it as found upon the contract between the parties. The gravamen of the case is a breach of duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. This duty exists independently of the contract, although there is no contract in the legal sense between the parties. Whether there is a contract to carry or the services rendered are gratuitous, an action lies against the carrier for injury to a passenger. The law raises the duty out

of regard for human life, and for the purpose of securing the utmost vigilance by carriers in transporting those who are committed to their hands."

In *Bretherton v. Wood*, 3 Brod. & Bing. 54, which was an action brought against ten defendants as proprietors of a coach for injury sustained by the plaintiff, a passenger, in consequence of negligence in driving, the jury found a verdict against eight of the defendants and in favor of two. The judgment was affirmed, and Allen, C. J., said: "If it were true that the present action were founded on contract so that a separate contract must have been proved, the objection would have deserved consideration; but we are of the opinion that the action is not so founded, and that on the trial it could not have been necessary to show that there was any contract; and, therefore, that the objection fails. The action is on the case against a common carrier upon whom the duty is imposed by the custom of the realm, or, in other words, by the common law, to convey and carry their goods and passengers safely and securely, so that by their negligence or fault no injury happens. The breach of this duty is a breach of law, and for this breach an action lies, founded on the common law, which action wants not the aid of contract to support it. * * * This case, therefore, is not within the principle of many of the cases cited which forbid a recovery upon a contract made in respect to a matter prohibited by law, or for a cause of action which requires a proof of an illegal contract to support it."

Previous to this decision was *Merritt v. Earle*, 29 N. Y. 115, where horses were put on board a steamer for transportation on Sunday, the freight paid and receipt taken. The court held that a contract made on Sunday was not void, and to invalidate a contract made for transportation under the statute the contract must necessarily require the act to be performed on Sunday, which the contract did not in that case; but that, in any case, whether the contract was good or bad, the recovery against the carrier could be sustained because the liability of the common carrier did not arise on contract, but was a liability imposed by law and had its foundation in the policy of the law, and that it was upon this legal operation that the defendant was chargeable as carrier on the loss of property intrusted to him, (p. 122). This follows precisely the holding in *Carroll v. S. I. R. Co.*, *supra*, and for precisely the same reasons.

These decisions accord with the general rule of law that the obligation of the carrier arises from a public duty. See "Common Carrier of Goods," p. 197.

In *Shelton v. M. D. T. Co.*, 59 N. Y. 258, it was held that the fact that goods were unloaded on Sunday, in absence of proof that, by the law of another state, where the accident happened, it was unlawful, did not prevent recovery.

A ride for pleasure on a street car is not "recreation." *Horton v. Norwalk Tramway Co.*, 66 Conn. 272.

In *W. U. Tel. Co. v. Wilson*, 108 Ind. 306, it was held that one presenting a dispatch for transmission and delivery on Sunday could not recover the penalty prescribed by revised statutes of 1887, §§ 41-76, for neglect or delay of the company in its transmission.

A person returning from work on Sunday was injured by negligence of defendant and recovered. *Illinois Cent. R. Co. v. Dick*, 91 Ky. 434.

In *Wallace v. Merrimac &c. Co.*, 134 Mass. 95, it was held that for a pleasure boat negligently run down no recovery could be allowed unless the injury was produced through wantonness and malice.

The courts of Massachusetts have uniformly held that a passenger on a railway injured while traveling on Sunday contrary to the prohibition of the statute could not recover. *Day v. Highland Street R. Co.*, 135 Mass. 113. Conductor of one street car company while engaged in his duties was injured by car of another company.

Stanton v. Met. R. Co., 14 Allen, 485; *Smith v. Boston &c. R. Co.*, 120 Mass. 490; *Bucher v. Fitchburg R. Co.*, 131 Mass. 156.

But by statute, (1884, chap. 37) the rule was changed.*

That the injury from railroad's negligence, was sustained on Sunday, was no defense under the Massachusetts statute. *Jordan v. New York &c. R. Co.*, 165 Mass. 346.

In *Opsahl v. Judd*, 30 Minn. 126, the injury was to a passenger, and the decision was placed upon the ground that the general obligation of the carrier to use due care, as the law enjoins upon carriers, is not determined by the contract or engagement with the passenger, but upon considerations of public policy.

Citing *Carroll v. S. I. R. Co.*, *supra*.

Under New Jersey statute prohibiting Sunday traveling save for necessity or charity, with the proviso that railroad companies may run one train each day for the accommodation of travelers, a passenger, though not traveling for necessity or charity, recovered for an injury, through negligence of company. *Smith v. N. Y. & S. R. R. Co.*, 46 N. J. L. 7.

The fact that the owner of goods wished transportation of them for sale on Sunday, contrary to law, does not excuse delay of carrier to transport according to the terms of his contract. *Waters v. Richmond &c. R. Co.*, 110 N. C. 338.

Where goods were landed by a steamboat and deposited on Sunday in the warehouse of a connecting railroad, which was under contract to continue the carriage, and the goods were burned on the same day, the court had no authority to declare the goods forfeited, even admitting that the acts of landing and depositing the same and of opening and closing the warehouse on Sunday were within the prohibition of a statute of the state against labor. *Powhatan Steamboat Co. v. Appomatox R. R. Co.*, 24 How. (U. S. S. C.) 247.

*NOTE.—The provisions of chapter ninety-eight of the public statutes, relating to the observance of the Lord's day shall not constitute a defence to an action for a tort or injury suffered by a person on that day.

(2) The second class includes those whose services are performed upon Sunday.

That one is laboring in a mine contrary to statute does not deprive him of the right to recover for negligence. *Taylor v. Star Coal Co.*, 110 Iowa, 40.

Physician is not precluded from recovering, because his services were rendered on Sunday. *Re Staggers Estate*, 8 Pa. Super. Ct. 260.

Deceased was working in violation of statute. It was not a necessity within the exception mentioned in the statute, and recovery could not be had for defendant's negligence. *Hoadley v. International Paper Co.*, 72 Vt. 79.

Keepers of a drawbridge are excepted from the statutory prohibition of manual work on Sunday. *Boland v. Combination Bridge Co.*, 94 Fed. Rep. 888.

(3) The third class embraces those where a person traveling on a highway on Sunday has been injured on account of defective highway.

The second class of cases includes those where a person traveling on Sunday on a public highway or navigable stream has received injury. The leading case in New York is *Platz v. Cohoes*, 89 N. Y. 219; 24 Hun, 1, where a person driving on a public street was injured by a defect therein.

The court said that there was "no principle upon which it could be held that the right to maintain an action in respect to special damages arising from the omission of the defendant to perform a public duty is taken away because the person injured was, at the time, disobeying a positive law." That it must appear that the disobedience contributed to the accident and that the mere presence of the plaintiff at the time of the accident was not sufficient to constitute such a contribution. And here again the duty results not from the relation of the parties, but is a duty created by public law, and, so owing to the public, and it was the duty of the municipality to so keep the highway in repair whether the persons abroad were so for a good or forbidden purpose. In such case, the opinion states that "there are decisions by very eminent and learned courts contrary to this holding," (cited *Townsend v. Irasburgh*, 47 Vt. 28; *Holcomb v. Town of Danby*, 51 N. Y. 428; *Bosworth v. Swansey*, 10 Metcalf, 363; *Jones v. Andover*, 19 Allen, 18); and stating that while there was "conflict in cases," yet that the weight of authority seems to favor the conclusions reached.

It will be seen that in this as in the first class of cases just considered the relation was not contractual, and in both instances the duty was one owed to the public generally and not to the person injured specially.

The rule laid down in the Platz case was also observed in the following cases, where the injury arose to a person using a public highway, or navigable stream, injured by an obstruction unlawfully placed therein. *Philadelphia, W. & B. R. Co. v. Havre de Grace Steam Tow Boat Co.*, 23 How. (U. S. S. C) 209. (Where a boat was injured by obstructions unlawfully left in a stream by the defendant, which followed Mahoney

v. Cook, 26 Pa. 342, which was an injury to a boat, navigating a river, by obstruction therein.) Schmid v. Humphreys, 48 Iowa, 652, (defendant's dog frightened plaintiff's horse on the highway).

Where an injury occurred to a traveler while traveling on Sunday on a defective highway a recovery was allowed, and the question was discussed and cases considered in Sutton v. Town of Wauwautosa, 29 Wis. 26, where the cases are said to be founded on two principles, viz.: (1) That one party to an action, when called upon to answer for the consequences of his own wrongful act done to another, cannot allege or rebut the separate or distinct wrongful act of the other done not to himself nor to his injury, and not necessarily connected with or leading to, or causing or producing the wrongful act complained of; and, (2) that the fault, want of due care, or negligence on the part of the plaintiff, which will preclude a recovery for the injury complained of, as contributing to it, must be some act or conduct of the plaintiff having the relation to that injury of a cause to the effect produced by it.

See, also, Sewell v. Webster, 59 New Utah, 586; Black v. Lewiston, Idaho Sup. Ct. 13; Pac. R. 80; Baldwin v. Barney, 12 R. I. 392; 34 Am. Rep. 670.

The contrary is held in numerous cases. Lyons v. Desotelle, 124 Mass. 387.

Day v. Highland Street R. Co., 135 Mass. 113; Holcomb v. Town of Danby, 51 Vt. 428; Jones v. Andover, 10 Allen, 18; Johnson v. Irasburgh, 47 Vt. 28; Bosworth v. Swansey, 10 Metc. 363; Davis v. Somerville, 128 Mass. 594.

One is not traveling on Sunday in contravention to statute, where, being an invalid she is taken for a ride for her health. Cleveland v. Bangor, 87 Me. 259.

Prior to the Maine act of 1895, no recovery was allowed for injury received while so driving, as the injury was held to be directly attributable to the violation of the law. Beacham v. Proprietors &c., 68 N. H. 382.

(4) The fourth class of cases embraces those where a servant, while doing an act prohibited on Sunday, is injured by failure of his master to observe for his protection the care usually required by the contractual relation. The argument against recovery would seem to be this.

The relation of master and servant can only arise from contract, express or implied. (See "Master and Servant," p. 1386.) It is a rule of quite usual observance that all contracts to do an act forbidden by law are void; and if the contract provide for doing on Sunday acts forbidden by a penal statute to be done on Sunday, such a contract is void. The argument in support of a recovery has been that although the contract be void, and the doing of the acts provided by it be punishable as a crime, yet if a master and servant undertake to do the penal acts, the master must use the reasonable care to fulfill all the duties that would

spring from the contract if it were not void. Those asserting this rule would hold, that if "A" furnish the cloth to and employ "B" to make a coat on Sunday (not a work of necessity or charity), while conceding that the contract would be void, and that "B" could not recover compensation for making the coat, would still maintain that, if "B," by his negligence, should injure the coat in an attempted fulfillment of the contract "A." might recover against him the damages resulting from such negligence.

Such argument necessarily is that duties derived from a contract, that is invalid, are themselves obligatory. Hence there can be no defence on the ground that the master did not owe the duty upon the breach of which the action is founded.

This argument has no logical or legal foundation.

"If "A" and "B" engage to do an act on Sunday, prohibited on that day, the day gives to the act an unlawful quality. If "A," a master, by his contract, express or implied, undertakes to furnish "B," his servant, machinery or appliances to do forbidden work, the contract is void, and the relation of master and servant must always arise out of contract. This is necessarily the logical condition.

(1) "A" and "B" agree to do a penal act.

(2) "B" agrees, as a contractual duty, to furnish reasonably safe machinery to do the act.

(3) It cannot be said that although the act is penal, the duty still rests on "A" to so furnish safe machinery that "B" may safely do the penal act? Such a holding transgresses the rule that there is no duty to an unlawful act. *Carpenter v. Cohoes*, 81 N. Y. 21.

Veeder v. Little Falls, 100 N. Y. 343.

But not only is recovery prevented upon the ground just stated, viz.: that the master owes no duty dependent upon a void contract, but the principle of law is also fatal to the recovery that the servant cannot have relief for an injury received while doing, and arising from doing, a penal act. In this respect the question of negligence is not involved. It is the mere question of applying the common law rule that a violator of the law cannot invoke the law. *Simpson v. Bloss*, 7 Taunton, 246.

Booth v. Hodgson, 6 T. R. 405; *Stokes v. Twitchem*, 8 Taunt. 492; *Howson v. Hancock*, 8 T. R. 575; *Worcester v. Eaton*, 11 Mass. 368; *Babcock v. Thompson*, 3 Pick. 446; *Dwight v. Brewster*, 1 id. 50; *Wheeler v. Russell*, 17 Mass. 258; *Van Dyck v. Hewitt*, 1 East. 96; *March v. Abel*, 3 B. & P. 35; *Fivaz v. Nicholls*, 2 M. G. & S. 500; *Roby v. West*, 4 N. H. 285.

The court of appeals of New York has said (*Jetter v. N. Y. &c. R. Co.*, 2 Abb. Ct. App. sec. 458), "it is an axiomatic truth that every person, while violating an express statute, is a wrong-doer, and, as such, is *ex necessitate* negligent in the eyes of the law; and every innocent party

whose person is injured by the act which constitutes the violation of the statute is entitled to civil redress for such injury, notwithstanding any redress the public may also have." *Saulisbury v. Herchenroder*, 106 Mass. 458.

It may be urged that where a penalty is attached, the penalty is exclusive of any other damage or forfeiture, but whatever *dictum* there is of this kind has been thoroughly overruled. *Jetter v. N. Y. &c. R. Co.*, 2 Abb. Ct. App. Dec. 458.

Carroll v. B. C. & R. Co., 38 Iowa, 120; *Develin v. Gallagher*, 6 Daly, 494; *Beisegal v. N. Y. &c. R. Co.*, 14 Abb. Pr., (N. S.) 29; *McGrath v. N. Y. &c. R. Co.*, 63 N. Y. 522; *Massoth v. D. & H. C. Co.*, 64 id. 524; *Ryan v. Thomson*, 38 Supr. Ct. 135.

It may be that the doing of the forbidden act must be, to some degree, a causative force in effecting the injury, that is, the injured person must be actively participating in the illegal act out of which the injury arises; so that if the illegal act is existing separate from the act which did the injury, it should have no influence upon the remedy. The exact legal situation is illustrated by an authoritative case in Massachusetts, which, as incorrectly stated in *Solarz v. Manhattan R. Co.*, 8 Misc. 656, (N. Y.) was not founded on the peculiar laws of Massachusetts, but is based on broad and essential rules applicable to all penal acts.

In *McGrath v. Merwin*, 12 Mass. 469, the plaintiff was injured while engaged on Sunday in digging sand from a wheel-pit in order to save the necessity of stopping the mill on a week day, and it was held that the defendant by his own illegal act contributed to the injury and that he could not recover. The opinion, among other things, says:

"The decisions in this commonwealth are numerous and uniform to the effect that the plaintiff, being engaged in a violation of law, cannot recover, if his own illegal act was an essential element of his case as disclosed upon all the evidence. The cases upon this subject are reviewed in *Myers v. Meinrath*, 101 Mass. 366; *Hall v. Corcoran*, 107 id. 251, and *Cranston v. Goss*, id. 439. The rules of law as applied to actions of tort for injuries, like the case at bar, are, that if the illegal act of the plaintiff contributed to his injury he cannot recover; but though the plaintiff at the time of the injury was acting in violation of law, if his illegal act did not contribute to the injury, but was independent of it, he is not precluded thereby from recovery. Of the latter class are the cases cited by the plaintiff of *Spofford v. Holmes*, 3 Allen, 176; *Stube v. Burkhardt*, 104 Mass. 59; *Kearns v. Sowden*, id. 63. But the case at bar falls within the first-named class of cases. The illegal act of the plaintiff was inseparably connected with the cause of action and contributed to his injury. The difference between the two rules may be illustrated by supposing the plaintiff, while engaged in his work, to have been assaulted by a stranger; he could maintain an action therefor, because his violation of law had no connection with the trespass. The two are contemporary facts, but the one has nothing to do with the other. He could show a complete cause of action independently of his own violation of law. But upon the facts of this case it is different. The plaintiff and defendant

were engaged in mutual illegal work, and the accident which happened was one of the incidents and risks of the employment. The plaintiff was participating in an illegal work, which led to the injury he sustained, and the law will not aid him to recover damages for the consequences of his own illegal act."

The vice of the argument that would allow a recovery to one injured from doing an act forbidden on Sunday, is illustrated by applying such a rule to misdemeanors, as found in the statutes of any state.

By section 317 (N. Y. Penal Code), a person who prints an indecent article is guilty of a misdemeanor. If an employe were injured on his master's press, by the latter's negligence, while knowingly preparing those prints, could he recover against the master?

In *Railroad Co. v. Buck*, 116 Ind. 566, it is said when he (the plaintiff) "can prove his cause of action without proving that he was violating the law, even though it appears, incidentally, that he was acting at the time in disobedience of some statute, and unless his illegal act was the efficient or proximate cause of the injury complained of, or unless the illegal act or contract is the foundation of his action, a recovery can be maintained nevertheless." By this rule the employe injured at such a time could show that he was engaged to manage the printing press, and that while so using it the injury occurred. The moral quality of the article in the course of publication would be no part of the plaintiff's case, and would not appear unless the defendant should make it a part of the record; yet, here, the plaintiff, in using the property for a purpose absolutely prohibited by the statute, was subject to punishment for such violation. The argument for an injured plaintiff should be, that, had he been engaged in the publication of the most delicately chaste literature, the accident would have happened quite the same, and that the moral quality of the work on which he was engaged should not effect his recovery; yet, the fact remains that he was using machinery constructed for a useful and proper purpose to prepare an article that was forbidden by law, and it could not be doubted that when such fact appeared the law would refuse him redress.

Section 319 provides that a person who commits such indecent print to a carrier for transportation is guilty of a misdemeanor. Assume that through the negligence of the carrier such articles so committed to him were injured; in that case, of course, no recovery could be had. Let us suppose, in addition, that the owner of this indecent literature, while delivering such prints into the car of the carrier, was injured through the negligence of the carrier's servant. Here the injured man, while in the course of doing an illegal act, is harmed. The illegal act does not consist in delivering the package to the carrier, but in delivering the package of paper upon which is written or printed an article, the moral nature of which has led to a prohibition against it. According to the opposite view, he would have been so injured had he been delivering an article entirely unobjectionable, and the nature of the article in no way contributed to his injury, and the defense would be discarded as a mere moral delinquency that could not, by its very nature, "contribute to the injury." But the fact remains that he was doing an act forbidden by law, and while doing that very act received injury of which he complained.

Section 343 forbids a person to keep a building for gambling. If such person's servant should be injured while about such duties in the building, aiding and abetting the gambling, could he recover?

Section 353 forbids horse-racing for a wager. If a horse racing under such circumstances were injured by the negligence of one in charge of the other horses, could he recover against the negligent person?

Section 401 prohibits adulteration of food, drugs and liquors. If a servant were knowingly aiding his master to do this and was injured by the machine furnished negligently by his master, could the servant recover?

Section 458 forbids prize-fighting. If a servant were knowingly fitting a platform for a prize-fight and were injured by the breaking or falling thereof through his master's negligence, could he recover?

It is true that it is perfectly proper to build platforms at proper times and for proper purposes, and it is certain that the purpose for which the platform was in the course of construction in no way contributed to the accident, yet the fact remains that the act itself, which the servant was doing at the time he received the injury, was condemned by the law as a criminal act, and that while creating an instrumentality for the furtherance of that criminal act he received harm.

The law requires a person cutting ice to guard the openings with fences, and if he does not do so, he would be liable to innocent persons injured thereby. Suppose the injured person were there to convert the ice, would the liability still exist? If so, why not? The motive with which a person does an act, according to the argument of the cases adverse to the position contended for at present, is of no consequence; it cannot operate to produce harm, and yet such wrong-doer could not recover under such circumstances. Suppose the injured person were there on the Sabbath day to cut the ice, in violation of the statute against such work, could a recovery then be had? *Hargreaves v. Deacon*, 25 Mich. 1; *Levy v. Cleveland &c. R. Co.*, 78 Ind. 323.

Perhaps the most complete illustration which arises would be in connection with the sale of liquor on the Sabbath day, when it is forbidden. If on that day the servant, while in violation of this statute, were injured by the negligence of the master, in providing appliances necessary for the performance of the servant's duty, could recovery be had by the servant?

The sale of liquor, if licensed, is a lawful occupation on any day of the week save Sunday. The work contracted for by a master with his servant may be lawful on every day of the week except Sunday. These two, then, stand in precisely the same relation—neither occupation being an offense at common law. The statutes are simply *malum prohibitum* in each case. Would it be for a moment thought that if a master furnished a servant with improper appliances for selling liquor on Sunday (for instance a defective beer pump), and the servant were thereby injured in the course of his employment, that he could recover against the master on account of the breach of the master's duty?

There are cases holding apparently a different rule:

In an action for personal injuries caused by negligence of the master, the fact that such injuries were sustained while working on Sunday cleaning a railway blacksmith shop, is no defense, where the performance of the work on that day was required by the master. *Solarz v. Manhattan R. Co.*, 8 Misc. 656, *aff'd* by general term (Supr. Ct. N. Y. City), 11 Misc. 715.

See cases collected in opinion, 8 Misc. 656.

Fact that one sustaining an injury by the negligent act of another may have been, at the time of such injury, acting in disobedience of the Sunday laws of the state did not prevent recovery from the one whose negligent act was the proximate cause of the injury. The plaintiff was a switchman on defendant's railway. *Louisville &c. R. Co. v. Frauley*, 110 Ind. 10.

A car coupler was hurt while uncoupling cars on Sunday, and recovery was allowed. *Louisville &c. R. Co. v. Buck*, 116 Ind. 566.

It should be observed that the operation of railway trains is not necessarily within the prohibition of Sunday statutes, as such operation may, and is sometimes held, to be a work of necessity or charity; hence an operator engaged in such operation may not be doing a forbidden act. The Indiana cases may be maintainable on that ground. *Carroll v. S. I. R. Co.*, 58 N. Y. 26.

And so, also, it was held that a person injured by the negligence of a railway company who was, at the time, engaged in, or was returning from, work which he had been doing on Sunday in violation of law, would not prevent a recovery where the work in which he had been engaged did not contribute to the injury. *Illinois Central R. Co. v. Dick*, 12 Ky. L. R. 772.

Where a servant was injured loading a vessel on Sunday it was held that such loading came under the exception to the statute forbidding "common labor" on Sunday and was a "work of necessity," as navigation was about to close. *McGatrick v. Wason*, 4 Oh. St. 566.

Persons who are fellow-servants of a railway company do not, in view of the rule which affects the liability of the company to one of them who may be injured by another one, cease to be such because the work on which they were employed at the time of the injury was being done on the Sabbath. The fact that the work was not of the character allowed by law to be done on the Sabbath does not affect the question. *Houston St. R. Co. v. Rider*, 62 Tex. 267.

The argument on this side of the question is presented and cases discussed in *Sutton v. Town of Wauwautosa*, 29 Wis. 26, *ante*, p. 2377.

(5) The fifth class of cases embraces those, where a pure tort has been committed against the plaintiff on Sunday.

An action for deceit in the sale of a horse, when the sale took place in the state of Connecticut on Sunday, could not be sustained either as founded on deceit or upon the contract of sale. *Northrup v. Foote*, 14 Wend. 249.

In *Grant v. McGrath*, 56 Conn. 333, false warranty on a sale made on Sunday could not be maintained.

In *Kelly v. Cosgrove*, 48 Iowa, 979, one who illegally sells property on Sunday cannot recover the property in replevin on grounds of the in-

validity of the contract, even though he tender the consideration paid on the following day.

In *Whelden v. Lyford*, 84 Me. 114, a recovery cannot be had for injury to a team hired under a contract void under Maine revised statutes, chap. 124, sec. 20, because made on the Sabbath. The action was not within chap. 82, sec. 118, providing that no person should defend an action upon a Sunday contract unless he restores the consideration received.

The rules above enunciated have been modified to this extent: If the legal act be inseparably connected with the cause of action and contributed to the injury, there can be no recovery; but if the illegal act did not contribute to the injury, but was independent of it, recovery may be had. *Spafford v. Harlow*, 3 Allen, 176.

Shute v. Burkhardt, 104 Mass. 59; *Keans v. Sonder*, 104 id. 63.

In *Robson v. French*, 12 Met. 24, an action for deceit in a contract for horse trading on Sunday could not be maintained.

Similar cases are *Gregg v. Wyman*, 4 Cush. 322; *Whelden v. Chappel*, 8 R. I. 230.

In *Myers v. Minerath*, 101 Mass. 366, horses were traded on Sunday, and the plaintiff having returned the defendant's horse, sued the defendant for conversion of his own. Such an action could not be maintained.

There are cases holding a contrary doctrine.

Order of arrest for procuring a sale of meat on the Sabbath by wrongful operation. The court called attention to the fact that meat was properly sold before 9 A. M. on the Sabbath, and there was no presumption that such was not the case in this instance, and that in any case it was obtained by fraud, and that the Sunday statute could not be used as a shield by the one perpetrating the active fraud. The subject was not discussed in the court of appeals, but the case was affirmed without opinion. *O'Shea v. Kohn*, 33 Hun, 114; 97 N. Y. 648.

"A" sued "B" for selling "A's" son liquor on Sunday so that the son drove "A's" horse to death. The fact that "A" loaned his horse to the son to be used on Sunday to drive to a neighbor's was held not to deprive "A" of his cause of action. The court of appeals did not discuss the subject. There was no violation of the Sabbath on the part of "A," nor was his act in any way connected with the remote act of "B" in selling liquor. *Berthold v. O'Reilly*, 8 Hun, 16; 74 N. Y. 509.

A person who has let horses and a carriage for pleasure driving on Sunday can recover damages if the hirer, by negligence, injures them. *Nodine v. Doherty*, 46 Barb. 59.

Acts of 1895, chap. 129, amending act of 1821 (Me. R. S., chap. 124,

sec. 20), specially enacts that the provisions thereof shall not bar any action for a tort. *Knights v. Brown*, 93 Me. 557.

Action for conversion by bailee is not defeated by the fact that a contract of hiring was made on Sunday. *Hall v. Corcoran*, 107 Mass. 251.

Disobedience in one's duty to the state to observe Sunday, does not prevent recovery for a private wrong which is the proximate cause of injury. *Kansas v. Orr*, 62 Kan. 61.

One driving on Sunday may recover for injury from the reckless driving of another. *Baldwin v. Barney*, 12 R. I. 392.

Where a horse was hired on Sunday and the defendant drove it to another place than that bargained for, it was held a conversion and that trover would lie. *Woodman v. Hubbard*, 5 Foster, (Vt.) 67.

TELEGRAPH COMPANIES.

- I. GENERAL RULES.
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- III. EQUAL FACILITIES MUST BE FURNISHED.
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 - (j) Special contract—effect upon the rights of the sendee.
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- XXIV. DAMAGES.
 - (a) Cipher messages.
 - (b) Notice of the importance of message.
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 - (d) Contracts of sale, hiring, &c.
 - (e) Mental suffering.
 - (f) Miscellaneous elements.
- XXV. PROXIMATE CAUSE.

I. General Rules.

Telegraph companies are not common carriers.—Companies, formed with the public authority to send communications by electricity, and known as telegraph companies,* are not common carriers, but have analogous functions and duties, whereby they are constrained to provide reasonable facilities for the due disposition of the ordinary business presented, and to serve on equal terms all persons complying with their just demands and regulations.

They are not insurers of the due transmission and delivery of a message, but must use such reasonable skill, care and vigilance to properly fulfill their undertaking, as men of good business capacity and prudence would observe under the same circumstances. This may, on occasions, require a very considerable promptness and high degree of care as in the case of a message summoning the sendee to one sick or dying, or one constituting a contract of sale and purchase.

Duty of sender.—The sender of a message should use care in writing it, and in correctly and definitely giving the address of the sendee, and in the observance of, and the adjustment of his business to, those reasonable rules and regulations that a company has the right to make.

Contracts enlarging liability.—A telegraph company is not obliged to undertake the performance of an act beyond the scope of its chartered duty; but it may, by contract, enlarge its usual obligation, as by stipulating specially to insure the due transmission and delivery of a message, or to

*NOTE.—The general principles herein stated are applicable to telephone companies. *Chesapeake, &c., Telephone Co. v. Baltimore, &c. T. Co.*, 66 Md. 399; *State, ex rel. v. Nebraska Telephone Co.*, 17 Neb. 126; 22 N. W. R. 237; *State ex. rel. v. Telephone Co.*, 36 Ohio St. 296; *American R. Tel. Co. v. Conn. Tel. Co.*, 44 Am. R. 237; citing *Attigen v. Edison Telephone Co.*, 6 Q. B. Div. 244; Same principle. *Central U. Telephone Co. v. Bradbury*, 106 Ind. 1.

undertake its transmission and delivery at a point beyond its own line, or to insure the correctness of news transmitted by it.

Special contracts limiting liability.—A telegraph company cannot stipulate with the employer to wholly exempt itself from liability for the negligence of itself or its servants according to the holdings of the federal courts, and the courts of many states; but may do so by the authority of the courts of New York and several other states. The question of the power to stipulate for limitation of liability to a fixed sum, usually divides the courts on the same lines.

But it is considered by the federal courts and those of New York and a majority of other states, with numerous dissenting authorities, however, that a telegraph company may make contracts founded on sufficient consideration, with its employers, limiting its liability to a reasonable extent, as that a company shall not be liable for failure to properly transmit and deliver a message, unless repeated at some additional and just price, to insure its accuracy; and there is a general consensus of opinion that a contract may be made that claims for damage may be presented within a certain number of days, the time being reasonably long to enable the claimant to discover the failure of duty on the part of the company. It is a general and probably uniform judgment that a company cannot stipulate against liability for damages arising from its willful or reckless disregard of duty, or its gross negligence.

Special contracts in actions for penalty.—There are, in several states, statutes prescribing a penalty for failure of duty on the part of telegraph companies. It is usually, but not uniformly, held in such states that the recovery of a statutory penalty is not precluded by the terms of a special contract made between the company and the sender, but some of such decisions were in actions by the sendee, and there is much authority that neither the sender nor the sendee can, by any independent act of his own, diminish a recovery which the other would otherwise have.

Special contracts—effect upon rights of sendee.—It is, however, sometimes considered that the sendee has no greater rights than the sender, and especially would this be so where the sendee sues for non-delivery, or when the sendee was the real employer to whom the sender stood in the relation of an agent, or when the message to the sendee is in reply to one sent by the latter and is on the same terms.

How made.—Special contracts may be made by sending, without dissent, the message on the usual blank provided by telegraph companies, whereby the employer agrees to the regulations therein stated, and in which the company states a limit to its liability. In such case it is immaterial that the sender has not read the stipulation and did not know the same; but he must have a fair opportunity to become acquainted with a rule or regulation before he can be bound thereby. Such contracts are strictly construed against the company, and no one entitled to send a message can be compelled to enter into the same.

Delivery.—The company must use a reasonable effort to find and deliver the message to the sendee, and even repeated efforts to do so might not excuse failure to make further attempt; but the company may demand an extra compensation for delivery beyond a reasonable distance from the point of arrival.

Evidence—burden of proof.—The fact of non-delivery is sufficient evidence of a breach of a contract to deliver; delivery of the message in an altered condition of language is sufficient evidence of breach of contract to duly transmit, and in either case the company is put to an explanation of such breach, consistent with the duty of the care and skill required of it.

Action by sendee.—Under certain statutes it has been held that the sendee might maintain an action for non-delivery, and the contrary has also been maintained. So, the sendee may maintain an action for non-delivery, when the sender acted as his agent, or the message was in reply to one sent by himself, or when the message was sent for his benefit, or where he holds some peculiar relation to the company that entitles him to the service in his own behalf. Unless the relation as above, or equivalent relations, exist, it is considered that the sendee has no action for non-delivery. But the sendee has an action for the delivery of an altered message, by which he has been misled and upon which he has, in good faith and with ordinary prudence, acted to his damage.

Action by sendee against sender.—There is a respectable authority for and against the doctrine that the sender is also liable to the sendee for damages caused to the latter by the delivery of the message in an altered condition.

Sunday messages.—A company may refuse to send messages on Sunday, but if its line be open for business on that day, it may send messages relating to matters of charity or necessity; but its duty in that regard would depend much on the terms of local statutes.

Immoral or illegal transactions.—A company may decline to send or deliver messages relating to matters involving immoral or illegal transactions, at least where the same appear upon the face of the message, but the immorality or illegality of the transaction has not always been regarded as a defense to a breach of contract.

Unauthorized disclosure.—A company is liable for damages for the unauthorized disclosure of a message.

Damages—cipher messages.—The company is not liable beyond nominal damages for breach of contract to send and deliver cipher messages, or those unintelligible to the company; but if it appears from the language of the message that a breach of its contract may place the person entitled in a position where he will probably suffer pecuniary loss, such loss, if reasonably certain to accrue, may be recovered from the company.

Damages—extrinsic knowledge.—It is frequently decided that if the company, from sources extrinsic to the message, learn of the importance and nature of the message, such knowledge becomes a part of the contract and imposes upon it the same diligence and obligation as if the message disclosed such information. The further holding that a company is bounden to equal vigilance, whether or not it has knowledge, and that the duty of obtaining such knowledge is upon it, has been held. A company may lawfully stipulate that it shall not be affected by information or statement not embodied in the message.

Connecting companies.—The rule governing the relation of a telegraph company to another connecting company is similar to that governing connecting lines of common carriers. The general holding is, that a company's duty is only to transmit over its own line and duly deliver to the connecting carrier; that it may, however, contract to send through to the

place of delivery, that in such last case, as regards the sender, the company so contracting and not the auxiliary company is liable for breach of contract, although either company would be liable to the sendee for a message altered by its negligence, and stipulations of exemption in case of a through contract, if lawful, apply to an auxiliary company; but this is not the case where the initial company simply contracts to deliver to the connecting line, unless the special contract be expressly extended thereto, or the initial company made the contract as agent of the auxiliary company.

When a company contracts to deliver to the connecting company, it does so as agent of the connecting company, and not as agent of the sender. A stipulation to deliver at a point on a connecting line would not be inferable from a message addressed to that point, and payment of the full price of transmission, unless the companies were partners or otherwise jointly connected in business, or the second company was the agent of the first; but in regard to what would constitute a contract for a through message, as in the case of common carriers, there is a diversity of decision.

In an action against a connecting carrier, proof of contract with the first company, and non-delivery, or delivery of an altered message, is sufficient to put the company to its proof of due care and of delivery of message as received from the preceding connecting company.

In an action against the first company contracting through, proof of the contract and non-delivery at the place of final delivery, is sufficient, but not where the first company was only bound to deliver to the connecting company, although there is authority that the same evidence will be sufficient in either case.

II. Nature of the Undertaking.

Telegraph companies are not common carriers. *Leonard v. Tel. Co.*, 41 N. Y. 544; *Breese v. U. S. Tel. Co.*, 48 id. 132; *Kiley v. Tel. Co.*, 109 id. 231; *Ellis v. Am. T. Co.*, 13 Allen, 232; *Birney v. N. Y. &c. Tel. Co.*, 18 Md. 341; *Fowler v. W. U. T. Co.*, 80 Me. 381; *Grinnell v. Tel. Co.*, 113 Mass. 299; *W. U. T. Co. v. Carew*, 15 Mich. 525; *Wann v. W. U. T. Co.*, 37 Mo. 472; *W. U. T. Co. v. Griswold*, 37 Oh. St. 301; *N. Y. &c. T. Co. v. Dryburg*, 35 Pa. 297; *Camp v. W. U. T. Co.*, 1 Met. (Ky.) 164; *W. U. T. Co. v. Mumford*, 87 Tenn. 190; *Southern Ex. Co. v. Caldwell*, 88 U. S. (21 Wall.) 264, 269, 270; *W. U. T. Co. v. Texas*, 105 U. S. 460; *Primrose v. W. U. T. Co.*, 154 id. 1; *Gillis v. Tel. Co.*, 61 Vt. 461 (Vermont case holds that its status is the same as that of a common carrier of passengers for hire); *W. U. T. Co. v. Reynolds*, 77 Va. 173; *Wharton on Neg.*, sec. 756; but they have been described as common carriers. *McAndrew v. Electric &c. T. Co.*, 17 C. B. (84 E. C. L.) 3; *Central U. T. Co. v. Bradbury*, 106 Ind. 1; *Parks v. Alta. &c. T. Co.*, 13 Cal. 422; *State v. W. U. T. Co.*, 17 Neb. 126; but they exercise duties of a public nature, analogous to those of a common carrier, and hence must serve fairly and on equal terms all who wish to employ them.

Leonard v. N. Y. &c. Co., 41 N. Y. 544; Elwood v. W. U. T. Co., 45 id. 549; Baldwin v. U. S. Tel. Co., id. 744; Breese v. U. S. Tel. Co., 48 id. 132; 45 Barb. 274; Pearsall v. W. U. T. Co., 124 N. Y. 256, 268; De Rutte v. N. Y. & Al. & B. Tel. Co., 1 Daly, 547; Schwartz v. A. & P. Tel. Co., 18 Hun, 157; Tyler v. W. U. T. Co., 60 Ill. 421; s. c., 74 id. 168; W. U. T. Co. v. Yopst, 118 Ind. 257-8; True v. Int. Tel. Co., 60 Me. 9; Bartlett v. W. U. T. Co., 62 id. 209; Chesapeake &c. Telephone Co. v. Baltimore & Ohio T. Co., 66 Md. 399; The State of Nebraska v. Nebraska Telephone Co., 17 Neb. 126; Turnpike Co. v. News Co., 43 N. J. L. 381; Tel. Co. v. Griswold, 37 Oh. St. 301; Wolf v. W. U. T. Co., 62 Pa. St. 83; Passmore v. W. U. T. Co., 78 id. 238; Pensacola Tel. Co. v. W. U. T. Co., 96 U. S. 9; Primrose v. W. U. T. Co., 154 id. 1.

See *post*, p. 2401.

III. Equal Facilities Must be Furnished.

(See cases last cited.)

A corporation chartered to transmit stock quotations, must furnish equal facilities to all paying therefor. *Friedman v. Gold & Stock Tel. Co.*, 32 Hun, 4.

A stipulation by which the defendant might discontinue a stock ticker placed in the plaintiff's office whenever, in its judgment, the plaintiff had violated any of the conditions of the contract, was not a reasonable regulation, and hence not binding. *Smith v. Gold Stock Co.*, 42 Hun, 453.

Telegraph company agreed to furnish certain information to members of a stock exchange. It was not bound to furnish it to one whose application to it had been rejected by the stock exchange. *In re Renville*, 46 App. Div. 37.

Forgetfulness is not impartiality. *Weaver v. Grand Rapids &c. R. Co.*, 107 Mich. 300.

Nor is an unintentional omission. *Wishelman v. Western Union Teleg. Co.*, 62 N. Y. Supp. 491.

Mandamus will lie to compel a telegraph company to furnish facilities, in case of refusal so to do, to a person wishing them and offering compliance with its regulations. *State v. Neb. Tel. Co.*, 17 Neb. 126.

Precedence.—Must send messages in order of receipt. *Mackay v. W. U. Tel. Co.*, 16 Nev. 222.

Private dispatches must give way to transmission of intelligence of public and general interest, and to communications for and from officers of justice. *W. U. Tel. Co. v. Ward*, 23 Ind. 377.

IV. Care and Skill Required.

A telegraph company is bound to the diligence and skill of good specialists in the particular department, and the accuracy and promptitude must be in proportion to the critical character of the work. *Baldwin v. W. U. T. Co.*, 45 N. Y. 751.

Elwood v. W. U. T. Co., 45 N. Y. 549; Leonard v. N. Y. &c. Co., 41 id. 544, 571; Breese v. U. S. Tel. Co., 48 id. 141; Pearsall v. W. U. Tel. Co., 124 N. Y. 256; De Rutte v. N. Y. &c. T. Co., 1 Daly, 547; Little Rock &c. T. Co. v. Davis, 41 Ark. 79; Graham v. W. U. T. Co., 1 Col. 230; W. U. T. Co. v. Blanchard, 68 Ga. 299; W. U. T. Co. v. Buchanan, 35 Ind. 430; W. U. T. Co. v. Meek, 49 id. 53; Sweatland v. Ill. &c. T. Co., 27 Iowa, 433; La Grange v. S. W. Tel. Co., 25 La Ann. 383; Smithson v. U. S. Tel. Co., 29 Md. 167; Fowler v. W. U. T. Co., 80 Me. 381; W. U. T. Co. v. Carew, 15 Mich. 525; N. Y. &c. Tel. Co. v. Dryburg, 35 Pa. St. 298; Pinckney v. Tel. Co., 19 S. C. 71; W. U. T. Co. v. Neill, 57 Tex. 283; Wash. &c. T. Co. v. Hobson, 15 Gratt, 122; Wharton on Neg., sec. 756.

It must carry correctly and without delay, but not as an insurer. *W. U. Tel. Co. v. Chamblee*, 122 Ala. 428.

Ordinary care and skillful operators and most approved instruments required. *Tyler v. W. U. T. Co.*, 60 Ill. 421, 433.

Care should be commensurate with importance of trust; if matters of great moment are involved, great care is required. *Bartlett v. W. U. T. Co.*, 62 Me. 209, 220.

Company cannot set up in defense of its negligence that the sendee might have been more judicious. *W. U. T. Co. v. Cook*, 54 Neb. 109.

Care required is one of a very high degree, and not such as one of ordinary prudence might use in his own business. *Jones v. W. U. T. Co.*, 101 Tenn. 442.

Reference to company as a common carrier was cured by statement that liability depended on negligence. *W. U. T. Co. v. Hines*, 22 Tex. Civ. App. 315; *Hargrave v. W. U. T. Co.*, (Tex. Civ. App.) 60 S. W. Rep. 687.

Where there is a choice of two routes, company must use reasonable care in making its selection. *Mitchell v. W. U. T. Co.*, 12 Tex. Civ. App. 262.

V. Form of Message.

A message written on note paper, copied by the operator, is sufficient, although company's rule provided that no messages, unless written on sending blanks, should subject the company to damages, where the sender is in ignorance of such rule. *Beasley v. W. U. T. Co.*, 39 Fed. Rep. 181.

Contributory negligence of sender will bar recovery of statutory penalty for breach of duty. Where sender directs "to Mrs. La Fountain, Kankokee," a city of 12,000 or 15,000 inhabitants, and fails, upon having his attention called to the fact by agent to make name more definite or give street and number of her residence, he is guilty of contributory negligence. *W. U. T. Co. v. McDaniel*, 103 Ind. 294.

Where a message on a leaf from a blank book was delivered to an operator without any word spoken or compensation made or tendered, the company was not liable for failure to send the same. *W. U. T. Co. v. Liddell*, 68 Mich. 1.

In the absence of evidence of the custom to receive verbal messages orally delivered, failure to transmit such message does not subject the company to damages. *W. U. T. Co. v. Dozier*, 67 Miss. 288.

A message received and paid for, although not written on the regular blank, must be sent. *W. U. T. Co. v. Jones*, 69 Miss 658.

If hand writing was so bad that operator could not read it, he ought not to have sent it; but if he assumed it, he should have sent what was written, and had no right to add letters confessedly not in the message. *N. Y. & W. P. T. Co. v. Dryburg*, 35 Pa. St. 304.

A company is not negligent in transmitting a word as it appears to be written, as where the word "two" more nearly resembles "ten." *Koons v. W. U. T. Co.*, 102 Pa. St. 164.

Mere acceptance for the purpose of sending of message by the company, is sufficient to create a contract to send the message. *Express Co. v. Caldwell*, 21 Wall. 264, 266.

Aiken v. W. U. Tel. Co., 5 S. C. 358.

CONTRIBUTORY NEGLIGENCE OF SENDEE.—Where the dispatch, as received, is not intelligible, the receiver acts on it at his own risk.

One Hertz, at Stuttgart, had in his possession twenty-three "Central Pacific Joaquin Branch bonds" belonging to plaintiff. In November, 1875, Hertz telegraphed to plaintiff as follows: "Joaquin unsalable, sell the twenty-three or what answer." Plaintiff delivered to defendant the following message in reply: "Unsalable account Missouri, Pacific troubles, Hatch says hold undoubted." The message as delivered read: "unsalable account Missouri, pacific troubles, Hatch says sold undoubted." Hertz interpreting this as an order to sell, sold the bonds at a loss, to recover which this action was brought. *Hart v. The Direct U. S. Cable Co.*, 86 N. Y. 633, aff'g non-suit.

VI. Agency—Sender.

A message sent to plaintiff and forwarded to him by his clerk, did not make the defendant liable for penalty for failure to transmit the forwarded message. *W. U. T. Co. v. Kinney*, 106 Ind. 468.

A company, accepting a message and payment therefor, cannot question the validity or character of the sender who signed the name of the plaintiff thereto. *W. U. T. Co. v. Buskirk*, 107 Ind. 549.

In a statutory action by sender for the misdirection of a telegram which

was received by telephone by the sending operator, claim that the latter acted as sender's agent was denied. *W. U. T. Co. v. Todd*, (Ind.) 53 N. E. Rep. 194.

Though in contravention to the rule that all messages must be received in writing. *Carland v. W. U. T. Co.*, 118 Mich. 369.

Company's agent received and undertook to deliver a message within the scope of his authority. It was no defense that it was not done within office hours. *McPeck v. W. U. T. Co.*, 107 Iowa, 356.

A message not written upon one of the defendant's blanks was sent to its office for transmission. It was forwarded in due time, but was not delivered by the office at which it was received. In an action brought for the recovery of damages occasioned by the failure to deliver, it appeared that the plaintiff's agent who sent the message knew the terms and conditions on which the defendant, by its rules, provided that messages should be sent over its line as set forth in the blank then used by it. This knowledge of the plaintiff's agent was binding upon him, and no recovery could be had. *Clement v. W. U. T. Co.*, 137 Mass. 463.

Where an agent is interested, as for commissions, or by reason of special property in the subject-matter, and the contract in reference thereto is made in his name, he may sue as if he were principal. This applies to a factor, broker, warehouseman, carrier, auctioneer, policy broker, whose name is on the policy, or the captain of a ship for freight. If contract in terms is made with an agent personally, he may sue thereon; or if he appear to be the proprietor, and sell goods as apparent owner, he can sustain an action in his own name. Broker sent message in his own name, an order for purchase of gold, on behalf of principal, and could sue the telegraph company for breach of contract, but he would hold the recovery as trustee for his principal. *U. S. T. Co. v. Gildersleeve*, 29 Md. 232.

Where the sender requested the operator to write a dispatch, the operator is the former's agent so as to bind him to printed stipulations on the blank relative to repeated messages. *W. U. T. Co. v. Edsall*, 63 Tex. 668.

VII. Compensation.

A sender may be required to deposit the sum payable for an answer to a message. *W. U. T. Co. v. McGuire*, 104 Ind. 130.

Where the agent declined to receive compensation, but asks that payment may be made by the receiver, such arrangement is binding upon the company. *W. U. T. Co. v. Yopst*, 118 Ind. 248.

That company may owe sender does not prevent the latter from withholding service until the charges are paid. *Rushville &c. Tel. Co. v. Irvin*, 27 Ind. App. 62.

Sender must affix and cancel the revenue stamp for the message before he can demand its transmission. *Kirk v. W. U. T. Co.*, 90 Fed. Rep. 809.

VIII. By-Laws and Regulations.

A shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or of provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and when dealing with the corporation as a customer his rights are not limited by its regulations or by-laws not brought to his knowledge. *Pearsall v. W. U. T. Co.*, 124 N. Y. 256.

Citing *Hill v. Manchester & Salford Water Works Co.*, 5 B. & Adol. 866; *Rice v. Peninsula Club*, 52 Mich. 87; *Mor. Corp.*, secs. 500, 500a.

Under section 4176 R. S. 1881, company may regulate, reasonably, its office hours at various points, according to the demands of business.

There is not a failure to receive and transmit unless it be during the usual office hours, both at the point of sending and receiving.

Company need not keep its agents informed as to office hours of its various offices. A case might arise where the company would be bound to ascertain and disclose its inability to send a message speedily. *W. U. T. Co. v. Harding*, 103 Ind. 505.

Citing *Given v. W. U. T. Co.*, 24 Fed. Rep. 119; *Stevenson v. Montreal T. Co.*, 16 U. C. Q. B. 530.

The by-laws for the regulation of the company's business, is binding on all the patrons when brought to their notice.

Whether a by-law is reasonable is a question of law. *W. U. T. Co. v. McGuire*, 104 Ind. 130.

Company may fix reasonable office hours, and a penalty for failure to send message is not recoverable, unless there is a failure to receive and transmit during the usual office hours, both at the point of receipt and destination of the message. *W. U. T. Co. v. Wilson*, 108 Ind. 308.

Sender must take reasonable notice of the usual course of business of a telegraph company. *W. U. T. Co. v. Yopst*, 118 Ind. 248.

Though a message is received at night, the company is not bound to transmit it out of its reasonable office hours. *W. U. T. Co. v. Steinburger*, (Ky.) 54 S. W. Rep. 829.

Especially where there is an express stipulation that it would not. *W. U. T. Co. v. Johnson*, (Ky.) 54 S. W. Rep. 427; *W. U. T. Co. v. Van Cleave*, (Ky.) 54 S. W. Rep. 827.

But where it is received at 4 P. M. it was negligence not to deliver it

until after nine the next morning; though it had a right to close at six in the evening, especially where it is an announcement of sickness. *W. U. T. Co. v. Fisher*, (Ky.) 54 S. W. Rep. 830.

The reasonableness of regulations as to office hours depends on the locality. *Davis v. W. U. T. Co.*, 46 W. Va. 48.

And is a question for the court. *W. U. T. Co. v. Crider*, (Ky.) 54 S. W. Rep. 963.

Where the quantity of business does not justify night business, it need not be done. *W. U. T. Co. v. Van Cleave*, (Ky.) 54 S. W. Rep. 827; *W. U. T. Co. v. Crider*, 54 id. 963.

Company may make and enforce reasonable regulations. *Bartlett v. W. U. T. Co.*, 62 Me. 209, 213.

Ellis v. Am. Tel. Co., 13 Allen, 226; *True v. Int. Tel. Co.*, 60 Me. 9; *A. & P. Tel. Co. v. W. U. T. Co.*, 4 Daly, 527, 537; *W. U. T. Co. v. Griswold*, 37 Ohio St. 301.

That a press agent was allowed to use the office and wires at night when the office was closed to the public, did not make the company liable for his act in receiving a message. *Sweet v. Postal &c. Tel. Co.*, 22 R. I. 344.

Where the rule as to the non-delivery of messages beyond a half mile in a small town was not mentioned, it was not allowed to be set up. *W. U. T. Co. v. Robinson*, 97 Tenn. 638.

Company may prescribe reasonable hours during which its office shall be closed, and is not bound to deliver telegrams during such hours, although no actual notice thereof is given the sender. *W. U. T. Co. v. Neel*, 86 Tex. 368.

The fact that the office at the place of destination was practically closed, was not an excuse for failure to send a message, where no effort was made to send it until too late on the following day. *W. U. T. Co. v. Bruner*, (Tex.) 19 S. W. Rep. 149.

Though the receiving office is open at night, the transmitting office may be closed. *Robinson v. W. U. T. Co.*, (Tex. Civ. App.) 43 S. W. Rep. 1053.

Acceptance of message at 6.10 P. M., but with the positive statement by the operator that he did not know at what hour the receiving office closed, though he stated that he would try and get it through, did not charge the company for failure to get it through on that account. *W. U. T. Co. v. Gibson*, (Tex. Civ. App.) 53 S. W. Rep. 712.

See, also, *Sweet v. Postal &c. Co.*, 22 R. I. Rep. 344.

Message was accepted on a night blank which made it subject to delivery the next morning; but the operator promised to deliver it so that

the sendee would be able to start on the 7 A. M. train. Defendant was bound by the modification. *Seffell v. W. U. T. Co.*, (Tex. Civ. App.) 57 S. W. Rep. 857.

IX. Special Contracts Enlarging Liability.

Destination off company's line.—Agreement to deliver at point not on company's line is binding. *De Rutte v. N. Y. & C. Tel. Co.*, 1 Daly, 547.

Thurn v. Alta. Tel. Co., 15 Cal. 472, 476.

(This is a general rule in the case of common carriers. See p. 337.)

Company receiving full payment for transmission of a message to point beyond its line, without a stipulation limiting its liability to its own time, contracts for the delivery of the message at the place of destination. *W. U. T. Co. v. Schumate* (Tex. Civ. App.) 21 S. W. Rep. 109.

Company is not bound to undertake a transmission of a message beyond its own lines, and may make any stipulation respecting the same, not contrary to the law or public policy, limiting its liability in so doing. *W. U. T. Co. v. Way*, 83 Ala. 542.

Insuring transmission and delivery.—Agreement to insure for a higher rate is valid. *W. U. T. Co. v. Carew*, 15 Mich. 525.

Furnishing and transmitting news.—Agreement to furnish news and market quotations is binding on the company and must be done with accuracy. *W. U. T. Co. v. Stevenson*, 128 Pa. St. 442.

Bank of N. O. v. W. U. T. Co., 27 La. Ann. 49.

Where a company contracts to deliver market reports, it binds itself to procure and furnish *correct* reports, and it is responsible for the loss occasioned by any mistake in them. Where it undertakes to furnish market reports from a point beyond its own line, it will be presumed, in absence of evidence, that the report was correctly delivered to it at the place where its own line commences, and the burden is on the company to show that mistake occurred from causes that would relieve it from liability. *Turner v. Hawkeye T. Co.*, 41 Iowa, 458.

X. Special Contracts Limiting Liability.

(a). STIPULATION WHOLLY RELEASING IT FROM LIABILITY.

Company can stipulate against liability arising from negligence. *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744.

Breese v. U. S. Tel. Co., 48 N. Y. 132; *Kiley v. W. U. T. Co.*, 109 id. 231; *Schwartz v. A. & P. Tel. Co.*, 18 Hun, 157; *W. U. T. Co. v. Carew*, 15 Mich. 525;

Redpath v. W. U. T. Co., 112 Mass. 71; *Clement v. W. U. T. Co.*, 137 id. 463; *Riley v. W. U. Tel. Co.*, 8 Misc. 217.

Public policy prohibits stipulations relieving a company from that degree of care and skill which a prudent man would exercise in his own business under the same circumstances. *W. U. T. Co. v. Enbank*, 100 Ky. 591.

Statement on the back of the blank that the company is "the agent of the sender," without liability, is not binding on the sender. *W. U. T. Co. v. Seals*, (Tex Civ. App.) 45 S. W. Rep. 964.

A telegraph company cannot stipulate to wholly relieve itself from liability for negligence of itself or its servants. *Primrose v. W. U. T. Co.*, 154 U. S. 1.

Am. Tel. Co. v. Daughtry, 89 Ala. 191; *W. U. T. Co. v. Short*, 53 Ark. 434; *W. U. T. Co. v. Graham*, 1 Col. 230; *W. U. T. Co. v. Fontaine*, 58 Ga. 433; *W. U. T. Co. v. Blanchard*, 68 id. 299; *W. U. T. Co. v. Shotter*, 17 id. 760; *Tyler v. W. U. T. Co.*, 60 Ill. 421; s. c., 74 id. 168; *W. U. T. Co. v. Fenton*, 52 Ind. 1; *Sweatland v. Ill. &c. Co.*, 27 Iowa, 432; *Garrett v. W. U. T. Co.*, 83 id. 257; *True v. Int. Tel. Co.*, 60 Me. 9; *Smith v. W. U. T. Co.*, 82 Ky. 104; *Kemp v. W. U. T. Co.*, 28 Neb. 961; *Tel. Co. v. Griswold*, 37 Oh. St. 301; *Aiken v. W. U. T. Co.*, 5 S. C. 358; *Marr v. W. U. T. Co.*, 85 Tenn. 529; *Wormack v. W. U. T. Co.*, 58 Tex. 176; *Gillis v. W. U. T. Co.*, 61 Vt. 46; *W. U. T. Co. v. Reynolds*, 77 Va. 173; *Hibbard v. W. U. T. Co.*, 33 Wis. 558; *Thompson v. W. U. T. Co.*, 64 id. 531.

Nebraska Stat (sec. 12, chap. 89a, Comp. S.) provides that telegraph companies shall not be exempted from any liability for the non-delivery or incompetent transmission of messages by reason of any "clause, condition or agreement contained in its printed blanks."

Unrepeated messages.—A rule of a telegraph company that its responsibility for accuracy in the transmission of messages over its lines shall be restricted to repeated messages, and that any claim for damages must be made in writing within sixty days, is reasonable, and, unless waived, is binding upon one who sends a message with knowledge of it. *W. U. T. Co. v. Stevenson*, 128 Pa. St. 442.

(b) GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

Plaintiff, in reply to a message received the same day quoting prices of articles, left with defendant a message ordering the same. The message was laid aside for several days, and was then sent without plaintiff's knowledge. The goods ordered were forwarded, but they had advanced \$225, which plaintiff was obliged to pay. Defendant was held liable for gross negligence, which made stipulation in message blank, limiting its liability unless message was repeated, inoperative. This case holds that knowledge of the first message was sufficient, in connection with what appeared on the face of the second, to apprise the company of the nature and importance of the message. *Mowery v. W. U. T. Co.*, 51 Hun, 126.

Citing *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; *Hart v. Direct U. S. C. Co.*, 86 N. Y. 633; *McColl v. W. U. T. Co.*, 7 Abb. N. C. 151.

Company cannot contract against its gross negligence or willful misconduct. *W. U. T. Co. v. Crall*, 38 Kas. 679.

The case does not decide whether the company could exempt itself for negligence less than gross negligence, but the spirit of the opinion would indicate that it could not.

Mowry v. W. U. T. Co., 51 Hun, 126; *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232; *Wann v. W. U. T. Co.*, 37 Mo. 472. This rule is regarded as uniform.

But see *Clement v. W. U. T. Co.*, 137 Mass. 463, where it was found that defendant had been grossly negligent and yet special contract prevailed.

A stipulation, exempting the company from liability, did not cover gross negligence, where the agent took down and delivered a message containing two words less than the number that he was informed the message actually contained. *W. U. T. Co. v. Goodbar*, (Miss.) 7 S. R. 214.

Mere error in message is not sufficient to show gross negligence, where stipulation required message to be repeated and it was not. *Becker v. W. U. T. Co.*, 11 Neb. 87.

Mere proof of the fact that there is a mistake of a word or a figure in the message is not sufficient evidence of negligence or fraud to render the company liable for gross negligence where there is a special contract limiting liability. *Jones v. W. U. T. Co.*, 18 Fed. Rep. 717.

Citing *W. U. T. Co. v. Neill*, 57 Tex. 283; *Aikin v. W. U. T. Co.*, 5 S. C. 353; *Pinckney v. W. U. T. Co.*, Sup. C. S. C. MSS. (1882); *Ellis v. Amer. Tel. Co.*, 13 Allen, 226; *Grinnell v. W. U. T. Co.*, 113 Mass. 299; *Schwartz v. A. & P. T. Co.*, 18 Hun, 157; *Becker v. W. U. T. Co.*, 11 Neb. 87; *Sweatland v. Ill. & C. T. Co.*, 27 Iowa, 455; *White v. W. U. T. Co.*, 14 Fed. Rep. 710.

(c). STIPULATION AS TO UNREPEATED MESSAGES—WHEN VOID.

Exemption for error in transmitting unrepeated messages, cannot be construed to extend to negligent errors. *W. U. T. Co. v. Crawford*, 110 Ala. 460.

So, a stipulation limiting damages for sending an unrepeated message does not apply in case of negligence. *W. U. T. Co. v. Enbank*, 100 Ky. 591; *Reed v. W. U. T. Co.*, 135 Mo. 661.

Stipulation for a release from mistakes, unless sender requires message to be repeated, is invalid. *W. U. T. Co. v. Chamblee*, 122 Ala. 428.

Where the mistake could have been prevented by repeating. *North Packing & Co. v. W. U. T. Co.*, 70 Ill. App. 275.

Stipulation that company should not be liable unless message be repeated, is void. *W. U. T. Co. v. Graham*, 1 Col. 230.

W. U. T. Co. v. Blanchard, 68 Ga. 299 (as far as gross negligence is concerned); *Tyler v. W. U. T. Co.*, 60 Ill. 421; s. c., 74 id. 168; *W. U. T. Co. v.*

Meek, 49 Ind. 53; *W. U. T. Co. v. Fenton*, 52 id. 1 (these two last cases appear to be controlled by statute); *Sweatland v. Ill. &c. Tel. Co.*, 27 Iowa, 432; *Manville v. W. U. T. Co.*, 37 id. 214; *W. U. T. Co. v. Crall*, 38 Kas. 679; *W. U. T. Co. v. Howell*, id. 685; *Smith v. W. U. T. Co.*, 83 Ky. 104; *Ayer v. W. U. T. Co.*, 79 Me. 493; *U. S. Tel. Co. v. Gildersleve*, 29 Md. 232; *W. U. T. Co. v. Griswold*, 37 Oh. St. 301; *Aiken v. W. U. T. Co.*, 5 S. C. 358, 372; *Marr v. W. U. T. Co.*, 85 Tenn. 529; *Wormack v. W. U. T. Co.*, 58 Tex. 176; *Wertz v. W. U. T. Co.*, 7 Utah, 446; *Candee v. Tel. Co.*, 34 Wis. 471; *Thompson v. W. U. T. Co.*, 64 id. 531.

Stipulation for exemption for all mistakes and delays in transmission or delivery or for nondelivery of unrepeatd messages, held contrary to statutory prohibition against exemption by agreement for mistakes in transmission or for nondelivery of messages. *W. U. T. Co. v. Beals*, 56 Neb. 415.

Want of due care in such stipulations will be construed to mean negligence. *W. U. T. Co. v. Odom*, 21 Tex. Civ. App. 537.

(d). STIPULATION AS TO UNREPEATED MESSAGES—WHEN VALID.

A stipulation that the company should not be liable, unless the message be repeated, is reasonable and valid. *Breese v. U. S. Tel. Co.*, 48 N. Y. 132.

Kiley v. W. U. T. Co., 109 N. Y. 231, 235; *Camp v. W. U. T. Co.*, 1 Met., (Ky.) 164, 168; *Birney v. N. Y. &c. Co.*, 18 Md. 341; *U. S. Tel. Co. v. Gildersleve*, 29 id. 232, 246, 248; *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *Redpath v. W. U. T. Co.*, 112 Mass. 71; *Grinnell v. W. U. Tel. Co.*, 113 id. 299; *Clement v. W. U. T. Co.*, 137 id. 463 (in this case it was found that the defendant had been guilty of gross negligence; but without passing on the subject of gross negligence generally, the court held that the stipulation covered the negligence in question, where there was several days' delay in delivering a message); *W. U. T. Co. v. Carew*, 15 Mich. 525, 535; *Becker v. W. U. T. Co.*, 11 Neb. 87 (but not for gross negligence); *Baxter v. Dominion Tel. Co.*, 37 U. C. Q. B. 470; *Lassiter v. W. U. T. Co.*, 89 N. C. 334; *Pegram v. W. U. T. Co.*, 97 id. 57; *McAndrew v. Electric Tel. C.*, 17 C. B. 3; *W. U. T. Co. v. Richman*, (Pa.) 6 Cent. 565; *Passmore v. W. U. T. Co.*, 9 Phila. 90; 78 Pa. St. 238; *W. U. T. Co. v. Stevenson*, 128 id. 442; *Gulf &c. Co. v. Wilson*, 69 Tenn. 739; *W. U. T. Co. v. Hearne*, 77 Tex. 83.

Stipulation for release in case of unrepeatd messages whether caused by negligence or otherwise, was binding where the mistake was not due to gross negligence. *Cort v. W. U. T. Co.*, 130 Cal. 657.

A company is liable as for a repeated message, where the receiver requested the operator to inquire if it had been correctly transmitted, and was told that he had done so. *W. U. T. Co. v. Landis*, 11 Cent. 193.

The following case presents a careful survey of the law on this and other features of the general subject.

Telegraph companies are not common carriers, and are not subject to the same liabilities.

The regulation of a telegraph company requiring the sender of a message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, is a reasonable regulation.

The terms on the back of a telegraph message, so far as they are not inconsistent with law, form part of the contract between the sender and the company under which the message is transmitted.

Where the only mistake of any consequence in the transmission of a message consisted in the change of the word "bay" into "buy" or rather of the letter "a" into "u," the difference in telegraphic symbol between these two letters being a single dot, a jury would be warranted in finding that it was only ordinary negligence for which the plaintiff, not having had the message repeated according to the terms printed upon the back thereof, and forming part of his contract with the company, could not recover more than the sum which he had paid for sending the single message.

The stipulation on a telegraphic message, that if the handwriting of the message, delivered to the company for transmission, is obscure or in cipher, the company will not be responsible for its miscarriage, is reasonable, and not against public policy, and the sender can recover of the company for a failure to transmit or deliver such a message only the sum he paid for sending it. *Primrose v. W. U. T. Co.*, 154 U. S. 1.

From opinion.—"This was an action by the sender of a telegraphic message against the telegraph company to recover damages for a mistake in the transmission of the message, which was in cipher, intelligible only to the sender and to his own agent, to whom it was addressed. The plaintiff paid the usual rate for this message, and did not pay for a repetition or insurance of it.

The blank form of a message, which the plaintiff filled up and signed, and which was such as he had constantly used, had upon its face, immediately above the place for writing the message, the printed words 'Send the following message subject to the terms on back hereof, which are hereby agreed to;' and just below the place for his signature this line, 'Read the notice and agreement on back of this blank.'

Upon the back of the blank were conspicuously printed the words, 'All messages taken by this company are subject to the following terms,' which contained the following conditions or restrictions of the liability of the company:

'(1) To guard against mistakes or delays, the sender of a message should order it REPEATED; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any *unrepeated* message whether happening by

negligence of its servants or otherwise, beyond the amount received for sending the same;

‘(2) Nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any *repeated* message, beyond fifty times the sum received for sending the same, unless specially insured;

‘(3) Nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages.’

After stating the rates at which correctness in the transmission of a message may be insured, it is provided that ‘no employé of the company is authorized to vary the foregoing.’

‘(4) The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission.’

The condition or restrictions, the reasonableness and validity of which are directly involved in this case, are that part of the first, by which the company is not to be liable for mistakes in the transmission or delivery of any message, beyond the sum received for sending it, unless the sender orders it to be repeated by being telegraphed back to the original office for comparison, and pays half that sum in addition; and that part of the third, by which the company is not to be liable at all for errors in cipher or obscure messages.

(Telegraph companies are not common carriers, but must serve all customers alike and without discrimination.)

Telegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce; and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination. They have, doubtless, a duty to the public, to receive, to the extent of their capacity, all messages clearly and intelligibly written, and to transmit them upon reasonable terms. But they are not common carriers; their duties are different, and are performed in different ways; and they are not subject to the same liabilities. *Southern Exp. Co. v. Caldwell*, 88 U. S., (21 Wall.) 264, 269, 270; *W. U. T. Co. v. Texas*, 105 U. S. 460, 464.

(Distinctions and analogies between telegraph companies and common carriers.)

The rule of the common law, by which common carriers of goods are held liable for loss or injury by any cause whatever, except the act of God, or of public enemies, does not extend even to warehousemen or wharfingers, or to any other class of bailees, except innkeepers, who, like carriers, have peculiar opportunities for embezzling the goods or for collusion with thieves. The carrier has the actual and manual possession of the goods; the identity of the goods which he receives with those which he delivers can hardly be mistaken; their value can be easily estimated, and may be ascertained by inquiry of the consignor, and the carrier's compensation fixed accordingly; and his liability in damages is measured by the value of the goods.

But telegraph companies are not bailees, in any sense. They are entrusted with nothing but an order of message; which is not to be carried in the form or characters in which it is received, but is to be translated and transmitted through different symbols by means of electricity, and is peculiarly liable to mistakes. The message cannot be the subject of embezzlement; it is of no intrinsic value; its importance cannot be estimated, except by the sender, and often cannot be disclosed by him without danger of defeating his purpose; it may be wholly valueless, if not forwarded immediately; and the measure of

damages, for a failure to transmit or deliver it, has no relation to any value of the message itself, except as such value may be disclosed by the message, or be agreed between the sender and the company.

(Telegraph companies may limit the measure of their responsibilities to a reasonable extent.)

As said by Mr. Justice Strong, speaking for this court, in *Southern Exp. Co. v. Caldwell*, above cited, 'Like common carriers, they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier.'

(Cannot wholly exempt themselves from liability for damages caused by the negligence of themselves or their employés.)

By the settled law of this court, common carriers of goods or passengers cannot, by any contract with their customers, wholly exempt themselves from liability for damages caused by the negligence of themselves or their servants. *New York Cent. R. Co. v. Lockwood*, 84 U. S., (17 Wall.) 357; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, ('The Montana') 129 U. S. 397, 442, and cases cited.

But even a common carrier of goods may, by special contract with the owner, restrict the sum for which he may be liable, even in case of a loss by the carrier's negligence; and this upon the distinct ground, as stated by Mr. Justice Blatchford, speaking for the whole court, that 'where a contract of this kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in cases of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations.' *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 343.

(Telegraph companies may make valid contract with employer that company shall not be liable for any negligence in transmitting or delivery of message, unless the message be repeated at the cost of half the usual price for a single transmission.)

By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence; but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delays in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants or otherwise.

In *W. U. T. Co. v. Hall*, 124 U. S. 444, 453, the effect of such a regulation was presented by the certificate of the circuit court, but was not passed upon by this court, because it was of opinion that upon the facts of the case the damages claimed were too uncertain and remote.

But the reasonableness and validity of such regulations have been upheld in *McAndrew v. Electric Teleg. Co.*, 17 C. B. 3, and in *Baxter v. Dominion Teleg. Co.*, 37 U. C. Q. B. 470, as well as by the great preponderance of authority in this country. Only a few of the principal cases need be cited.

In the earliest American cases, decided by the court of appeals of Kentucky, the reasons for upholding the validity of a regulation very like that now in question were thus stated: 'The public are admonished by the notice, that in order to guard against mistakes in the transmission of messages, every message of importance ought to be repeated. A person desiring to send a message is thus apprised that there may be a mistake in its transmission, to guard against which it is necessary that it should be repeated. He is also notified that if a mistake occur, the company will not be responsible for it unless the message be repeated. There is nothing unreasonable in this condition. It gives the party sending the message the option to send it in such a manner as to hold the company responsible, or to send it for a less price at his own risk. If the message be unimportant, he may be willing to risk it without paying the additional charge. But if it be important and he wishes to have it sent correctly, he ought to be willing to pay the cost of repeating the message. This regulation, considering the accidents to which the business is liable, is obviously just and reasonable. It does not exempt the company from responsibility, but only fixes the price of that responsibility, and allows the person who sends the message either to transmit it at his own risk at the usual price, or by paying in addition thereto half the usual price to have it repeated, and thus render the company liable for any mistake that may occur.' *Camp v. W. U. T. Co.*, 1 Met., (Ky.) 164, 168; 71 Am. Dec. 461.

In *W. U. T. Co. v. Carew*, 15 Mich. 525, 535, 536, the supreme court of Michigan held that a similar regulation was a valid part of the contract between the company and the sender, whether he read it or not. 'The regulation,' said Chief Justice Christiancy, 'of most, if not all telegraph companies operating extensive lines, allowing messages to be sent by single transmission for a lower rate of charge, and requiring a larger compensation when repeated, must be considered as highly reasonable, giving to their customers the option of either mode, according to the importance of the message, or any other circumstance which may affect the question.' 'The printed blank, before the message was written upon it, was a general proposition to all persons of the terms and conditions upon which messages would be sent. By writing the message under it, signing and delivering it for transmission, the plaintiff below accepted the proposition, and it became a contract upon those terms and conditions.'

In *Birney v. New York & W. P. Teleg. Co.*, 18 Md. 341, 358; 81 Am. Dec. 607, the court of appeals of Maryland, while recognizing the validity of similar regulations, held that they did not apply to a case in which no effort was made by the telegraph company or its agents to put the message on its transit.

In *United States Teleg. Co. v. Gildersleve*, 29 Md. 232, 246, 248, the same court, speaking by Mr. Justice Alvey (since chief justice of Maryland, and the court of appeals of the District of Columbia), said: 'The appellant had a clear right to protect itself against extraordinary risk and liability by such rules and regulations as might be required for that purpose.' 'The appellant could not, by rules and regulations of its own making, protect itself against liability for the consequences of its own willful misconduct, or gross negligence, or any conduct inconsistent with good faith; nor has it attempted by its rules and regulations to afford itself such exemption. It was bound to use due diligence, but not to use extraordinary care and precaution. The appellee, by requiring the message to be repeated, could have assured himself of its dispatch and accurate transmission to the other end of the line, if the wires were in working condition; or, by special contract for insurance, could have secured himself against all

consequences of non-delivery. He did not think proper, however, to adopt such precaution, but chose rather to take the risk of the less expensive terms of sending his message. And having refused to pay the extra charge for repetition or insurance, we think he had no right to rely upon the declaration of the appellant's agent that the message had gone through, in order to fix the liability on the company.'

In *Passmore v. W. U. T. Co.*, 9 Phila. 90, and 78 Penn. 238, at the trial in the district court of Philadelphia, there was evidence that Passmore, of whom one Edwards had offered to purchase a tract of land in West Virginia, wrote and delivered to the company at Parkersburg, upon a blank containing similar conditions, a message to Edwards at Philadelphia, in these words: 'I hold the Tibbs tract for you; all will be right,' but which, as delivered by the company in Philadelphia, was altered by substituting the word 'sold' for 'hold;' and that Edwards thereupon broke off the contract for the purchase of the land, and Passmore had to sell it at a great loss. The verdict being for the plaintiff, the court reserved the question whether the defendant was liable, inasmuch as the plaintiff had not insured the message, nor directed it to be repeated; and afterwards entered judgment for the defendant, notwithstanding the verdict, in accordance with the opinion of Judge Hare, the most important parts of which are as follows:

'A railway, telegraph, or other company, charged with a duty which concerns the public interest, cannot screen themselves from liability for negligence; but they may prescribe rules calculated to insure safety, and diminish the loss in the event of accident, and declare that, if these are not observed, the injured party shall be considered as in default, and precluded by the doctrine of contributory negligence. The rule must, however, be such as that reason, which is said to be the life of the law, can approve; or, at least, such as it need not condemn. By no device can a body corporate avoid liability for fraud, for willful wrong, or for the gross negligence which, if it does not intend to occasion injury, is reckless of consequences, and transcends the bounds of right with full knowledge that mischief may ensue. Nor, as I am inclined to think, will any stipulation against liability be valid, which has the pecuniary interest of the corporation as its sole object, and takes a safeguard from the public without giving anything in return. But a rule—which, in marking out a path plain and easily accessible, as that in which the company guarantees that every one shall be secure, declares that if any man prefers to walk outside of it, they will accompany him, will do their best to secure and protect him, but will not be insurers, will not consent to be responsible for accidents arising from fortuitous and unexpected causes, or even from a want of care and watchfulness on the part of their agents—may be a reasonable rule, and, as such, upheld by the courts.'

'The function of the telegraph differs from that of the post-office in this, that while the latter is not concerned with the contents of the missive, and merely agrees to forward it to its address, the former undertakes the much more difficult task of transcribing a message written according to one method of notation, in characters which are entirely different; with all the liability to error necessarily incident to such a process. Nor is this all. The telegraph operator is separated by a distance of many miles from the paper on which he writes, so that eye cannot discern and correct the mistakes committed by his hand. It was also contended during the argument, that the electric fluid which is used as the medium of communication, is liable to perturbations arising from

thunder storms and other natural causes. It is, therefore, obvious that entire accuracy cannot always be obtained by the greatest care, and that the only method of avoiding error is to compare the copy with the original, or, in other words, that the operator to whom the message was sent should telegraph it back to the station whence it came.'

'Obviously, he who sends a communication is best qualified to judge whether it should be returned for correction. If he asks the company to repeat the message, and they fail to comply, they will clearly be answerable for any injury that may result from the omission. If he does not make such a request, he may well be taken to have acquiesced in the conditions which they prescribe, and at all events cannot object to the want of precaution he has virtually waived. It is not a just ground of complaint that the power to choose is coupled with an obligation to pay an additional sum to cover the cost of repetition.' 9 Phila. 92-94; 78 Penn. 242-244.

The judgment was affirmed by the supreme court of Pennsylvania, for the reasons given by Judge Hare and above stated. 78 Penn. 246; *W. U. T. Co. v. Stevenson*, 128 Penn. 442, 455.

In *Breese v. United States Telegr. Co.*, 48 N. Y. 132; 8 Am. Rep. 526, the plaintiff's agent wrote, at his own office in Palmyra, on one of the company's blanks, substantially like that now before us, and delivered to the company at Palmyra, a message addressed to brokers in New York, and in these words: 'Buy us seven (\$700) hundred dollars in gold.' In the statement of facts upon which the case was submitted, it was agreed that he had never read the principal part of the blank, and that 'the message thus delivered was transmitted from the office at Palmyra, as written; but, by some error of the defendant's operators working between Palmyra and New York,' it was received in New York delivered in this form: 'Buy us seven thousand dollars in gold,' and the brokers accordingly bought that amount for the plaintiff who sold it at a loss. It was held that there was no evidence of negligence on the part of the company, and that, the message not having been repeated, the company was not liable.

In *Kiley v. W. U. T. Co.*, 109 N. Y. 231, 235-237, a similar decision was made, the court saying: 'That a telegraph company has the right to exact such a stipulation from its customers is the settled law in this and most of the other states of the Union and in England. The authorities hold that telegraph companies are not under the obligations of common carriers; that they do not insure the absolute and accurate transmission of messages delivered to them; that they have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents, and the mistakes and defaults incident to the transaction of their peculiar business. The stipulation printed in the blank used in this case has frequently been under consideration in the courts, and has always in this state, and generally elsewhere, been upheld as reasonable.' 'The evidence brings this case within the terms of the stipulation. It is not the case of a message delivered to the operator, and not sent by him from his office. This message was sent, and it may be inferred from the evidence that it went so far as Buffalo, at least; and all that appears further is that it never reached its destination. Why it did not reach there remains unexplained. It was shown that the failure was due to the willful misconduct of the defendant, or to its gross negligence. If the plaintiff had requested to have the message repeated back to him, the failure would have been

detected and the loss averted. The case is, therefore, brought within the letter and purpose of the stipulation.'

In the supreme judicial court of Massachusetts, the reasonableness and validity of such regulations have been repeatedly affirmed. *Ellis v. American Teleg. Co.*, 13 Allen, 226; *Redpath v. W. U. T. Co.*, 112 Mass. 71; 17 Am. Rep. 69; *Grinnell v. W. U. T. Co.*, 113 Mass. 299; 18 Am. Rep. 485; *Clement v. W. U. T. Co.*, 137 Mass. 463.

(Review of authorities holding a contrary doctrine.)

There are cases, indeed, in which such regulations have been considered to be wholly void. It will be sufficient to refer to those specially relied on by the learned counsel for the plaintiff, many of which, however, upon examination, appear to have been influenced by considerations which have no application to the case at bar.

Some of them were actions brought not by the sender, but by the receiver of the message, who had no notice of the printed conditions until after he received it, and could not, therefore, have agreed to them in advance. Such were *N. Y. & W. R. Teleg. Co. v. Dryburg*, 35 Penn. 298; 78 Am. Dec. 338; *Harris v. W. U. T. Co.*, 9 Phila. 88, and *De La Grange v. Southwestern Teleg. Co.*; 25 La. Ann. 383.

Others were cases of night messages, in which the whole provision as to repeating was omitted, and a sweeping and comprehensive provision substituted, by which, in effect, all liability beyond the price paid was avoided. *True v. International Teleg. Co.*, 60 Me. 9, 18; 11 Am. Rep. 156; *Bartlett v. W. U. T. Co.*, 62 Me. 209, 215; 16 Am. Rep. 437; *Candee v. W. U. T. Co.*, 34 Wis. 471, 476; 17 Am. Rep. 452; *Hibbard v. W. U. T. Co.*, 33 Wis. 558, 564. In *Bartlett's* case, the court said: 'Most, if not all, the cases upon this subject refer to rules requiring the repeating of messages to insure accuracy, and seem to be justified in their conclusion on the ground that owing to the liability to error, from causes beyond the skill and care of the operator, it is but a matter of common care and prudence to have the messages repeated; the neglect of which in messages of importance, after being warned of the danger, is a want of care on the part of the sender, and, as the person sending the message is presumed to be the best judge of its importance, he must on his own responsibility make his election whether to have it repeated.' 62 Me. 216, 217; 16 Am. Rep. 437.

The passage cited from the opinion of the circuit court of appeals of Delaware and A. Teleg. & Teleph. Co. v. State, 3 U. S. App. 30, 105, in which the same judge who had decided the present case in the circuit court said: 'It is no longer open to question that telephone and telegraph companies are subject to the rules governing common carriers and others engaged in like public employment,' had regard, as is evident from the context, and from the reference to *Budd v. New York*, 143 U. S. 517; 4 Inters. Com. Rep. 45, to those rules only which require persons or corporations exercising a public employment to serve all alike, without discrimination, and which make them subject to legislative regulation.

In *Rittenhouse v. Independent Line of Telegraph*, 1 Daly, 474, and 44 N. Y. 263, and in *Turner v. Hawkeye Teleg. Co.*, 41 Iowa, 458; 20 Am. Rep. 605, it does not appear that the company had undertaken to restrict its liability by express stipulation.

The Indiana decisions cited appear to have been controlled by a statute of the state, enacting that telegraph companies should 'be liable for special damages occasioned by failure or negligence of their operators or servants, in receiving,

copying, transmitting or delivering dispatches.' W. U. T. Co. v. Meek, 49 Ind. 53; W. U. T. Co. v. Fenton, 52 id. 1.

The only cases cited by the plaintiff in which, independently of statute, a stipulation that the sender of a message, if he would hold the company liable in damages beyond the sum paid, must have it repeated and pay half that sum in addition, has been held against public policy and void, appear to be Tyler v. W. U. T. Co., 60 Ill. 421; 14 Am. Rep. 38, and 74 Ill. 168; Ayer v. W. U. T. Co., 79 Me. 493; W. U. T. Co. v. Griswold, 37 Ohio St. 301; W. U. T. Co. v. Crall, 38 Kas. 679; W. U. T. Co. v. Howell, id. 685; and a charge to the jury by Mr. Justice Woods, when circuit judge, as reported in Dorgan v. Telegraph Co., 1 Am. L. T. N. S. 406, and not included in his own reports.

The fullest statement of reasons, perhaps, on that side of the question, is to be found in Tyler v. W. U. T. Co., above cited.

In that case the plaintiffs had written and delivered to the company on one of its blanks, containing the usual stipulation as to repeating, this message, addressed to a broker: 'Sell one hundred (100) Western Union; answer price.' In the message, as delivered by the company to the broker, the message was changed by substituting 'one thousand (1000).' It was assumed that 'Western Union' meant shares in the Western Union Telegraph Company. The supreme court of Illinois held that the stipulation was 'unjust, unconscionable, without consideration, and utterly void.' 60 Ill. 439; 14 Am. Rep. 38.

The proposition upon which that decision was based may be sufficiently stated in the very words of the court, as follows: 'Whether the paper presented by the company, on which a message is written and signed by the sender, is a contract or not, depends on circumstances,' and 'whether he had knowledge of its terms and consented to its restrictions, is for the jury to determine as a question of fact upon evidence *aliunde*.' 'Admitting the paper signed by the plaintiffs was a contract, it did not, and could not, exonerate the company from the use of ordinary care and diligence, both as to their instruments and the care and skill of their operators.' 'The plaintiffs having proved the inaccuracy of the message, the defendants, to exonerate themselves, should have shown how the mistake occurred;' and, 'in the absence of any proof on their part, the jury should be told the presumption was a want of ordinary care on the part of the company.' The printed conditions could not 'protect this company from losses and damages occasioned by causes wholly within their control,' but 'must be confined to mistakes due to the infirmities of telegraphy, and which are unavoidable.' 60 Ill. 431-433; 14 Am. Rep. 38.

The effect of that construction would be either to hold telegraph companies to be subject to the liability of common carriers, which the court admitted in an earlier part of its opinion that they were not, or else to allow the stipulation no effect whatever; for, if they were not common carriers, they would not, even if there were no express stipulation, be liable for unavoidable mistakes, due to causes over which they had no control.

But the final, and apparently the principal, ground for that decision was restated by the court, when the case came before it a second time, as follows: 'On the question whether the regulation requiring messages to be repeated, printed on the blank of the company on which a message is written, is a contract, we held it was not a contract binding in law, for the reason the law imposed upon the companies duties to be performed to the public, and for the performance of which they were entitled to a compensation fixed by themselves,

and which the sender had no choice but to pay, no matter how exorbitant it might be. Among these duties, we held, was that of transmitting messages correctly; that the tariff paid was the consideration for the performance of this duty in each particular case, and when the charges were paid the duty of the company began, and there was, therefore, no consideration for the supposed contract requiring the sender to repeat the message at an additional cost to him of fifty per cent. on the original charges.' 74 Ill. 170, 171.

The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate of compensation, establishes the usual rate as the compensation for the duty of transmitting any message whatever. Whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again if the company is to be liable for mistakes or delays in the transmission or delivery or in the non-delivery of a message.

Indeed, that learned court frankly admitted that its decision was against the general current of authority, saying: 'It must, however, be conceded that there is great harmony in the decisions that these companies can protect themselves from loss, by contract, and that such a regulation as the one under which appellees defend, is a reasonable regulation and amounts to a contract.' And again: 'We are not satisfied with the grounds on which a majority of the decisions of respectable courts are placed.' 60 Ill. 420, 431, 435; 14 Am. Rep. 38."

(e). HALF-RATE MESSAGES.

Stipulation that company will receive messages to be sent, without repetition, during night for delivery not earlier than morning of next day, at reduced rates on condition "that the sender will agree not to claim damages for error or delays, or for non-delivery, happening from any cause, beyond ten times, the amount paid for transmission" assented to by the sender, is void. *Fowler v. W. U. T. Co.*, 80 Me. 381.

True v. Int. Tel. Co., 60 Me. 9; *Bartlett v. Tel. Co.*, 62 id. 209; *Ayer v. Fontaine*, 58 Ga. 433 (does not relieve from gross negligence); *Garrett v. W. U. T. Co.*, 83 Iowa, 257; *Pinckney v. W. U. T. Co.*, 19 S. C. 71; *W. U. T. Co. v. Neill*, 57 Tex. 283; *Candee v. W. U. T. Co.*, 34 Wis. 471 (this case holds that the company cannot relieve itself from liability for gross negligence or willful fraud, but the argument of the court is hostile to any limitation of liability for negligence); *Hibbard v. W. U. T. Co.*, 33 Wis. 558.

Contract of exemption for errors in sending half rate messages, unless the result of fraud or gross negligence, are valid. Evidence of an error of a word or figure is not proof of gross negligence. *Jones v. W. U. T. Co.*, 18 Fed. Rep. 717.

Schwartz v. A. & P. T. Co., 18 Hun, 157 (failure to transmit).

(f). STIPULATION FOR FIXED SUM AS DAMAGES.

Conditions in a contract for the transmission of telegraph messages that the company shall not be liable for mistakes or delays in transmis-

sion or delivery, or for non-delivery, or any unrepeatd message beyond the amount received for sending the same, nor in any case for delays arising from unavoidable interruption in the working of its lines, &c., are reasonable and not against public policy.

Plaintiff delivered to defendant for transmission a message directing his yacht to be taken to the club house as a storm was coming on, which message was written on a blank containing such conditions. The day was a stormy one, and the wires between the places of transmission and delivery grounded. It appeared that defendant's operators made frequent attempts to send the message, but were unable to secure communication for over an hour. The message was received too late to permit the boat to be taken to the club house, and it went ashore that night. Held, that no willful or gross negligence on the part of the defendant was shown, and that it could not be held liable for a greater amount than the sum paid for the message. *Riley v. W. U. T. Co.*, 6 Misc. 221, rev'g judg't for pl'ff. (City Court of New York.)

A contract limiting company's liability to twenty-five cents is void. *W. U. T. Co. v. Young*, 93 Ind. 118.

W. U. T. Co. v. Blanchard, 68 Ga. 299.

A stipulation limiting the liability of a telegraph company for negligence in respect to mistakes or delay to fifty times the sum received for sending it, is void. *Brown v. Postal Tel. Co.*, 111 N. C. 187.

The above cases illustrate the provisions in special contracts. Courts that do not favor a limitation of liability for negligence, extend the holding to stipulations fixing a sum to be paid in case liability arises, unless such sum be a fair equivalent for the loss; but of course courts that permit contracts relieving from liability *in toto*, would uphold agreements limiting the sum recoverable. The subject is discussed in *Primrose v. W. U. T. Co.*, 154 U. S. 1; and see, also, "Common Carrier of Goods," pp. 237, 268.

(g). LIMITATION OF TIME FOR PRESENTATION OF CLAIM—WHEN VALID.

Agreement for a consideration, as a reduced rate, to present claim for damages within a limited time, is valid. *Young v. W. U. T. Co.*, 65 N. Y. 163; 2 J. & S. 390.

Hill v. W. U. T. Co., 85 Ga. 425; *W. U. T. Co. v. Blanchard*, 68 id. 299; *W. U. T. Co. v. Yopst*, 118 Ind. 248; *W. U. T. Co. v. Jones*, 95 id. 228; *W. U. T. Co. v. Wilson*, 108 id. 308; *Cole v. W. U. T. Co.*, 33 Minn. 227; *Wolf v. W. U. T. Co.*, 62 Pa. St. 83; *Express Co. v. Caldwell*, 21 Wall. 264; *W. U. T. Co. v. Reins*, 63 Tex. 27.

Exemption beyond the amount paid for the message, unless claim is presented within sixty days, is valid. *Webber v. W. U. T. Co.*, 64 Ill. App. 331.

Thirty days' limitation is reasonable where the damages were known within three days. *W. U. T. Co. v. Culberson*, 79 Tex. 65.

Ninety days after the message is filed for transmission is valid under Texas statutes. *Baldwin v. W. U. T. Co.*, (Tex. Civ. App.) 33 S. W. Rep. 890.

Sixty days' clause for the presentation of claims is reasonable. *Harris v. W. U. T. Co.*, 121 Ala. 519.

Within sixty days after message is filed. *Albers v. W. U. Tel. Co.*, 98 Iowa, 51; *Russell v. Id.*, 57 Kan. 230; *Kirby v. W. U. T. Co.*, 7 S. D. 623.

Within sixty days from the time message is left for transmission, is reasonable. *Clements v. W. U. T. Co.*, 77 Miss. 747.

A ninety days' limit clause for the presentation of claims is valid. *W. U. T. Co. v. Vanway*, (Tex. Civ. App.) 54 S. W. Rep. 414.

Stipulation for twenty days on a night message was held to be reasonable. *Heimann v. W. U. T. Co.*, 57 Wis. 562.

A stipulation on a telegraph blank that "no claim for damages shall be valid unless presented in writing within twenty days from sending the message" is valid, although the message be delayed by the fault of the company, provided reasonable time be left to ascertain and present the claim. *Heimann v. W. U. T. Co.*, 57 Wis. 562.

W. U. T. Co. v. Daugherty, 54 Ark. 221 (sixty day limitation valid).

Beasley v. W. U. T. Co., 39 Fed. Rep. 181 (thirty day limitation valid).

(h). LIMITATION OF TIME FOR PRESENTATION OF CLAIM—WHEN VOID.

Sixty days' limit clause for presentation of claims is unreasonable and void as against public policy besides being a violation of the Kentucky constitution. *Western Union Teleg. Co. v. Enbank*, 100 Ky. 591.

That is, within sixty days after the message is filed. *Davis v. Western Union Teleg. Co.*, (Ky.) 54 S. W. Rep. 849.

Tex. R. S. 1895, art. 3398, 79, invalidating such clauses, does not apply to messages coming from without the state. *Western Union Teleg. Co. v. Burgess*, 43 S. W. Rep. 1033; s. c. mod'd, 46 S. W. Rep. 794; see *Western Union Teleg. Co. v. Lovely*, (Tex. Civ. App.) 52 S. W. Rep. 563.

A limitation of thirty days for the presentation of claims for damages after sending message, is void. The action was by the sendee. It seems that he called repeatedly for the message and was told that there was none, and his opportunity to discover the error was very limited. *Johnston v. W. U. T. Co.*, 33 Fed. Rep. 362.

Stipulation limiting presentation of claim for sixty days is not reason-

able where the message is sent a long distance, and a reply would not be expected, and in the ordinary course of business a letter would not be received until the time limit had expired. *Conrad v. W. U. T. Co.*, 162 Pa. St. 204.

See opinion in *Wolf v. W. U. T. Co.*, 62 Pa. St. 83.

(i). LIMITATION OF TIME FOR PRESENTATION OF CLAIM—SUFFICIENT COMPLIANCE WITH.

Service of a complaint, setting forth cause of action, is sufficient presentation of claim. *W. U. T. Co. v. Henderson*, 89 Ala. 510.

A stipulation limiting the time for the presentation of claims to sixty days, is met by an action upon the demand brought within that time. *W. U. T. Co. v. Trumbell*, 1 Ind. App. 121.

Sixty days' limit clause for presentation of claim was complied with, by commencement of suit within such time after receipt of notice of sending. *Western Union Teleg. Co. v. Mellon*, 100 Ky. 429; *Western Union Teleg. Co. v. Mellon*, 96 Tenn. 66.

(j). SPECIAL CONTRACT—EFFECT UPON THE RIGHTS OF THE SENDEE.

Stipulation of sixty days' limitation for presentation of claim applies to all special damages, and affects the sender and sendee, where the message relates to the business of both, and is an answer to a previous message by the receiver. *W. U. T. Co. v. James*, 90 Ga. 254.

Receiver of a telegram is not bound by a sixty day limit clause on the blank unless actually assented to. *Webbe v. Western Union Teleg. Co.*, 169 Ill. 610; rev'g s. c., 64 Ill. App. 331.

Action under statute by sendee. Stipulation as to an unrepeatd message could not affect sendee in an action under the statute, and such stipulation is void in any event. *W. U. T. Co. v. Fenton*, 52 Ind. 1.

Rights of sendee depends upon the contract made by the sender. *Russel v. Western Union Teleg. Co.*, 57 Kan. 230.

The receiver of a dispatch derives his right through the sender, and has no greater rights, and is bound by contract made by the latter. It is difficult to see how the plaintiff, who claims through the contract entered into by the sender of the message with the defendants, which created the duty and obligation resting on the defendants, can claim any higher or different degree of diligence than that which was stipulated for by the parties to the contract. Certainly a derivative and incidental right cannot be greater or more extensive than that which attaches to the principal or source whence such right accrued or was derived. Error in transmission whereby \$125 was changed to \$175. *Ellis v. Am. Tel. Co.*, 13 Allen, 226.

See, to same effect, *Aikin v. W. U. T. Co.*, 5 S. C. 358; *W. U. T. Co. v. Neill*, 57 Tex. 283.

The sendee cannot affect the rights of the sender to a penalty for non-delivery. *Brashears v. W. U. T. Co.*, 45 Mo. App. 433.

Stipulation as to unrepeatd messages binds sendee when brought home to him or made the subject of special contract. There was an alteration of a dispatch, but it was in reply to one sent by plaintiff. *Becker v. W. U. T. Co.*, 11 Neb. 87.

The sender of an unrepeatd message cannot recover the cost of sending the same, unless the company was negligent, where there is a stipulation exempting the company from liability. *Thompson v. W. U. T. Co.*, 106 N. C. 549.

"Send me * * * two hand bouquets" translated "two hundred bouquets." Receiver could maintain action, having commenced to fill the order. *N. Y. & W. P. T. Co. v. Dryburgh*, 35 Pa. St. 298.

Recipient of message from Staten Island, but negligently reading as if sent from S. Carolina, after inquiring at telegraph office, and finding it closed, made a fruitless trip to S. Carolina. For jury whether he was guilty of contributory negligence.

Company was not relieved from liability by the fact that the plaintiff did not have the message repeated, in accordance with a rule limiting its responsibility to messages so repeated. The rule applied to the sender and not the sendee. *Tobin v. W. U. T. Co.*, 146 Pa. St. 375.

Citing *N. Y. & C. T. Co. v. Dryburg*, 35 Pa. St. 298; *W. U. T. Co. v. Richman*, 6 Cent. Rep. 565; 19 W. N. Rep. 569.

Right of receiver is founded on misfeasance of company. *Rose v. W. U. T. Co.*, 3 Abb. Pr. (N. S.) 408; *W. U. Tel. Co. v. Richman*, (Pa.) 6 Cent. 565.

Stipulation applies as well to sender as sendee. *Cole v. Tel. Co.*, 8 Am. & Eng. Corp. Cas. 45.

Tel. Co. v. Jones, 8 Am. & Eng. Corp. Cas. 47; *Tel. Co. v. Meredith*, id. 54; *Tel. Co. v. Jones*, 95 id. 228.

When the receiver sues as a principal upon a contract made by his agent, the sender, and when he sues merely for deprivation of benefit for non-performance of a contract, he is bound by the terms of any contract valid as to the sender. *Gray Com. by Tel.*, p. 131.

Citing *Aiken v. W. U. T. Co.*, 5 S. C. 358; *Ellis v. Am. T. Co.*, 13 Allen, 226, 238; *W. U. T. Co. v. Fenton*, 52 Ind. 1; see, also, *Sweatland v. Ill. & C. Co.* 27 Iowa, 433.

But when receiver sues for damages done by his being misled by the altered reading of the contract, he is not bound by any special stipulation entered into between the sender and the company. *N. Y. & C. T. Co. v. Dryburgh*, 35 Pa. St. 298.

Whart. on Neg., sec. 764; *W. U. T. Co. v. Fenton*, 52 Ind. 1; Gray Com. by Tel., p. 132; *De La Grange v. S. W. T. Co.*, 25 La. Ann. 383; *De Rutte v. N. Y., Alb. & Buf. T. Co.*, 1 Daly, 547; *Rose v. U. S. T. Co.*, 3 Abb. Pr., (N. S.) 408, 410; *Wash. & N. O. T. Co. v. Hobson*, 15 Gratt. 122.

(k). EFFECT IN AN ACTION FOR A PENALTY UNDER A STATUTE.

A stipulation that a claim for damages shall be presented within sixty days, does not exempt the company from statutory penalty for negligent delay. *W. U. T. Co. v. Cobbs*, 47 Ark. 344.

Limitation of time for presentation of claims is not available in an action for the penalty. *W. U. T. Co. v. Cooledge*, 86 Ga. 104.

A special contract does not avoid a statutory penalty for failure to correctly send a message. *W. U. T. Co. v. Adams*, 87 Ind. 598.

The sendee, suing under Ind. R. S. 1881, sec. 4177, for special damages, is not precluded from recovering by stipulation on blank requiring presentation of claim within a certain time. *W. U. T. Co. v. McKibben*, 114 Ind. 511.

The statutory penalty cannot be recovered unless notice of the company's default, as required by the contract for the transmission of a message, be given. *W. U. T. Co. v. Yopst*, 118 Ind. 248.

Under Neb. Comp. Stat., chap. 89a, sec. 12, a printed stipulation on a blank, releasing company for failure or delay, is void. *W. U. T. Co. v. Lowery*, 32 Neb. 732.

A stipulation limiting the liability of a company for unrepeatd messages, does not excuse it from the care and diligence imposed by statute. *W. U. T. Co. v. Cook*, 61 Fed. Rep. 624.

(l). HOW SPECIAL CONTRACTS MAY BE MADE.

(See "Common Carrier of Goods.")

Notice of regulation at head of blank on which message is written, and statement thereunder that the sender agrees to the regulations, and requests that the message be sent subject to them, if fairly presented, binds the sender, if he does not dissent, whether or not he read the terms offered. When the sender has, for some time, been in possession of blanks containing the stipulation, he will be presumed to know of it. *Breese v. U. S. T. Co.*, 48 N. Y. 132.

Young v. W. U. T. Co., 65 N. Y. 163; 2 J. & S. 390; *Kiley v. W. U. T. Co.*, 109 N. Y. 231; *Schwartz v. A. & P. T. Co.*, 18 Hun, 157; *Bryant v. A. T. Co.*, 1 Daly, 578; *Beaseley v. W. U. T. Co.*, 39 Fed. Rep. 181; *W. U. T. Co. v. Fontaine*, 58 Ga. 433; *U. S. T. Co. v. Gildersleve*, 29 Md. 232 (the message was written on blank of another company, and thus presented by sender); *Redpath v. W. U. T. Co.*, 112 Mass. 71; *Grinnell v. W. U. T. Co.*, 113 id. 299; *Clement v. W. U. T. Co.*, 137 id. 463; *W. U. T. Co. v. Carew*, 15 Mich. 525; *Becker v. W. U. T. Co.*, 11 Neb. 87; *Camp v. W. U. T. Co.*, 1 Metc., (Ky.) 164; *Passmore*

v. W. U. T. Co., 78 Pa. St. 238; *Southern Exp. Co. v. Caldwell*, 88 U. S., (21 Wall.) 264; *Primrose v. W. U. T. Co.*, 154 U. S. 1; *Ellis v. Am. T. Co.*, 13 Allen, 226; *Heimann v. W. U. T. Co.*, 57 Wis. 562.

Plaintiff had for many years extensively used defendant's blanks in sending telegrams, and was familiar with their contents. These blanks had printed at the top a provision that the company should not be liable for mistakes, delays or the non-delivery of any unrepeatd message beyond the amount received for sending the same, and at the bottom a notice calling attention to the agreement. In an action to recover damages for failure to deliver a message written upon one of said blanks, and delivered by plaintiff to one of defendant's operators and sent by him, which plaintiff had not ordered to be repeated, it was not shown that the failure to deliver was due to the willful misconduct or gross negligence of the defendant. Held, that the case was within the letter and purpose of the stipulation, to which plaintiff must be held to have assented, and that he was only entitled to recover the amount paid by him for sending the message.

The blank upon which the message was written when introduced in evidence was mutilated, a portion of the top having been torn off, but there still remained the provision requiring a message to be repeated and the agreement relieving defendant from liability for failure to deliver and for delay in the case of an unrepeatd message. There was no evidence that it was torn when plaintiff wrote the message. It was to be presumed that the blank was perfect when delivered to defendant; that, as plaintiff knew that the blanks when complete contained certain agreements, by using this blank and delivering it to defendant, even if it was then mutilated, he must be held to be bound by the agreement contained in a perfect blank; also, that enough remained upon the blank as mutilated to show that the defendant was not to be responsible for an unrepeatd message. *Kiley v. Western Union Telegraph Co.*, 109 N. Y. 231; aff'g 39 Hun, 158.

Where a message is written on blank paper, not on the blank form, the company is not relieved from liability to one not actually knowing the contents of such forms, although he had been in the habit of sending messages thereon. *Pearsall v. W. U. T. Co.*, 124 N. Y. 256, aff'g 44 Hun, 532, and judg't for pl'ff.

Plaintiff wrote message on plain paper, handed it in and paid charges. He was not bound because agent subsequently pasted it on a blank having conditions. *Harris v. Western Union Teleg. Co.*, 121 Ala. 519.

There being an absence of knowledge or consent thereto. *Western Union Teleg. Co. v. Pruett*, (Tex. Civ. App.) 35 S. W. Rep. 78.

Conditions on the back of a blank, must be assented to to be binding. *North Packing &c. Co. v. Western Union Teleg. Co.*, 70 Ill. App. 275; see *Webbe v. Western Union Teleg. Co.*, 169 Ill. App. 610; rev'g s. c., 64 Ill. App. 331.

Whether a paper furnished by a telegraph company containing conditions and restrictions in respect to the liability of the company in case of an incorrect transmission of messages, and upon which a message is written and signed by the sender, is a contract or not, depends upon the

fact whether the sender had knowledge of such conditions and restrictions and assented thereto, and whether or not such regulation was brought to the notice of the sender so as to fix knowledge upon him, is a question of fact for the jury. Slight evidence of assent will, no doubt, suffice. *Tyler v. W. U. T. Co.*, 60 Ill. 421.

The same rule exists in Illinois as to common carriers, see *ante*, p. 281.

Person sending message, knowing of rules, though he does not use blank of the company upon which rules are printed, is bound by the rules. *W. U. T. Co. v. Buchanan*, 35 Ind. 430.

Party sending message is supposed to know that the engagements of the company are controlled by such rules and regulations as it has a right to make, and in law engrafts them in his contracts of bailment and is bound by them. *Birney v. N. Y. &c. T. Co.*, 18 Md. 341.

W. U. T. Co. v. Carew, 15 Mich. 525.

Sender bound to know of rules and regulations. *U. S. T. Co. v. Gildersleeve*, 29 Md. 232.

Regulations of which sender has knowledge become part of the contract. *Wann v. W. U. T. Co.*, 37 Mo. 472.

A telegraph company had the rules printed at the head of its message blanks, accompanied by a stipulation that the message to be written on the blank was received subject thereto. At the Bradford oil exchange, on account of the peculiar nature and exigencies of the business transacted, the company dispensed with the use of these blanks and received and delivered messages orally.

In such case the business, as thus conducted, being special and peculiar, as compared with the general and ordinary business of the company, it was not error to submit to the jury whether, from the circumstance that the company had dispensed with the use of its blanks, it did not intend to relieve its patrons from the stipulations contained in them. *W. U. T. Co. v. Stevenson*, 128 Pa. St. 442.

Pinning message to a blank without knowledge of the sender or sendee does not make the stipulations on the blank a part of the contract. *Anderson v. W. U. T. Co.*, 84 Tex. 17.

The sender is chargeable with knowledge of stipulation on sending blank, whether he reads it or not, in the absence of fraud. Omission to read the contents cannot relieve the plaintiff. *Beasley v. W. U. T. Co.*, 39 Fed. Rep. 181; *Grinnell v. W. U. T. Co.*, 113 Mass. 299; *Redpath v. W. U. T. Co.*, 112 id. 71, 73; *W. U. T. Co. v. Carew*, 15 Mich. 525; *Wolf v. W. U. T. Co.*, 62 Pa. St. 83; *Breese v. U. S. T. Co.*, 48 N. Y. 132; *Marr v. W. U. T. Co.*, 85 Tenn. 529.

Pegram v. W. U. T. Co., 97 N. C. 57.

(m). WHAT SPECIAL CONTRACTS INCLUDE.

Clause that company will not be responsible for mistakes or delay in transmission of a message, applies only to the transmission of the message, and not to mistakes or delay in delivery. *Bryant v. A. T. Co.*, 1 Daly, 575.

A condition limiting the liability in the transmission of unrepeatd messages and cipher or obscure messages, does not cover failure to transmit a cipher dispatch from the receiving office. *W. U. T. Co. v. Way*, 83 Ala. 542.

Stipulation exempting company from liability on unrepeatd messages, does not cover liability for failure to deliver such messages after they have been properly received at their destination. *W. U. T. Co. v. Henderson*, 89 Ala. 510.

W. U. T. Co. v. Tyler, 74 Ill. 168; *W. U. T. Co. v. Lowry*, 32 Neb. 732; *White v. W. U. T. Co.*, 14 Fed. Rep. 710; *Birney v. N. Y. & W. P. T. Co.*, 18 Md. 341.

Contractual limitation to sixty days for presenting claim does not apply to statutory penalty. *W. U. T. Co. v. Jannes*, 90 Ga. 254.

Provision for repeating a message could constitute no defense to an action brought by the person to whom the message was sent against a company for negligence in failing to deliver the message in a reasonable time, the making prompt delivery dependent on such repetition being unreasonable, and the company, like a common carrier, being unable to contract against liability for its own negligence, and the action being based upon the statute and not upon contract between the parties. *W. U. T. Co. v. Fenton*, 52 Ind. 1, 2.

Citing, on behalf of contract against negligence, *W. U. T. Co. v. Buchanan*, 35 Ind. 429; *W. U. T. Co. v. Meek*, 49 id. 53.

A contract that the company will not be liable for damages in any case where claim is not presented within sixty days, applies only where message is sent, and if there is a failure to transmit no notice is necessary. *W. U. T. Co. v. Yopst*, 118 Ind. 248.

The words claimed to create the exemption should be strictly construed. *Id.*

Stipulation limiting damages to the sum paid for transmission, including extra amount for repeated messages, does not cover a mistake due to misdirection. *Western Union Teleg. Co. v. Todd*, (Ind.) 53 N. E. Rep. 194.

Rules exempting company from liability for *non-transmission* or *non-delivery of unrepeatd messages*, do not apply to a case where no effort is made by the company or its agents to put a message on transit. *Birney v. N. Y. & Wash. T. Co.*, 18 Md. 341.

See *Garrett v. W. U. T. Co.*, 83 Iowa, 252; *Sprague v. W. U. T. Co.*, 6 Daly, 200.

A stipulation limiting time is not available where the message was not even started from the place of transmission. *Barrett v. W. U. T. Co.*, 42 Mo. App. 542.

A stipulation against liability for unrepeatd messages, does not cover negligent delay in transmission. *Thompson v. W. U. T. Co.*, 107 N. C. 449.

Where error in transmission arose from operator voluntarily changing the wording of the message, the stipulation did not apply. *N. Y. & C. T. Co. v. Dryburg*, 35 Pa. St. 298.

Stipulation requiring message to be repeated is not a defense for delay and failure in delivering message, nor any other failure not pertaining to errors curable by repeating. *W. U. T. Co. v. Broesche*, 72 Tex. 654; *Gulf & C. Co. v. Wilson*, 69 Tex. 739.

W. U. T. Co. v. Graham, 1 Colo. 230; *Bryant v. A. T. Co.*, 1 Daly, 575.

Where the company concealed the fact of its violation of duty until after the expiration of a time limited for notice of claim on its blank, the company was not released from liability. *Gulf & C. Co. v. Todd*, (Tex. App.) 19 S. W. Rep. 761.

Exemption as to mistakes in unrepeatd messages, does not cover negligence in failing to deliver. *Western Union Teleg. Co. v. Nagle*, 11 Tex. Civ. App. 539.

Stipulation limiting damages to the sum paid for transmission, does not cover negligent delay; there being no mistake in transmission. *Barnes v. Western Union Teleg. Co.*, (Nev.) 50 Pac. Rep. 438.

Nor prevent a recovery where there had been such a mistake through negligence. *Mitchell v. Western Union Teleg. Co.*, 12 Tex. Civ. App. 262; *Western Union Teleg. Co. v. Norris*, (Tex. Civ. App.) 60 S. W. Rep. 982.

Where the damages arise from failure to duly deliver, a special contract releasing the company from liability in the case of unrepeatd messages is inoperative. *White v. W. U. T. Co.*, 14 Fed. Rep. 710.

W. U. T. Co. v. Henderson, 89 Ala. 510; *W. U. T. Co. v. Lowery*, 32 Neb. 732.

A company was held liable for not transferring urgent and important message to a competing line, as it might have done, or informing sender that line was down, where it was held until his own line was in working order, although there was a stipulation relieving the company from liability for error in delay in sending unrepeatd dispatch. *Fleischner v. Pacific Postal Tel. Co.*, 55 Fed. Rep. 738.

(n) CONFLICT OF LAWS.

The *lex fori* rather than the *lex loci contractus* governs the validity of the stipulation, so that a stipulation allowing a greater limit of time for

the presentation of claims than Texas allows, though valid where the contract is made, will not be upheld in Texas. *W. U. T. Co. v. Lovely*, (Tex. Civ. App.) 52 S. W. Rep. 563.

XI. Delivery.

Where the company entered an assumed name in its register as that of the man entitled to receive a message, addressed to his residence, and such message was not delivered, it was liable for not fulfilling promise to deliver. *Milligan v. W. U. T. Co.*, 110 N. Y. 403.

Although the business at a receiving office does not justify the employment of a separate telegraph operator or messenger boy, that is not an excuse for failure to deliver a telegram. *W. U. T. Co. v. Henderson*, 89 Ala. 510.

Company must use ordinary care and diligence to find the sendee. Instruction that company is only required to deliver a message at the office of the person addressed, is erroneous; also error to charge that plaintiff must show that sendee was at his office ready to receive the message. *Pope v. W. U. T. Co.*, 9 Brad. (Ill. App.) 283.

W. U. T. Co. v. Lindley, 62 Ind. 371 (an attempt to deliver a message after business hours, or on Sunday, is no excuse for failure to deliver).

A woman lived and had lived for four years at Christian Ridge; the telegraph operator understood that she had moved. The messenger, on three different occasions, on going out, was told by some that she still lived there, and by some that she had moved. He did not go to the place, but after a delay of a day left the message with the janitor of Blue Ribbon Hall, which she sometimes frequented, from whom she received it twenty-four hours later. Judgment for plaintiff was sustained. *W. U. T. Co. v. Gougar*, 84 Ind. 179.

Verbal instruction to a messenger boy when not in the office as to a place for delivering a message, is not binding on the company. A direction in writing should be left or sent to the company's office.

Delivery of a message to hotel clerk is a sufficient delivery to a guest of the hotel, temporarily absent, however negligent the clerk may be thereafter in delivering it. *W. U. T. Co. v. Trissal*, 98 Ind. 566.

That the company's messenger was unable, upon inquiry at the hotels, post-office, and of persons on the street, to find the plaintiff, and so advised the sender, who assented thereto, does not bind the sendee when the sendee for six years had lived in the same house within a mile of the telegraph office. *W. U. T. Co. v. McKibben*, 114 Ind. 511.

Agreement to forward telegrams to a person moving away, is binding for reasonable time, and whether twenty-six days was reasonable was for

jury, and they found for defendant. The company mailed postal card to the first address. *Thorp v. W. U. T. Co.*, 84 Iowa, 190.

It was for the jury to say whether delay of five hours in delivering a telegram was the proximate cause of death, where there was evidence to show probability of recovery by earlier treatment. *Henderschott v. W. U. T. Co.*, 106 Iowa, 529.

By undertaking to transmit message to "S," and thence forward it by mail to "W," company became liable for a delay of three days in such forwarding. *W. U. T. Co. v. McIlvoy*, (Ky.) 55 S. W. Rep. 428.

According to the customary method a despatch was left *according to the address*, and upon the information that the addressee lived at the place where it was delivered. Company was not liable to addressee, although said addressee lived at the same number on a street to which the same name also applied. *Deslottes v. Balt. Co.*, 40 La. Ann. 183.

"A" hired a shop and post-office box in a town, and assumed the same name as a reputable merchant of the town. After writing to plaintiff upon paper on which was printed his assumed name and number of his box, and asking the price of goods, and receiving reply, he ordered goods. The plaintiff, assuming that he was dealing with the "reputable merchant," forwarded the goods, addressed to "A" with the name of the town, by a common carrier, and sent letter of advice to "A." The carrier delivered the goods to occupant at shop hired by "A," and took receipt. "A" soon disappeared; the carrier was not liable for conversion of goods unless negligent. *Samuel v. Cheney*, 135 Mass. 278.

Citing *Cundy v. Lindsay*, 3 App. Cas. 459; *Lindsay v. Cundy*, 1 Q. B. Div. 348; *Dunbar v. Boston &c. R. Co.*, 110 Mass. 26; *McKean v. M'Ivor*, L. R., 6 Ex. 36; *Heugh v. London &c. R.*, 5 id. 51; *Clough v. London &c. R.*, 7 id. 26.

Distinguishing *Winslow v. Vermont &c. R.*, 42 Vt. 700; *Am. Ex. Co. v. Fletcher*, 25 Ind. 492; *Price v. Oswego &c. R. Co.*, 50 N. Y. 213.

(Although not a telegraph case, the above is useful on the subject of delivery.)

Although a company had maintained no agent at the place of destination, but had only a wire there for the convenience of the railroad company, yet it was liable for failure to transmit and deliver a message undertaken by it when, after discovering mistake, the sender was not notified and the fee was retained. *W. U. T. Co. v. Jones*, 69 Miss. 658.

Transmission of a telegraph message to the person addressed through a telephone is not proper compliance with the contract. *Brashears v. W. U. T. Co.*, 45 Mo. App. 433.

Exemption from delay through unreported messages did not relieve defendant as such neglect was not the proximate cause of the delay. See *Barnes v. W. U. T. Co.*, 24 Nev. 125.

Failure of a messenger boy to go to the back door to ascertain an address from the postmaster when the delivery window was closed presented

a question of negligence for the jury. *Lyne v. W. U. T. Co.*, 123 N. C. 129.

Message was directed to plaintiff in care of his employer. The boy went to the factory and inquired for plaintiff, and was told to look for him. He did not do so thoroughly, but returned it to the office. No effort was made to deliver a second message. Plaintiff did not receive word till too late, and then only upon his own inquiry. Recovery was allowed. *Hendricks v. W. U. T. Co.*, 126 N. C. 304.

Sender may testify that he could have verified the address had he been notified of the failure to deliver. *Hendricks v. W. U. T. Co.*, 126 N. C. 304.

The initial company changed the name from "Sam." to "Wm.," but the connecting company could, by the exercise of due diligence, have delivered it to the proper person, who would have known that it was intended for him. The initial company was not liable. *W. U. T. Co. v. Mumford*, 87 Tenn. 190.

Whether failure to make further effort after going twice to a physician's office was negligent, was for the jury. *W. U. T. Co. v. Cooper*, 71 Tex. 507.

Where a message is sent to one person in care of another, and the latter, upon delivery to him, declines to forward to the other, the company is not obliged to find the receiver. *W. U. T. Co. v. Young*, 77 Tex. 345.

Due care to find the sendee must be taken, although the message is addressed in care of a person who cannot be found. *W. U. T. Co. v. Houghton*, 82 Tex. 561; 1 R. & C. L. J. 112.

Whether defendant is bound to deliver to sender's wife when he himself is absent, is a question for the jury. *W. U. T. Co. v. Mitchell*, 91 Tex. 454; *W. U. T. Co. v. Seals*, (Tex. Civ. App.) 45 S. W. Rep. 964.

Use of "street" instead of "alley" in address, was no defense, where the city directory so designated it and it was so known. *W. U. T. Co. v. Cain*. (Tex. Civ. App.) 40 S. W. Rep. 624.

Company is chargeable for a failure to deliver, where its delay in transmitting to a connecting line contributed to plaintiff's failure to receive. *Watherford & Co. R. Co. v. Seals*, (Tex. Civ. App.) 41 S. W. Rep. 841.

Duty to notify sender of inability to deliver depends upon whether or not it is negligence not to do so. *W. U. T. Co. v. Davis*, 51 S. W. Rep. 258; s. c., 59 S. W. Rep. 46.

Where inquiry was made at various places and of numerous persons, as to addresses and residence, reasonable diligence has been exercised. *W. U. T. Co. v. Burgess*, (Tex. Civ. App.) 43 S. W. Rep. 1033, mod'g s. c., 46 S. W. Rep. 794.

That the telegram is addressed to the care of another, does not excuse delivery to the addressee, where it can be done by the exercise of reasonable diligence. *W. U. T. Co. v. Jackson*, 19 Tex. Civ. App. 273.

Plaintiff may show that strangers, carrying the same news, located the party within twenty to thirty minutes after his arrival. *W. U. T. Co. v. Daus*, (Tex. Civ. App.) 59 S. W. Rep. 46.

That message for the sheriff received at 11.20 A. M. was not presented at his office until his return at 3 P. M., did not show negligence. *W. U. T. Co. v. Wofford*, (Tex.) 60 S. W. Rep. 546, rev'g s. c., 58 S. W. Rep. 627.

Defendant's testimony to the effect that its messenger went to a mill to find one addressed as "near" that mill, and failing, tried to locate the sendee upon the giving of another address, established due diligence. *Hargraves v. W. U. T. Co.*, (Tex. Civ. App.) 60 S. W. Rep. 687.

Upon failure to discover sendee, and upon information that he was out of the city for two days, delivery to his wife and advice thereof to sender was sufficient. *Given v. W. U. T. Co.*, 24 Fed. Rep. 119.

Company was liable for sending out a duplicate of a message, where the original had been contradicted. *W. U. T. Co. v. Va. Paper Co.*, 87 Va. 418.

(a) FREE DELIVERY LIMITS.

It is the duty of the sender to ascertain whether the proposed receiver resides within the limits of free delivery, for if he do not the company is not obliged to deliver by special messenger without compensation. *W. U. T. Co. v. Henderson*, 89 Ala. 510.

Company is under no obligation to deliver in the country without a guaranty of payment for its charges therefor. *W. U. T. Co. v. Matthews*, (Ky.) 55 S. W. Rep. 427.

Where the sender did not know of the regulation respecting a message for delivery beyond the free limit delivery, he was entitled to recover penalty for non-delivery. *Brashears v. W. U. T. Co.*, 45 Mo. App. 433.

Company's obligation is to transmit to the place of delivery and there make reasonable effort to deliver it within the free delivery limit only. *Reynolds v. W. U. T. Co.*, 81 Mo. App. 223.

That sender lived beyond free delivery limits was no excuse for not notifying him of failure to deliver. *Hendricks v. W. U. T. Co.*, 126 N. C. 304.

Where a blank contained a stipulation that special rate would be charged for delivering a message outside of free delivery limits, the company was not liable for refusal to accept and deliver a message without such limits, without payment or guarantee of payment of such charges.

Where special charges for delivery outside of free delivery limits are not paid, it is the duty of the company to notify the sender thereof, where the company has undertaken the delivery. *Anderson v. W. U. T. Co.*, 84 Tex. 17.

Defendant undertook to send a message by special messenger to a place outside of free delivery limits, upon a guarantee of the costs thereof. Messenger should have been required to make inquiries at such places, as he is most likely to obtain information as to sendee's address, knowing that he resided some distance from such place. *W. U. T. Co. v. Drake*, 13 Tex. Civ. App. 572.

That an agent was mistaken in supposing that the company had an office at the place of delivery, was no excuse for not exercising reasonable diligence to make the delivery. *W. U. T. Co. v. Hargrove*, 14 Tex. Civ. App. 79.

Nor that addressee was not within the free delivery limits at the time where her home was and the message could have been transmitted therefrom. *W. U. T. Co. v. Clark*, 14 Tex. Civ. App. 563.

Where the addressee lived within such district, defendant is bound to exercise reasonable care to make the delivery. *W. U. T. Co. v. Gossett*, 15 Tex. Civ. App. 52.

Company had stipulated for an exemption outside of free delivery limits unless a change was made. Plaintiff was not, however, in the absence of knowledge of what those limits were, prevented from recovering. *W. U. T. Co. v. Davis*, (Tex. Civ. App.) 59 S. W. Rep. 46.

So, where it was the custom of the receiving office to notify the sending office of extra charges for special delivery, plaintiff was entitled to assume that there were none. *Evans v. W. U. T. Co.*, (Tex. Civ. App.) 56 S. W. Rep. 609.

So company cannot set up as a defense that the addressee was beyond the free delivery limit where such a restriction was not ordinarily observed. *W. U. T. Co. v. Cain*, (Tex. Civ. App.) 40 S. W. Rep. 624.

Or where it accepted the message without demanding extra compensation for delivery in such place and attempted to deliver it. *W. U. T. Co. v. Sweetman*, 19 Tex. Civ. App. 435.

And in such a case, it is not error to refuse to charge that the company is not under an obligation to go beyond such limits to make delivery. *W. U. T. Co. v. Davis*, (Tex. Civ. App.) 59 S. W. Rep. 46.

Defendant failed to secure sendee's address. Such fact was held to be immaterial however in view of the fact that the contract restricted delivery to certain limits, and sendee, in fact, lived beyond those limits. *W. U. T. Co. v. Redinger*, 22 Tex. Civ. App. 362.

XII. Liability as between Sender and Sendee.

"T. & Co." sent message to "T.," a broker, to sell five hundred barrels (it was transmitted five thousand barrels), which he did; "T & Co." repudiated the contract. "T" paid the difference to purchasers and sued the company for the difference and his commissions.

"T" was only agent and not the proper party to sue on the contract.

"T & Co." were bound by the contract to "T," and for five thousand barrels. *Rose v. U. S. T. Co.*, 3 Abb. Pr. (N. S.) 408.

Telegraphic operator is the agent of the sender, and if the message as actually sent offer merchandise at a less price than that written by the sender, and the proposition be accepted, the sender is bound thereby; whether bound or not, if the sender settle on the basis of the lower price, in good faith, and is induced to do so by the negligence of defendant's servants, he may recover from the company the difference between what he actually did and what he would have received for his property if the mistake had not been made; whatever he paid the sendee in settlement is immaterial. *W. U. T. Co. v. Shotter*, 71 Ga. 760.

Citing, for doctrine, Allen's Tel. Cases, 157, 330, 699; 40 Wis. 431; *contra*, Eng. Cases, Allen's Tel. Cases, 567, 697.

As between the sender and the sendee, the loss must fall upon the one who elected the means of communication; but he has a remedy over against the company where the loss is produced by his negligence. *Ayer v. W. U. T. Co.*, 79 Me. 493.

From opinion.—"The authorities are few and somewhat conflicting, but there are several in harmony with our conclusion upon this point.

In *Durkee v. Vt. C. R. Co.*, 29 Vt. 137, it was held that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of any contract.

In *Saveland v. Green*, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of a contract, binding on the sender.

In *Morgan v. People*, 59 Ill. 58, it was said that the telegram received was the original, and it was held that the sheriff receiving such a telegram from the judgment-creditor, was bound to follow it as it read.

There are *dicta* to the same effect in *Wilson v. M. & N. Ry. Co.*, 31 Minn. 481, and *Howley v. Whipple*, 48 N. H. 488; *Tel Co. v. Schotter*, 71 Ga. 760, is almost a parallel case."

Agent telegraphed for prices, receiving quotations in reply. He was entitled to act thereon without waiting for the arrival of the letter, which he was directed therein to see. There being no direction not to sell until its arrival, and no intimation that the prices were different. *Haubelt v. Rea & Co.*, 77 Mo. App. 672.

The company being the agent of the sender, the sendee is warranted in

relying on the wording of the message as received. *Ashford v. Choop*, 81 Mo. App. 539.

Although the sender has been obliged, by the courts of another state, to pay damages to receiver on account of alteration in a message, he was not allowed to recover of the company for the damages so sustained by the receiver. *Pegram v. W. U. T. Co.*, 100 N. C. 28.

Le Roy telegraphed Dryburg for two hand boquets, which was transmitted two hundred. In the opinion it was said, "That the defendants would be responsible to Le Roy and that he would be responsible over to Dryburg, are not contested, though, perhaps, not conceded points." *N. Y. & W. P. T. Co. v. Dryburg*, 35 Pa. St. 298.

The company is not an agent of the company so as to render the latter liable to receiver of a message on account of damages resulting from the negligent alteration of the message by the company. *Pepper v. W. U. T. Co.*, 87 Tenn. 554.

Sender, being entitled to rely on prompt delivery, is not responsible for the company's negligence. *Mitchell v. W. U. T. Co.*, 12 Tex. Civ. App. 262, cf. 56 S. W. Rep. 439.

Where, owing to the negligence of the company, words of a message differ from the words actually sent, the sender is not liable to the sendee, nor is the sendee to the sender. *Henkel v. Pape*, L. R., 6 Ex. 7.

Verdin v. Robertson, 10 Ct. Sess. Cas. 3, sec. 35; *Gray's Communication by Telegraph*, sec. 184, note 3.

XIII. When Company Is Bound by Act of Its Agent.

An operator sent a message in the name of the cashier of a bank, and purporting to come from and be dated at another station, at the request of a party known to the operator not to be such said cashier, which message was addressed to a banking house and held out such party as entitled to a credit for a large amount. The company was liable to the person to whom the money was addressed for the damages suffered. *Elwood v. W. U. T. Co.*, 45 N. Y. 549.

Plaintiff used a call box of the defendant, placed in a bank, to call one of its messenger boys, to whom he delivered certain money to be deposited in his bank, but by the negligence of the boy the money was lost. Held, that the defendant was liable for such loss. *Sanford v. American District Telegraph Co.*, 6 Misc. 534.

One "W," at once agent of the W. U. T. Co. and Wells, Fargo & Co.'s Express, at Colusa, and also insurance agent, employed in his general business, as his clerk, one Crowell, understanding telegraphy (not employed by telegraph company), and frequently employed him to re-

ceive and transmit telegraphic messages. Crowell prepared and sent a message as follows:

“COLUSA, *January 19, 1875.*

“To the Bank of California, San Francisco Co.,

“Pay Charles H. Crowley twelve hundred dollars gold.

“Signed,

“W. P. HARRINGTON, *Cashier.*”

Harrington was cashier of a bank at Colusa. Crowell then sent a message to Charles A. Crowley at San Francisco, directing him to call at the bank for the money; Crowley then went to San Francisco, obtained the dispatch and identification as Crowley, and received the money. The telegraph company was liable. *Bank of California v. W. U. T. Co.*, 52 Cal. 280.

Agent or manager at the point where the dispatch was sent, is the proper person upon whom to make a demand for damages. *Hill v. W. U. T. Co.*, 85 Ga. 425.

The agent, recipient of a message, represents the company as to all matters connected with the transaction. *W. U. T. Co. v. Yopst*, 118 Ind. 246.

Broker could not rely on declaration of company's agent that message had gone through, in order to fix liability of the company. *U. S. T. Co. v. Gildersleve*, 29 Md. 232.

Where the agent of a telegraph company reported and sent a false message, and the party receiving it in the usual course of business acted upon it in good faith, the company was liable.

Agent of a telegraph company and also of an express company, forged and sent a dispatch to a merchant requesting him to forward money by express to his correspondent, and the money when received was intercepted and converted to the agent's use; company was liable. *McCord v. W. U. T. Co.*, 39 Minn. 181.

Night operators of a railroad company were permitted customarily to receive, transmit and collect for night messages. Company was charged with their acts. *Dowdy v. W. U. T. Co.*, 124 N. C. 522.

Telephone company received messages and transmitted them to telegraph company, collecting for both lines. Former was not, however, the agent of the latter. *W. U. T. Co. v. Lovely*, (Tex. Civ. App.) 52 S. W. Rep. 563.

Message was given to a party, taken to be company's agent, but in fact a railroad employé working in the same office, notifying him of sendee's interest. It was shown that the agent received the message. It was held that such evidence justified the conclusion that he received the notice also. *W. U. T. Co. v. Vanway*, (Tex. Civ. App.) 54 S. W. Rep. 414.

Acceptance of a message by an agent for transmission to a place beyond the place where the company had an office (the transmission from the latter's place being by mail) was within the apparent scope of such agent's authority. *W. U. T. Co. v. Carter*, (Tex. Civ. App.) 58 S. W. Rep. 198.

Forgery of a money-order message held to be within the apparent scope of authority of telegraph operator charged with the duty of transmitting messages. *Bank of Palo Alto v. Pac. Postal Teleg. Co.*, 103 Fed. Rep. 841.

XIV. Parties—Who May Sue.

(See, *ante*, pp. 2411-13.)

A sendee has no action in England. Gray Com. by Tel., p. 115; see, also, *Playford v. Tel. Co.*, L. R., 4 Q. B. 706; *Dickson v. Reuters' Tel. Co.*, L. R., 2 C. P. D. 62; s. c., 37 L. T. (N. S.) 370.

In Wharton on Negligence, sec. 757, it is said, as to the non-delivery of a message to the sendee, that if there is a statutory duty to deliver messages to the sendee, then he may sue for failure to do so; and also the sendee may occupy a relation toward the company that would give him such right. If the company has agreed by special contract to deliver messages to him; if, on the faith of its general announcements, he has put himself in such a position to it that he suffers loss from its negligence, he may have suit. "But if there be no such confidence, or if the message be not in reply to one sent by the sendee, he cannot maintain a suit against the company for *mere non-delivery* of a message addressed to him."

The actual receiver of a message may recover damages for the delivery to him of an altered or erroneous message, caused by the negligence of the company. Wharton on Negligence, sec. 758.

Elwood v. W. U. T. Co., 45 N. Y. 549; *W. U. T. Co. v. Blanchard*, 68 Ga. 299; *W. U. T. Co. v. Dubois*, 128 Ill. 248; *W. U. T. Co. v. McKibben*, 114 Ind. 518; *LaGrange v. S. W. T. Co.*, 25 La. Ann. 383; *Ellis v. Am. T. Co.*, 13 Allen, 226; *N. Y. & Wash. T. Co. v. Dryburg*, 35 Pa. St. 298; *Tobin v. W. U. T. Co.*, 146 Pa. St. 375; *De Rutte v. N. Y., Albany & C. T. Co.*, 1 Daly, 547; *Rose v. U. S. T. Co.*, 3 Abb. Pr. (N. S.) 408; 6 Rob. (N. Y.) 305.

Gray Com. by Tel., p. 120, says: "It may be hazarded that the right of the person to whom a message is directed to sue as beneficiary for a breach of the contract to communicate that message—a contract to which he is not a party—will, where it is admitted at all, be restricted to the comparatively small class of cases in which the person who employs a telegraph company to communicate a message, *does so solely to benefit the person to whom the message is directed*; for where the person who employs a telegraph company to communicate a message does so to benefit

himself, there is no ground for the interpretation that he intends to part with his right of action for a breach of the contract."

The duty of a telegraph company is for the benefit of both the receiver and sender, and either party sustaining damages by negligence has action against the company. *Wolfskehl v. W. U. T. Co.*, 46 Hun, 542.

If the sendee is the one interested in the correct and diligent transmission, and bear the expense of sending, he is the one with whom the contract is made. *De Rutte v. N. Y., A. & B. E. M. T. Co.*, 1 Daly, 547.

Dryburgh v. N. Y. &c. T. Co., 35 Pa. St. 298; *Eyre v. Higbee*, 15 How. 46.

If commission is due an agent, he must sue his principal and not the telegraph company; but in this case the agent carried out the contract to buy, and so earned his commission. *Rose v. U. S. T. Co.*, 3 Abb. Pr. (N. S.) 408.

Where the plaintiff, under no duty to do so, voluntarily sent a message announcing the rise in the price of cotton, but, on account of the negligence in transmitting it, the plaintiff sold his cotton for less than he would otherwise have obtained for it had there been a prompt delivery, he did not recover damages therefor. *Frazier v. W. U. T. Co.*, 84 Ala. 487.

Sender, to recover for breach of contract, must show that he is either directly or *per alium*, a party. *Western Union Teleg. Co. v. Adair*, 115 Ala. 441.

Or that the sender was acting as his agent. *Ford v. Postal Teleg. C. Co.*, 124 Ala. 400.

The agreement between a civil engineer and a city's representative as to the former's services was not sufficient to connect him with the contract between the latter and the company, the telegram being sent by the city's representative was primarily for the benefit of his principal. *Postal Teleg. &c. Co. v. Ford*, 117 Ala. 672.

Failure to deliver telegram may give recovery against sender for breach of contract. It cannot, however, give sendee a recovery against the company. *Pacific Pine Lumber Co. v. Western Union Teleg. Co.*, 123 Cal. 428.

Undisclosed principal may sue in his own name. *Dodd Grocery Co. v. Postal Teleg. &c. Co.*, 112 Ga. 685.

See, also, *Haubelt v. Rea &c. R. Co.*, 77 Mo. App. 672.

Right of recovery of sendee for an alteration is in tort—not being a party to the contract. *Webbe v. W. U. T. Co.*, 169 Ill. 610, rev'g s. c., 64 Ill. App. 331.

The sender is the proper party to sue. *W. U. T. Co. v. Scircle*, 103 Ind. 227.

Under section 4177 R. S. 1881, unrepealed by act of 1885, p. 151, the sendee of a message may recover special damages caused by failure of

company to deliver it, and is not affected by contract between sender and company, requiring presentation of claim within a certain time. *W. U. T. Co. v. McKibben*, 114 Ind. 511.

Citing *W. U. T. Co. v. Meek*, 49 Ind. 53; *W. U. T. Co. v. Hopkins*, id. 223; *W. U. T. Co. v. Pendleton*, 95 id. 12.

Where one attorney sent a message to another for the benefit of the latter's client, the client maintained an action for damages for delay in delivery. Delay of three days was *per se* negligent, if unexplained. The action was subject to any defense available against the attorney. *Harlness v. W. U. T. Co.*, 73 Iowa, 190.

Citing, on agency, *Story's Agency*, sec. 418; *Ins. Co. v. Allen*, 116 Mass. 398; *Gage v. Steinson*, 26 Minn. 64.

Announcement to husband of illness of wife's mother does not enure to her as a beneficiary. *Davidson v. W. U. T. Co.*, (Ky.) 54 S. W. Rep. 830.

So, in case of death and funeral of wife's grandmother. *Morrow v. W. U. T. Co.*, (Ky.) 54 S. W. Rep. 853.

So, in case of death and funeral of wife's brother. *Southwestern T. & Teleg. Co. v. Gotcher*, (Tex.) 53 S. W. Rep. 686.

The party to whom a message announcing death and funeral is addressed is presumed to have a serious interest therein. *Davis v. W. U. T. Co.*, (Ky.) 54 S. W. Rep. 849.

So, as to a message summoning sendee to bedside of a brother seriously ill. *W. U. T. Co. v. Hale*, 11 Tex. Civ. App. 79.

Broker sending dispatch in his own name may maintain action thereon for default, but he holds recovery for his principal. *U. S. T. Co. v. Gildersleve*, 29 Md. 232.

Sender may sue in tort where he has received actual damage. *Ferrers v. W. U. T. Co.*, 9 App. D. C. 455; otherwise where he has not. *Reynolds v. W. U. T. Co.*, 81 Mo. App. 223.

Action by the receiver of a message for loss from the negligence of the operator, is in tort. *W. U. T. Co. v. Richman* (Pa.) 6 Cent. 565 (p. 1219.)

Company is liable to sendee of a dispatch intended for his benefit, for negligent delay. *Wadsworth v. W. U. T. Co.*, 86 Tenn. 695.

That a telegram is addressed to another, does not prevent the party who is the beneficiary on the face thereof from recovering. *W. U. T. Co. v. Mellon*, 96 Tenn. 66.

Company is liable for negligence in the transmission and delivery of a message with knowledge of its urgency, although it was prepared, delivered and paid for by one person acting for the benefit of another. *Loper v. W. U. T. Co.*, 70 Tex. 689.

Company will not be excused for its neglect on account of the rela-

tions that existed between the sender and the receiver, if the former intended to serve the latter, and the latter accepted the act. *W. U. T. Co. v. Adams*, 75 Tex. 531.

An action is properly brought by the sender of a message to a brother requesting him to come at once as sender's husband is not expected to live, where there is a breach of contract. *Potts v. W. U. T. Co.*, 82 Tex. 545.

Sendee has a cause of action against the company for breach of contract to transmit, although compensation for transmission was omitted by the sender. *W. U. T. Co. v. Barringer*, 84 Tex. 38.

One company receiving a message from another contracts for the reply in behalf and for the benefit of the first sender, on which he may maintain an action. *Smith v. W. U. T. Co.*, (Tex.) 19 S. W. Rep. 441; 1 R. & C. L. J. 299.

Sender need not act under instructions or directions to enable sendee to recover as the beneficiary named therein. *W. U. T. Co. v. Morrison*, 33 S. W. Rep. 1025.

Beneficiary who is named in or whose interest appears from the face of the telegram, may sue. *W. U. T. Co. v. Sweetman*, 19 Tex. Civ. App. 435.

That sender's agent was not charged because of being an employé of defendant, did not prevent sendee's recovery. *W. U. T. Co. v. Snodgrass*, (Tex. Civ. App.) 60 S. W. Rep. 308.

Sendees acted on a telegram from a total stranger. No liability. *McCormick v. W. U. T. Co.*, 79 Fed. Rep. 449.

XV. Evidence.

(a) SUFFICIENT EVIDENCE AND BURDEN OF PROOF.

When it has been shown that the message undertaken to be sent was not promptly delivered, or accurately transmitted, and that damages resulted therefrom, it then becomes incumbent on the defendant to overcome that presumption by showing that in the attempted transmission and delivery of the message, it exercised all proper care and diligence commensurate with the undertaking, and that the failure is not attributable to any fault or negligence on its part, or that of any of its employés. *Leonard v. N. Y. & Co.*, 41 N. Y. 544.

Baldwin v. U. S. T. Co., 45 N. Y. 744; (error in transcribing direction and hence misdelivery); *Breese v. U. S. T. Co.*, 48 id. 132; *Pearsall v. W. U. Tel. Co.*, 124 N. Y. 256; *W. U. T. Co. v. Graham*, 1 Col. 230; *W. U. T. Co. v. Fontaine*, 58 Ga. 433; *W. U. T. Co. v. Blanchard*, 68 id. 299; *Tyler v. W. U. T. Co.*, 60 Ill. 421; s. c., 74 id. 168; *W. U. T. Co. v. Meek*, 49 Ind. 53; *Julian v. W. U. T. Co.*, 98 id. 327; *W. U. T. Co. v. McDaniel*, 103 id. 294; *Sweatland*

v. Ill. &c. T. Co., 27 Iowa, 432; Camp v. W. U. T. Co., 1 Met., (Ky.) 164; La Grange v. S. W. T. Co., 25 La. Ann. 383; U. S. T. Co. v. Gildersleve, 29 Md. 232; True v. Int. T. Co., 60 Me. 9; Bartlett v. W. U. T. Co., 62 id. 209; W. U. T. Co. v. Carew, 15 Mich. 525; Wann v. W. U. T. Co., 37 Mo. 472; Tel. Co. v. Griswold, 37 Oh. St. 301; Passmore v. W. U. T. Co., 9 Phila. 90; s. c., 78 Pa. St. 238; Aiken v. W. U. T. Co., 5 S. C. 358; Pinckney v. W. U. T. Co., 19 id. 71; W. U. T. Co. v. Neill, 57 Tex. 283.

There is a presumption that a message delivered for transmission reached its destination. *Oregon T. Co. v. Otis*, 100 N. Y. 446.

Failure to transmit a message in the language received is *prima facie* evidence of negligence. *W. U. T. Co. v. Short*, 53 Ark. 434.

Plaintiff must show affirmatively that damages resulted from failure to deliver. *Clarke v. W. U. T. Co.*, 112 Ga. 633.

Upon proof of unreasonable delay, explanation thereof devolves upon the company. *W. U. T. Co. v. Scircle*, 103 Ind. 227.

When, in an action for penalty, the plaintiff proves that the message, properly addressed, was not delivered, he makes a *prima facie* case. *W. U. T. Co. v. McDaniel*, 103 Ind. 294.

It is not a necessary inference that the signature L. F. Brown, signed to a dispatch, is that of Alonzo F. Brown, the plaintiff. *W. U. T. Co. v. Brown*, 108 Ind. 538.

For the purpose of showing his good faith, the plaintiff was properly allowed to testify that the dispatch, as read by him, directed him to make a purchase at a certain price, and not for the purpose of showing a reasonable interpretation of the dispatch. *Aikin v. W. U. T. Co.*, 69 Iowa, 31.

Unexplained delay of three days before the delivery of a telegram after its receipt, was evidence of negligence. *Harkness v. W. U. T. Co.*, 73 Iowa, 190.

Proof that company's agents constantly and habitually observed no rule as to closing the office at night, held to be competent as conducing to show that no such rule existed; but a few instances are entirely consistent with its existence. *W. U. T. Co. v. Crider*, (Ky.) 54 S. W. Rep. 963.

Evidence that the abbreviation "Gtd" written by sender on a telegram, was understood to mean that he guaranteed all charges necessary for delivery, held sufficient to take the case to the jury. *Reynolds v. W. U. T. Co.*, 81 Mo. App. 223.

Twenty-four hours' delay in delivering a dispatch constituted gross negligence. *Thompson v. W. U. T. Co.*, 107 N. C. 449.

Plaintiff must show not only that he could, but that he would have gone, had he received the message in time. *Cumberland Tel. Co. v. Brown*, 104 Tenn. 56.

There was sufficient evidence that delay in delivery prevented attendance at a funeral, where it appeared that by reason of the failure to receive the message asking for a postponement it was held in his absence. *Jones v. Roach*, 94 Tex. 649, aff'g s. c., 51 id. 549.

A change of the word "bay" into "buy," in an unreported cipher dispatch, does not constitute more than ordinary negligence. *Primrose v. W. U. T. Co.*, 154 U. S. 1.

Reporting a message sent from New Orleans as sent from New York was *prima facie* evidence of negligence, throwing burden of rebuttal on the company. *W. U. T. Co. v. Tobin*, (Tex. Civ. App.) 56 S. W. Rep. 540.

So, as to errors in unreported messages. *W. U. T. Co. v. Hines*, 22 Tex. Civ. App. 315.

Plaintiff must establish negligent failure to promptly deliver by a preponderance of evidence. *Hargrave v. W. U. T. Co.*, (Tex. Civ. App.) 60 S. W. Rep. 687.

Error in changing name from "Norris" to "Nortys" was *prima facie* evidence of negligence. *W. U. T. Co. v. Norris*, (Tex. Civ. App.) 60 S. W. Rep. 982.

(b) SUFFICIENT EVIDENCE AND BURDEN OF PROOF—CONNECTING COMPANIES.

Sufficient evidence against the first of two connecting companies, where it agreed to deliver at destination, is that it stipulated to duly deliver at such point and did not. *De Rutte v. N. Y. & Co.*, 1 Daly, 547.

Where the first company stipulated duly to deliver to the second company, evidence that the message was not duly received at destination is not sufficient. *Gray Com. by Telegraph*, p. 110.

Citing, *contra*, *Baxter v. Dom. T. Co.*, 37 U. C. Q. B. 470.

In action against a connecting carrier, evidence of contract with first company and incorrect delivery at destination, establishes *prima facie* liability; company, to relieve itself, must show that it delivered the message as received from the first company. *Turner v. Hawkeye T. Co.*, 41 Iowa, 458.

Tel. Co. v. Griswold, 37 Oh. St. 301; *Gray Com. by Telegraph*, p. 112.

In action for breach of agreement to deliver beyond company's own line, the case was properly withheld from the jury where there was no evidence of an attempt to deliver or excuse for not attempting. *W. U. T. Co. v. Carter*, (Tex. Civ. App.) 58 S. W. Rep. 198.

See "Common Carriers," *ante*, pp. 345-354.

XVI. Messages Announcing Illness or Death.(See *post*, p. 2454.)

Delay of three days in delivery of announcement of severe illness of brother prevented attendance at the funeral. Recovery. *W. U. T. Co. v. Cain*, 14 Ind. App. 115.

Where a message summoning a husband to his wife's death bed was delayed eight days, although the receiver's place of residence was well known and near the point of reception, and he was thereby prevented from being present at his wife's death or funeral, he was entitled to maintain an action for tort. *Young v. W. U. T. Co.*, 107 N. C. 370.

A person in whose behalf, but not in whose name, a message was sent, requesting a notification of a death, may maintain an action for non-delivery of the message. *Sherall v. W. U. T. Co.*, 109 N. C. 527.

Plaintiff, on Sunday, sent a message announcing the death of his wife and child to his father, and requesting him to come, which, through negligence was not delivered until the next day, too late for the funeral. Plaintiff was entitled to recover compensatory damages.

It was held that there could be no recovery for mental suffering or exemplary damages. *Gulf &c. R. Co. v. Levy*, 50 Tex. 563; 46 Am. Rep. 278, overruling *So Relle v. W. U. T. Co.*, 55 Tex. 310.

A company negligently failed to deliver a message from a son to his mother, stating that he was very sick and requesting her to come to him. The mother missed the first train, but would have been conveyed in time but for the fault of the railroad company; such fault was not a defense in an action against the telegraph company. *Loper v. W. U. T. Co.*, 70 Tex. 689.

Delay in delivering a telegram stating the death and time of funeral of one referred to as "Willie," and without notice of his relation to the person addressed, does not give an action based solely on injury to fraternal feelings, for inability to attend the funeral. Only such damages as ordinarily resulted from failure to receive the message would be regarded as within the contemplation of the parties. *W. U. T. Co. v. Brown*, 71 Tex. 723.

Where a son sent a message of his coming to attend his mother's funeral, and the same was delayed for a few hours and the funeral could have been delayed until his coming, the company was not liable. *W. U. T. Co. v. Andrews*, 78 Tex. 305.

Action may be maintained for delay in delivering a message announcing the death of a near relative of the sendee, though the relationship did not appear on the face of the dispatch. *W. U. T. Co. v. Rosentreter*, 80 Tex. 406.

Company is liable to sendee, not a party to the contract, of a message announcing the approaching death of his mother, for negligence in delivery. *W. U. T. Co. v. Jones*, 81 Tex. 271.

A message from a mother to her son, stating that the latter's step father was dead, with notice that it was important and should be rushed through, was notice that it was for the mother's benefit and was sufficient to support an action for injury to her feelings caused by the non-delivery, whereby the son did not come to her for a week. *W. U. T. Co. v. Nations*, 82 Tex. 539.

Where a dispatch, advising the sendee of the illness of his child, was not delivered, he had an action therefor, although the sender had, after the sendee did not come as expected, ample time to bring him to the child before the latter's death. *W. U. T. Co., v. Wisdom*, 85 Tex. 261.

Failure to deliver telegram for medical aid to sick child gave recovery. *W. U. T. Co. v. Russel*, 12 Tex. Civ. App. 82.

Failure of sendee getting the late telegram to telegraph for a postponement of the funeral was no defense, where he had a right to expect that he would yet be in time. *Western Union Teleg. Co. v. Anderson*, (Tex. Civ. App.) 37 S. W. Rep. 619.

See, also, *Western Union Teleg. Co. v. Johnson*, 16 Tex. Civ. App. 546.

In *Western Union Teleg. Co. v. Cain*, (Tex. Civ. App.) 40 S. W. Rep. 624, the fact that sendee upon receipt of the late telegram did telegraph for a postponement was immaterial as the body could not be kept until arrival.

So, as to failure of sendee in such case to take a route which would have gotten her to the desired destination as soon as she would have had she gone by rail upon prompt delivery, as she had the right to use the *usual* route. *W. U. T. Co. v. Lavender*, (Tex. Civ. App.) 40 S. W. Rep. 1035.

See, also, *Cumberland T. Co. v. Brown*, 104 Tenn. 56.

So, the fact that sendee could not have been present at the funeral if it had been held within the usual time after death did not relieve defendant where it had in fact been delayed. *W. U. T. Co. v. Walker*, (Tex. Civ. App.) 47 S. W. Rep. 396.

That sendee had received a letter stating mother was very sick, is no excuse for failing to deliver an announcement that there is no chance of her recovery. *W. U. T. Co. v. Drake*, 14 Tex. Civ. App. 601.

Had a message that "if not otherwise instructed will bury to-day" been promptly delivered, sendee would have been able to have telegraphed back and prevented burial till arrival. Recovery allowed. *W. U. T. Co. v. Vanway*, (Tex. Civ. App.) 54 S. W. Rep. 414.

Ordinary care only is required, and not the highest degree of care and diligence. *Hargrave v. W. U. T. Co.*, (Tex. Civ. App.) 60 S. W. Rep. 687.

XVII. Sunday Messages.

A contract is essential to create a duty, and in order that one may recover the statutory penalty for a breach of duty in the transmission of a telegram, a valid contract must be shown, as the contract is the foundation of the action.

A contract by a telegraph company to transmit a message on Sunday is valid or invalid, owing to the reasonable necessity, or the want of it, for the transmission of the message on that day. For evidence held not sufficient to show a necessity, see opinion.

In determining whether an act is or is not one of necessity, it is proper to give just effect to the nature of the business in which the person who does it is engaged.

A telegraph company may not transmit ordinary business on Sunday, but it may keep open its offices for the receipt and transmission of messages where a reasonable necessity exists, such as those designated to relieve suffering, avert harm or prevent serious loss.

Where a complaint against a telegraph company to recover a statutory penalty shows that the contract was made on Sunday, the complaint is bad unless the contract is shown to be valid because of the existence of a necessity for the making of the contract on that day, and that the defendant knew of the necessity. *W. U. T. Co. v. Yopst*, 118 Ind. 248.

From opinion.—"The merchant who keeps open his shop for business and custom on Sunday the same as on a secular day, by that act violates the law, although he would not necessarily violate it if, upon request, he should sell some article needed at once to prevent serious loss or suffering. The case of a telegraph company is different. It may keep open its offices for the receipt and transmission of messages, where there is a reasonable necessity for transmitting them on that day, although it has no right on that day to do a general business. Messages that may as well be sent on any other day as on Sunday, without causing loss, harm or suffering, it is prohibited from receiving on that day; but messages designed to relieve suffering, avert harm, and prevent serious loss, it may on that day receive and transmit. The view we have taken is not only supported by our own decisions and by those of many other courts, but it is no more than a development of a principle declared by a court which has gone as far as any in the land in enforcing the statutes against Sabbath breaking. In *Flagg v. Inhabitants &c.*, 4 Cush. 243, that court said: 'By the word "necessity" in the exception we are not to understand a physical and absolute necessity, but a moral fitness or propriety in the work and labor done, under the circumstances of any particular case, may well be deemed necessity within the statute.' It is, as we believe, morally fit and proper that a telegraph company should receive and transmit messages on Sunday, when it is necessary to prevent serious loss. What was said by the court in *McGatrick v. Wason*, 4 Oh. St. 566, is peculiarly applicable here: 'Nor will it do,' said the court, 'to limit the word "necessity" to those cases of danger to life, health or property, which are beyond

human foresight or control. On the contrary, the necessity may grow out of, or indeed be incident to a particular trade or calling, and yet be a case of necessity within the meaning of the act.'

We collect and cite a few of the many cases sustaining our conclusion: *Hennersdorf v. State*, 25 Tex. App. 597; *Ashbrandt v. State*, id. 599; *Dixon v. State*, 76 Ala. 89; *Parmalee v. Wilks*, 22 Barb. 539; *Murray v. Commonwealth*, 24 Pa. St. 270."

A penalty cannot be recovered for the failure to perform an illegal contract. Statutory penalty given by "An act to regulate electric telegraph companies," 1 R. S. 1876, p. 868, cannot be recovered by a person who has delivered his dispatch for transmission and delivery on Sunday. A contract for such transmission on Sunday is void and the retention of the dispatch and of the consideration paid by the sender is not a ratification. *Rogers v. W. U. T. Co.*, 78 Ind. 169.

The reasonableness of the necessity, as well as the notice thereof to the company, must appear. *W. U. T. Co. v. Henley*, 23 Ind. App. 14.

Transportation of horses on Sunday, was no defense where such transportation was necessary. *Taylor v. W. U. T. Co.*, 95 Iowa, 740.

See, also, *Western Union Teleg. Co. v. Henley*, 23 Ind. App. 14.

XVIII. Illegal and Immoral Transactions.

Company is not liable for failure to deliver a message for illegal purpose. *Melchert v. Am. T. Co.*, 11 Fed. Rep. 193.

An agent who incurs loss or expense in carrying out a contract in speculation in cotton futures, through the negligence of the company, may recover although such contracts be illegal. *W. U. T. Co. v. Blanchard*, 68 Ga. 299.

An action for *statutory penalty* for failure to deliver a message, accepted and paid for, is not defeated because the dispatch related to the sale of futures and was an illegal transaction. *Gray v. W. U. T. Co.*, 87 Ga. 350; 35 Am. & Eng. C. Cas. 37.

Citing *Cothran v. W. U. T. Co.*, 83 Ga. 25.

Distinguishing *Bryant v. W. U. T. Co.*, 17 Fed. Rep. 825; *Smith v. Smith*, 84 Ky. 664, on the ground that in those cases the action was not founded on statute.

Upon its usual terms a company is bound to transmit any message couched in decent language, and it is no answer for a failure to do so that such message was intended for immoral purposes. The message was, "Send me four girls, on first train to Francesville, to tend fair." The company alleged that the girls were wanted for purposes of prostitution. *W. U. T. Co. v. Ferguson*, 57 Ind. 495.

A company can decline to transmit a message which is to furnish the means of carrying on an illegal business, whatever its motive in so doing.

Company is not required to furnish a bucket shop with market quotations of grain. *Smith v. W. U. T. Co.*, 84 Ky. 664.

Where the transaction is not a purchase and sale of stock intended for delivery, but only a settlement of the difference between the market and contract price, plaintiff cannot recover. *Morris v. W. U. T. Co.*, 94 Me. 423.

So, as to a deal in "futures," which is prohibited by statute. *W. U. T. Co. v. Harper*, 15 Tex. Civ. App. 37.

XIX. Disclosure of Messages.

Company was liable for disclosing the contents of a message sent to an attorney to attach a stock of goods in an action by the person in whose behalf the message was sent, although not in his name. *Gulf, &c. Co. v. Todd*, (Tex. App.) 19 S. W. Rep. 761.

Company is liable for unauthorized disclosure. *Kiernan v. Man. &c. Co.*, 50 How. Pr., (N. Y.) 194; *Gold &c. Co. v. Todd*, 17 Hun, 548.

By New York Laws 1895, chapter 287, it is made a misdemeanor to open or read or publish without authority, a telegram; and by New York Laws 1895, chapter 727, it is a penal offense to wrongfully obtain, or attempt to obtain, any knowledge of a telegraphic or telephonic message, by connivance with the agent of the company, or for such agent to divulge to any one other than the person entitled thereto, the contents or nature of a telegraphic or telephonic message entrusted to him for transmission or delivery, or of the contents of which he has become possessed through his employment, unless such message is in aid of or used to abet or carry on unlawful business or traffic, or to perpetrate any criminal offense, and in that case it is the duty of the agent to withhold such dispatch from delivery and take steps prescribed for the identification and arrest of the wrong-doer.

XX. Pleading.

Averment of payment or tender of the usual charges by sender must be made. *W. U. T. Co. v. Mossler*, 95 Ind. 29.

In an action for penalty for failure to transmit a message there must be an allegation that the omission was within reasonable office hours, both at the place of reception and at the place of destination. *W. U. T. Co. v. Harding*, 103 Ind. 505.

An amendment to an action for failure to deliver a message stating negligence of receiving operator in communicating announcement of his failure to locate sendee, held not to set up a new cause of action barred by the statute. *Western Union Teleg. Co. v. Norris*, (Tex. Civ. App.) 60 S. W. Rep. 982.

XXI. Statutory Penalties.

"Impartiality" does not apply, where the omission is unintentional. *Wishelman v. Western Union Teleg. Co.*, 62 N. Y. S. 491.

Or the message is simply mislaid and forgotten. *Weaver v. Grand Rapids &c. R. Co.*, 107 Mich. 300.

So "incorrect transmission," does not include delay in delivery. *Marshall v. Western Union Teleg. Co.*, 79 Miss. 154.

Proof that the company's agent received the message, but did not deliver it, in absence of excuse shown, makes the company liable for penalty under Gantt's Ark. Dig., sec. 5721. *Little Rock &c. R. Co. v. Davis*, 41 Ark. 79.

The mere negligent failure to transmit or deliver a telegram, does not permit a recovery under Ark. Act of March 31, 1885, authorizing a penalty to a person for whom a company *refuses* to transmit a message. *Frauenthal v. W. U. T. Co.*, 50 Ark. 78.

A statutory penalty for refusing to *transmit* a message, does not embrace refusal to *deliver*. *Brooks v. W. U. T. Co.*, 53 Ark. 224.

Under sec. 154, Act. of 1850, person entitled to recover penalty for failure to transmit a message, is the party who contracts or offers to contract for the transmission of the dispatch. The contract may be made by agent or servant, but the relation must be shown. *Thurn v. Alta T. Co.*, . . . 15 Cal. 472.

Under Ga. Act 1887, p. 112, company is not liable for failure to deliver a dispatch to a visitor at a place, who gives no definite address. *Moore v. W. U. T. Co.*, 87 Ga. 613.

Statutory liability does not preclude suit at common law. *W. U. T. Co. v. Hopkins*, 49 Ind. 223.

The sender is the proper party to sue for a penalty for failure to transmit a message, under Ind. R. S. 1881, sec. 4176. *W. U. T. Co. v. Penelton*, 95 Ind. 12; 48 Am. Rep. 692.

Penalty for failure to transmit telegram, under Ind. R. S. 1881, sec. 4476, does not apply to messages from another state. *W. U. T. Co. v. Reed*, 96 Ind. 195.

Company was liable for penalty under Ind. R. S. 1881, sec. 4176, for transmitting the word "seventeenth" as "seventh." The stipulation requiring that messages be repeated was not a defense. *W. U. T. Co. v. Hough*, 102 Ind. 535.

Statute giving a remedy is construed as giving it to the one entitled to recover under the general rules of law, unless it is otherwise expressed in the statute itself. *W. U. T. Co. v. McDaniel*, 103 Ind. 294.

A statute giving a penalty for negligent transmission of a message, is constitutional. *W. U. T. Co. v. Ferris*, 103 Ind. 91.

Ind. R. S. 1881, sec. 4176, is not violated unless the dispatch be wrongfully postponed or neglected, or bad faith or partiality be shown, and mere delay is not a ground for recovery. *W. U. T. Co. v. Wilson*, 108 Ind. 308.

By Ind. R. S., sec. 4176, penalty is given alone for failure or delay, and to sender only. The act of 1885 authorizes penalty for discrimination, but whether in behalf of the sendee, *quære*. *W. U. T. Co. v. Brown*, 108 Ind. 538.

W. U. T. Co. v. Fenton, 50 Ind. 1; *W. U. T. Co. v. Axtell*, 69 id. 199.

See *W. U. T. Co. v. Fenton*, 52 Ind. 1; *W. U. T. Co. v. Pendleton*, 95 id. 12; *W. U. T. Co. v. McKibben*, 114 id. 511.

Under Ind. Code, April 8, 1885, a penalty is only incurred when the company is guilty of partiality or bad faith, and not from mere negligence in transmitting a message. *W. U. T. Co. v. Swain*, 109 Ind. 405.

The statutory penalty (act 1885, p. 151, repealing sec. 4176 R. S. 1881) can only be recovered by the sender. *Hadley v. W. U. T. Co.*, 115 Ind. 191.

But under sec. 4177 and by common law, company is liable for special damages to sendee.

Under Ind. Act of 1885, a penalty for refusal to receive and transmit without discrimination is not recoverable for mere negligence. *W. U. T. Co. v. Jones*, 116 Ind. 361.

Unless there be a valid contract to transmit a message, a company is not liable for statutory penalty for failure to transmit. *W. U. T. Co. v. Yopst*, 118 Ind. 248.

Proof of a contract to send a message is essential to recovery of statutory penalty for failure so to do. *W. U. T. Co. v. Yopst*, 118 Ind. 248.

Rogers v. W. U. T. Co., 78 Ind. 169; *W. U. T. Co. v. Wilson*, 108 id. 308.

Recovery under Miss. Co. sec. 4326 is \$25 penalty, besides the expense incurred through failure to so transmit. *Western Union Teleg. Co. v. McCormick*, (Miss.) 27 South. Rep. 606.

A statute that a company shall provide sufficient facilities for the dispatch of the public business, and to receive messages from and for individuals on their telegraph lines, and to transmit them promptly and impartially, does not apply to a negligent failure to deliver. *Connell v. W. U. T. Co.*, 108 Mo. 459.

The sendee may, for negligence, recover special damages given by the statute, without privity of contract between him and the company. *Markle v. W. U. T. Co.*, 19 Mo. App. 80.

Under Mo. R. S. 1879, sec. 883, company is liable for penalty for failure to send a message, even in the absence of partiality or bad faith. *Burnett v. W. U. T. Co.*, 39 Mo. App. 591.

Neb. Act, sec. 12, making a company liable for non-delivery and mistakes in transmission, and waiving exemption, is valid. *Kemp v. W. U. T. Co.*, 28 Neb. 661; 30 A. & E. Corp. Cas. 607.

Under Wis. stat. 1885, chap. 171, company is liable for damages directly resulting from negligence in transmitting messages, and especially if contents and meaning are known to the agent. *Cutts v. W. U. T. Co.*, 71 Wis. 46.

XXII. Connecting Companies.

Each of the connecting companies, in the absence of evidence of special agreement or arrangement, either with the sender or between each other, will be liable for his own acts but not for the acts and defaults of the other. The dispatch was directed and paid through. The incorporating statute (Laws 1848, chap. 265, sec. 11; Laws 1855, chap. 559) requires each company to receive dispatches from the other. The lines of two telegraph companies terminated at S., the one leading from O. to S., and the other from S. to R. Messages passed over the line of the former company for transmission beyond S. to R., were customarily received by the latter company. The plaintiff at O. sent a message to R., paying for the whole distance. No partnership or mutual agency could be inferred from such facts. *Baldwin v. U. S. T. Co.*, 45 N. Y. 744.

The initial company is not the agent of the connecting company to make a contract binding upon the latter. *Baldwin v. U. S. T. Co.*, 45 N. Y. 744.

Each separate connecting line acting in concert with another for the sending of messages, is deemed to have constituted the receiving company its agent for making contracts over its line. *Baldwin v. U. S. T. Co.*, 54 Barb. 505.

Independent of any question of contract, if a person is put to loss or damage through the negligence of a telegraph company in transmitting to him an erroneous dispatch, they would be liable for damage caused, and if they contract through, they would be liable even if the error was by the connecting company. *De Rutte v. N. Y. & C. T. Co.*, 1 Daly. 547.

Where company is paid the whole compensation for transmission of a message to a place beyond their own line, with which they are in communication by the agency of other companies, they will be regarded as engaging that the message will be transmitted to and delivered at that place, unless there is an express stipulation to the contrary, or the circumstances are such as to show that the undertaking was otherwise. *De Rutte v. N. Y., A. & B. & C. T. Co.*, 1 Daly. 547.

Citing *Weed v. Railroad Co.*, 19 Wend. 534; *Muschamp v. Railroad Co.*, 8 M. & Wels. 421; *St. John v. Van Santvoord*, 25 Wend. 600; *id.*, 6 Hill, 167; *Wilcox v. Parmlee*, 3 Sandf. S. C. Rep. 610; *Foy v. Troy & C. R. Co.*, 24 Barb. 382.

Through message.—Message directed to a point on another line, accepted in absence of other evidence of the contract, binds the initial company to deliver duly to connecting company. *Thurn v. Alta T. Co.*, 15 Cal. 472.

De Rutte v. N. Y. & C. T. Co., 1 Daly, 547.

See "Common Carriers," *ante*, pp 337-359.

So, first company is not liable beyond its own line where it specially limits its liability to that line. *W. U. T. Co. v. Carew*, 15 Mich. 525.

Squire v. W. U. T. Co., 98 Mass. 232.

Where the company contracts to deliver to connecting company, it does not contract to do so as agents of the sender. *Thurn v. Alta T. Co.*, 15 Cal. 472.

Stipulations of exemption and regulation not expressly extended to second company, apply only to the first. *Squire v. W. U. T. Co.*, 98 Mass. 232.

It would be otherwise if the contract were made with an initial company as representing auxiliary companies. Wharton on Negligence, sec. 762.

By undertaking to transmit a death message to a certain place and there deliver it to a telephone company for further transmission, the company becomes liable for a failure to notify the latter that extra charges for delivery have been guaranteed. *Western Union Teleg. Co. v. Davis*, 16 Tex. Civ. App. 268.

Where such a message is accepted under an agreement making the company the sender's agent, the latter is entitled to select the line. *Western Union Teleg. Co. v. Turner*, (Tex. Civ. App.) 60 S. W. Rep. 432.

By undertaking to send to a certain place, the company assumes the duty of getting it there though it has to employ other lines to do so. *Jones v. Roach*, 21 Tex. Civ. App. 301; s. c. aff'd, 54 S. W. Rep. 240.

Company may decline to do more than deliver message to connecting company. *Mich. Cent. R. Co. v. Myrick*, 107 U. S. 102.

XXIII. Abatement of Action.

An action under the statute for neglect to transmit a message, does not abate by the death of the plaintiff. *W. U. T. Co. v. Scircle*, 103 Ind. 227.

XXIV. Damages.

Under a contract to transmit a message by telegraph, the damages for breach must be limited to those which may fairly be considered as arising according to the usual course of things, or which both parties must

reasonably have understood and contemplated when making the contract, as likely to result from its breach. *Primrose v. W. U. T. Co.*, 154 U. S. 1.

Leonard v. N. Y. &c. T. Co., 41 N. Y. 544; *Baldwin v. U. S. T. Co.*, 45 id. 744; *Daughtry v. Am. U. T. Co.*, 75 Ala. 168; *Parks v. Alta T. Co.*, 13 Cal. 422; *Hart v. W. U. T. Co.*, 66 id. 579; *W. U. T. Co. v. Graham*, 1 Col. 230; *McColl v. W. U. T. Co.*, 12 J. & S. 487; *True v. Int. T. Co.*, 60 Me. 9; *Bartlett v. W. U. T. Co.*, 62 id. 209; *U. S. T. Co. v. Gildersleeve*, 29 Md. 232; *Beaupre v. P. & A. T. Co.*, 21 Minn. 155; *Mackay v. W. U. T. Co.*, 16 Nev. 222; *W. U. T. Co. v. Griswold*, 37 Oh. St. 301; *Candee v. W. U. T. Co.*, 34 Wis. 471; *W. U. T. Co. v. Simpson*, 73 Tex. 422; *Bryant v. Am. T. Co.*, 1 Daly, 575.

From opinion.—"Beyond this, under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated, when making the contract, as likely to result from its breach." This was directly adjudged in *W. U. T. Co. v. Hall*, 124 U. S. 444.

In *Hadley v. Baxendale*, 9 Exch. 345, decided in 1854, ever since considered a leading case on both sides of the Atlantic, and approved and followed by this court in *W. U. T. Co. v. Hall*, above cited, and in *Howard v. Stillwel & B. Mfg. Co.*, 139 U. S. 199, 206, 207, Baron Alderson laid down, as the principles by which the jury ought to be guided in estimating damages arising out of any breach of contract, the following: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract." 9 Exch. 354, 355.

Cipher and unintelligible messages.—In *Sanders v. Stuart*, which was an action by commission merchants against a person whose business it was to collect and transmit telegraph messages, for neglect to transmit a message in words by themselves wholly unintelligible, but which could be understood by the plaintiff's correspondent in New York as giving a large order for goods, whereby the plaintiffs lost profits which they would otherwise have made by the transaction, to the amount of £150, Lord Chief Justice Coleridge, speaking for himself and Lords Justices Brett and Lindley, said: "Upon the facts of this case, we think that the rule in *Hadley v. Baxendale* applies, and that the damages recoverable are nominal only. It is not necessary to decide, and we do not give any opinion how the

case might be, if the message, instead of being in language utterly unintelligible, had been conveyed in plain and intelligible words. It was conveyed in terms which, as far as the defendant was concerned, were simple nonsense. For this reason, the second portion of Baron Alderson's rule clearly applies. No such damages as above mentioned could be 'reasonably supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it,' for the simple reason that the defendant, at least, did not know what his contract was about, nor what, nor whether any, damage would follow from the breach of it. And for the same reason, viz., the total ignorance of the defendant as to the subject-matter of the contract (an ignorance known to, and, indeed, intentionally procured by the plaintiffs) the first portion of the rule applies also, for there are no damages more than nominal which can 'fairly and reasonably be considered as arising naturally, *i. e.*, according to the usual course of things, from the breach' of such a contract as this." L. R., 1 C. P. Div. 326, 328; 45 L. J. C. P. 682, 684.

In *U. S. T. Co. v Gildersleve*, already referred to, which was an action by the sender against a telegraph company, for not delivering this message received by it in Baltimore, addressed to brokers in New York: "Sell fifty (50) gold." Mr. Justice Alvey, speaking for the court of appeals of Maryland, and applying the rule of *Hadley v. Baxendale*, above cited, said: "While it was proved that the dispatch in question would be understood among brokers to mean fifty thousand dollars of gold, it was not shown, nor was it put to the jury to find, that the appellant's agents so understood it, or whether they understood it at all. 'Sell fifty gold' may have been understood in its literal import, if it can properly be said to have any, or was as likely to be taken to mean fifty dollars, as fifty thousand dollars, by those not initiated. And if the measure of responsibility at all depends upon a knowledge of the special circumstances of the case, it would certainly follow that the nature of this dispatch should have been communicated to the agent at the time it was offered to be sent, in order that the appellant might have observed the precautions necessary to guard itself against the risk. But without reference to the fact as to whether the appellant had knowledge of the true meaning and character of the dispatch, and was thus enabled to contemplate the consequences of a breach of the contract, the jury were instructed that the appellee was entitled to recover to the full extent of his loss by the decline in gold. In thus instructing the jury, we think the court committed error, and that its ruling should be reversed." 29 Md. 232, 251.

In *Baldwin v. U. S. T. Co.*, which was an action by the senders against the telegraph company for not delivering this message: "Telegraph me at Rochester what that well is doing." Mr. Justice Allen, speaking for the court of appeals of New York, said: "The message did not import that a sale of any property, or any business transaction, hinged upon the prompt delivery of it, or upon any answer that might be received. For all the purposes for which the plaintiffs desired the information, the message might as well have been in a cipher, or in an unknown tongue. It indicated nothing to put the defendant upon the alert, or from which it could be inferred that any special or peculiar loss would ensue from a non-delivery of it. Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the non-performance of contracts, whether for the sale or carriage of goods or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at

the time of making the contract, as a contingency that might follow the non-performance." "The dispatch not indicating any purpose, other than that of obtaining such information as an owner of property might desire to have at all times and without reference to a sale, or even a stranger might ask for purposes entirely foreign to the property itself, it is very evident that whatever may have been the special purpose of the plaintiffs, the defendant had no knowledge or means of knowledge of it, and could not have contemplated either a loss or a sale, or a sale at an under value, or any other disposition of or dealing with the well or any other property, as the probable or possible result of a breach of its contract. The loss which would, naturally and necessarily, result from the failure to deliver the message, would be the money paid for its transmission, and no other damages can be claimed upon the evidence as resulting from the alleged breach of duty by the defendant." 45 N. Y. 744, 749, 750, 752; 6 Am. Rep. 165. See, also, *Hart v. Direct U. S. Cable Co.*, 86 N. Y. 633.

The supreme court of Illinois, in *Tyler v. W. U. T. Co.*, above cited (60 Ill. 421; 74 id. 168), took notice of the fact that in that case "the dispatch disclosed the nature of the business as fully as the case demanded." 60 Ill. 434; 14 Am. Rep. 38. And in the recent case of *Postal Teleg. Cable Co. v. Lathrop*, the same court said: "It is clear enough that, applying the rule in *Hadley v. Braxendale*, *supra*, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would, therefore, be justified in saying that it can obtain no information of value as pertaining to a business transaction, and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss." 131 Ill. 575, 585.

The same rule of damages has been applied upon failure of a telegraph company to transmit or deliver a cipher message in one of the Wisconsin cases cited by the plaintiff, and in many cases in other courts. *Candee v. W. U. T. Co.*, 34 Wis. 471, 479-481; 17 Am. Rep. 452; *Beaupre v. P. & A. T. Co.*, 21 Minn. 155; *Mackay v. W. U. T. Co.*, 16 Nev. 222; *Daniel v. W. U. T. Co.*, 61 Tex. 452; 48 Am. Rep. 305; *Cannon v. W. U. T. Co.*, 100 N. C. 300; *W. U. T. Co. v. Wilson*, 22 L. R. A. 434; 32 Fla. 527; *Behm v. W. U. T. Co.*, 8 Biss. 131; *W. U. T. Co. v. Martin*, 9 Ill. App. 587; *Abeles v. W. U. T. Co.*, 37 Mo. App. 554; *Kinghorne v. Montreal T. Co.*, 18 U. C. Q. B. 60, 69.

In the present case, the message was, and was evidently intended to be, wholly unintelligible to the telegraph company or its agents. They were not informed, by the message or otherwise, of the nature, importance or extent of the transaction to which it related, or of the position which the plaintiff would probably occupy if the message were correctly transmitted. Mere knowledge that the plaintiff was a wool merchant, and that Toland was in his employ, had no tendency to show what the message was about. According to any understanding which the telegraph company and its agents had, or which the plaintiff could possibly have supposed that they had, of the contract between these parties, the damages which the plaintiff seeks to recover in this action, for losses upon wool purchased by Toland, were not such as could reasonably be considered, either as arising according to the usual course of things, from the supposed breach of the contract itself, or as having been in the contemplation of both parties when they made the contract, as a probable result of a breach of it.

In any view of the case, therefore, it was rightly ruled by the circuit court that the plaintiff could recover in this action no more than the sum which he had paid for sending the message."

"B" sent to the plaintiff for \$500; the telegraph company made it \$5,000. "B" received it and embezzled it. The defendant's negligence was not the proximate cause of the loss. *Lowery v. W. U. T. Co.*, 60 N. Y. 198.

(a). CIPHER MESSAGES.

(See "Discussion," ante, p. 2441.)

A company is liable for non-delivery of a cipher dispatch, the meaning of which is unknown to it, to the same extent as if it had been known. *Daughtry v. Am. U. T. Co.*, 75 Ala. 168; 51 Am. Rep. 435.

Message was in cipher, but was sufficiently intelligible to show that it referred to a business transaction. Consequential damages were allowed. *Ferrers v. Western Union Teleg. Co.*, 9 App. D. C. 455.

Damages for delay of a cipher message is price charged for the service. *Ferguson v. Anglo-American Teleg. Co.*, 178 Pa. St. 377.

Mo. R. S. 1889, sec. 2729, does not alter the rule. *Hughes v. Western Union Teleg. Co.*, 79 Mo. App. 133.

Abbreviations commonly used in trade, understood by the telegraph company, cannot be regarded as a cipher communication. *Pepper v. W. U. T. Co.*, 87 Tenn. 554.

A company is only liable for nominal damages for failure to deliver or delay in delivery of a cipher dispatch. *Daniell v. W. U. T. Co.*, 61 Tex. 452; 48 Am. Rep. 305.

Message was in cipher but defendant's agent knew it related to a particular business and was marked "rush," besides being told that it was very important. Special damages were recovered. *Western Union Teleg. Co. v. Nagle*, 11 Tex. Civ. App. 539.

The company must, in some way, be acquainted with the nature of the matter to which the message relates so that the damages likely to follow non-delivery can be said to be within the contemplation of the parties. *Houston &c. T. Co. v. Davidson*, 15 Tex. Civ. App. 334.

So, consequential damages for delay owing to change of message from day to night message, not recoverable in the absence of such knowledge. *Id.*

A company is liable for entirely failing to transmit a cipher dispatch to the same extent as if it were intelligible. *W. U. T. Co. v. Reynolds*, 77 Va. 173; s. c., 46 Am. Rep. 715.

(b). NOTICE OF THE IMPORTANCE OF MESSAGE.

The rule of damages recoverable for the non-delivery of, or mistake in delivering telegraphic messages, is the natural and necessary consequence of the breach of contract as contemplated by the parties, interpreting the contract in the light of the circumstances under which, and

the knowledge by the parties of the purpose for which it was made, and when a special purpose is intended by one party, but is not known to the other and is not indicated by the message itself, such special purpose will not be taken into account in the assessment of damages for the breach of contract to send. The damages in such a case will be limited to those resulting from the ordinary and obvious purpose of the contract. *Baldwin v. U. S. T. Co.*, 45 N. Y. 744, rev'g 1 Lans. 125.

A telegram to a merchant stating that his clerk has gone to a place to recover a gold watch, and that the store is closed, is insufficient to hold telegraph company liable for the escape of such clerk with goods of which he had robbed the store. *W. U. T. Co. v. Cornwall*, 2 Col. App. 491.

A company has notice of the importance of a message which shows on its face that it relates to a purchase and sale of property. *Postal Teleg. Co. v. Lathrop*, 33 Ill. App. 400.

Where the contents of the message justified the inference that a delay until the next day would be injurious to one of the parties, the company was liable therefor. *Hadley v. W. U. T. Co.*, 115 Ind. 191.

Nature of the message was not such as to indicate that personal discomfort and humiliation would be the result of non-delivery. No recovery therefor. *Western Union Teleg. Co. v. Bryant*, 17 Ind. App. 70.

Company did not know a telegram directing shipment to one place was to forestall a previously agreed shipment to another. Damages for the delay in delivery did not cover the expense of the wrong shipment. *Evans v. Western Union Teleg. Co.*, 102 Iowa, 219.

Matter given was sufficient to show the nature of the transaction and the consequences likely to follow its non-delivery. Lack of detail was immaterial. *Evans v. Western Union Teleg. Co.*, 102 Iowa, 219.

Wife did not recover for mental anguish though deceased was her grandmother. The message was directed to her husband and gave no notice that it was intended for her benefit. *Morrow v. Western Union Teleg. Co.*, (Ky.) 54 S. W. Rep. 853.

So, though deceased was wife's brother. *Southwestern Teleg. &c. Co. v. Gotcher*, (Tex.) 53 S. W. Rep. 686.

"If possible come to S in the morning" gave no indication of its importance in a business transaction. *Melson v. Western Union Teleg. Co.*, 72 Mo. App. 111.

Where the dispatch, upon its face, demonstrates extreme urgency and immediate delivery, diligence must be proportioned to the exigencies and regardless of the rules of the company. *Pegram v. W. U. T. Co.*, 97 N. C. 57.

A message to buy or sell on certain terms shows its importance on its face; but if this importance is not thus disclosed and the sender does not

have the message repeated, whereby a mistake could have been avoided, the company is not liable in the absence of gross negligence. *Cannon v. W. U. T. Co.*, 109 N. C. 300.

Announcement of fatal accident is sufficient though the telegram did not state that the relation of the parties was husband and wife. *Lyne v. Western Union Teleg. Co.*, 123 N. C. 129.

A message, "You had better come and attend to your claim at once," sufficiently shows that loss may result from failure to transmit the message, so as to authorize damages. *W. U. T. Co. v. Sheffield*, 71 Tex. 570.

Where an agent had knowledge of the importance of prompt transmission of a message, or could have discovered it from the message or from other messages, the company was chargeable with such knowledge. *Erie Teleg. Co. v. Grimes*, 82 Tex. 89.

Where a rush message bore unmistakable evidence of its importance, it was sufficient to put the company on inquiry, and the sender might recover for the non-delivery, where it announced her husband's dangerous illness. *Potts v. W. U. T. Co.*, 82 Tex. 545.

Company is chargeable with knowledge of any relationship existing between all parties named in a telegram, and with such relationship as is reasonably inferable from the language used in connection with the subject-matter. But it is not chargeable with notice of the relationship of wife to the one to whom the message is sent, announcing her father's death. *W. U. T. Co. v. Carter*, 85 Tex. 580.

A telegram directing sendee to come, that — is sick, did not charge the company with notice that the sender, wife of the sick party, wishes his daughter to return to attend her in her distress, so as to permit recovery for mutual anguish. *Western Union Teleg. Co. v. Luck*, 91 Tex. 178; rev'g 40 S. W. Rep. 753.

Notice of consequences of failure to transmit were given to agent. Recovery. *Jones v. Roach*, 21 Tex. Civ. App. 301; s. c. aff'd, 54 S. W. Rep. 240.

"Ma is very low" charged company with notice that plaintiff may be deprived of the right to be present at the funeral. *Western Union Teleg. Co. v. Wilson*, (Tex. Civ. App.) 51 S. W. Rep. 521.

So, where the announcement that a child is very low. *Western Union Teleg. Co. v. Waller*, (Tex. Civ. App.) 47 S. W. Rep. 396.

"Come at once, bring father to secure my bond," shows importance of delivery. *Western Union Teleg. Co. v. Gossett*, 15 Tex. Civ. App. 52.

"I am sick;" sent by daughter to mother enures to the benefit of the latter as well as former. *Western Union Teleg. Co. v. Clark*, 14 Tex. Civ. App. 563.

The company being charged with the notice of such relationship

whether the telegram itself discloses it or not. *Western Union Teleg. Co. v. Sweetman*, 19 Tex. Civ. App. 435.

Announcement of serious sickness or death imports a serious interest in prompt delivery. *Western Union Teleg. Co. v. Sweetman*, 19 Tex. Civ. App. id.

But an announcement that stepfather of sendee is dying, is no notice of serious consequences in the absence of notice of a tender and affectionate relationship in fact. *Western Union Teleg. Co. v. Garrett*, (Tex. Civ. App.) 34 S. W. Rep. 649.

Announcement of the birth of a daughter of sendee imports necessity of prompt delivery, though it states that all are doing well. *Western Union Teleg. Co. v. Lavender*, (Tex. Civ. App.) 40 S. W. Rep. 1035.

That the sender will give a certain price and directing sendee to get all he can, is notice, that it is important as being a business transaction. *Western Union Teleg. Co. v. Carver*, 15 Tex. Civ. App. 547.

So, that one thinks he can make a trade. *Western Union Teleg. Co. v. Morrison*, (Tex. Civ. App.) 33 S. W. Rep. 1025.

So, where the telegram was read "Accept offer five three-quarters, Send tickets." *Western Union Teleg. Co. v. Turner*, (Tex. Civ. App.) 60 S. W. Rep. 432.

So, as to an acceptance of an offer to sell. *Dodd Grocery Co. v. Postal Tel. C. Co.*, 112 Ga. 685.

But direction to purchase January cotton for sender at a given price does not warrant the inference that it constitutes a gambling transaction. *Western Union Teleg. Co. v. Chamblee*, 122 Ala. 428.

(c). NOTICE OF THE IMPORTANCE OF MESSAGE—EXTRINSIC KNOWLEDGE.

A telegraph company "can" incorporate extrinsic knowledge of the meaning of a message into a contract, and thereby become liable for the loss that, from that extrinsic knowledge and not from the face of the message alone, would seem to be the natural and proximate consequence of a breach. *Gray Com. by Telegraph*, p. 166.

Citing *W. U. T. Co. v. Martin*, 9 Brad. (Ill. App.) 587; *Beaupre v. P. & A. T. Co.*, 21 Minn. 155; *Mackay v. W. U. T. Co.*, 16 Nev. 222; *Bryant v. Am. Tel. Co.*, 1 Daly, 575; *Sprague v. W. U. T. Co.*, 6 id. 200; *Candee v. W. U. T. Co.*, 34 Wis. 471.

To preclude the effect of extrinsic knowledge upon the damages for its liability, it must contract against it. *Gray Com. by Telegraph*, p. 170.

Citing *W. U. T. Co. v. Martin*, 9 Brad. (Ill. App.) 587; *Beaupre v. P. & A. T. Co.*, 21 Minn. 155; *Mackay v. W. U. T. Co.*, 16 Nev. 222; *Candee v. W. U. T. Co.*, 34 Wis. 471.

Where the defendants were fully informed of the object of a message

and of the importance of an early reply, it was held to inform them of the consequences of their neglect. *Sprague v. W. U. T. Co.*, 6 Daly, 200, 202.

Citing *Rittenhouse v. Ind. T. Co.*, 44 N. Y. 264; *Leonard v. N. Y. T. Co.*, 41 id. 544.

A statement to the operator by the sender that the message was of special importance, is *not* relevant on the question of negligence in delivery of a dispatch. *Pope v. W. U. T. Co.*, 14 Ill. App. 531.

When contents of a message are not sufficient to charge company with notice of the necessity for its transmission, the plaintiff must show knowledge of extrinsic facts. *W. U. T. Co. v. Yopst*, 118 Ind. 248.

Agent actually knew that sendee was expecting a telegram in regard to the capture of a criminal. He was chargeable with notice that a reward might be made for his capture, requiring prompt delivery. *McPeck v. Western Union Teleg. Co.*, 107 Iowa, 356.

So, where he knew that a telegram directed to a sheriff, was intended for him in his official capacity, reasonable diligence to deliver it to his deputy in his absence, was required. *Western Union Teleg. Co. v. Wofford*, (Tex. Civ. App.) 42 S. W. Rep. 119; see 58 S. W. Rep. 627; 60 S. W. Rep. 546.

"Sell fifty (50) gold," although understood among brokers to mean "fifty thousand dollars of gold," was not shown to be so understood by company's agent, and the nature of the dispatch should have been communicated to the company's agent in order that the company might observe the precautions necessary to guard itself against the risk. *U. S. T. Co. v. Gildersleve*, 29 Md. 232

Companies are liable for actual damages sustained for delay or failure in transmitting a dispatch, the importance of which is manifest either by its own words or made so by explanation. *Mackay v. W. U. T. Co.*, 16 Nev. 222.

Leonard v. N. Y. T. Co., 41 N. Y. 544; *Rittenhouse v. Ind. Tel. Co.*, 44 id. 265; *De Rutte v. N. Y. Tel. Co.*, 30 How. (N. Y.) 405; *Bryant v. Am. Tel. Co.*, 1 Daly, 590; *Sprague v. W. U. T. Co.*, 6 id. 201; *Parks v. Alta Tel. Co.*, 13 Cal. 424; *Squire v. W. U. T. Co.*, 98 Mass. 233; *True v. Int. Tel. Co.*, 60 Me. 27; *U. S. Tel. Co. v. Wenger*, 55 Pa. St. 268; *Tel. Co. v. Dryburg*, 35 id. 300; *W. U. T. Co. v. Tyler*, 74 Ill. 168.

Unless importance of message is shown either by its own terms or by explanation made to the person receiving it in behalf of the company, no damages are recoverable for failure or delay beyond price paid. *Mackay v. W. U. T. Co.*, 16 Nev. 222.

Citing *Landsberger v. Magnetic Tel. Co.*, 35 Barb. 530; *Beaupre v. P. & A. T. Co.*, 21 Minn. 155; *McColl v. W. U. T. Co.*, 12 J. & S. (N. Y.) 487; *Sanders v. Stuart*, 17 Eng. Rep. Moak's Notes, 286; *Candee v. W. U. T. Co.*, 34 Wis. 480; *Baldwin v. U. S. T. Co.*, 45 N. Y. 744.

Company may refuse to be affected by greater liability than that appearing on the face of the message. *Tel. Co. v. Griswold*, 37 Oh. St. 301.

Although a company could not foresee the amount of pecuniary loss likely to result from its negligence in transmitting a message, yet it was liable for damages if the subject to which the dispatch related was known to the company. *Pepper v. W. U. T. Co.*, 87 Tenn. 554.

A company notified by an agent that he believed his principal, from whom a dispatch had been received, was at Los Angeles and not at San Francisco, the message having been dated at the latter place by mistake of the company's agent, is liable if it send money furnished by the agent in response to a message to San Francisco, without proper investigation. *W. U. T. Co. v. Simpson*, 73 Tex. 422.

A company must take notice of what the dispatch suggests and must seek further information if desired, or be held to possess all the knowledge inquiry could have obtained. *W. U. T. Co. v. Edsall*, 74 Tex. 329.

A company was liable for negligent delay in sending a message, for special damages caused by the advance in price of materials, for the purchase of which the sender had conditional contracts, although the company had no notice of such contracts but had notice of facts from which they might have been inferred. *Gulf &c. Co. v. Loonie*, 82 Tex. 323.

Words did not show importance of delivery. Defendant, however, was actually otherwise notified thereof. Recovery was permitted. *Ward v. Western Union Teleg. Co.*, (Tex. Civ. App.) 51 S. W. Rep. 259.

As to conversation showing an appreciation of the importance of the message, see *Western Union Teleg. Co. v. Davis*, (Tex. Civ. App.) 59 S. W. Rep. 46.

Notification of pursuit to kill was directed to no particular place. Party was killed on his way to the office. There was no reasonable time for delivery after defendant was charged with notice of his arrival by coming in sight of the office. No recovery. *Ross v. Western Union Teleg. Co.*, 81 Fed. Rep. 676.

(d). CONTRACTS OF SALE, HIRING, &C.

The plaintiffs, at "S." had an agent at Chicago and one at Oswego. The former telegraphed the latter to send 500 sacks of salt, which message was transmitted to the plaintiffs as 5,000 sacks of salt, which were sent by Oswego; but before the boat left Oswego, and after the loading of the salt and the agent at Oswego supposed it had gone, he learned of the error. Held, (1) that the defendant was liable; (2) that it was no legal negligence of the agent at Oswego not to stop the vessel; and (3) that the measure of damage was the difference between the market value at Oswego and what it sold for at Chicago, and the expense of

transportation. The expense of transportation to Chicago from Oswego was proved, but not the cost of transporting back.

The plaintiff was not bound to return it to Oswego, although the difference in market price was greater than the cost of outward transportation. *Leonard v. N. Y. &c. Teleg. Co.*, 41 N. Y. 544.

The failure of a telegraph company to transmit messages in the form in which they were received, makes it presumptively liable. Message to "buy five Hudson" was sent to "buy five hundred." Learning of the error, the plaintiffs sent another message, but owing to the delay plaintiff lost a sum by the advance of stock ordered. Defendant was liable. *Rittenhouse v. Independent Line of Telegraph*, 44 N. Y. 263.

Plaintiff, who was a member of a firm of stock brokers doing business in the city of New York, while absent from the city delivered a telegram to defendant, directed to his firm, written upon a sheet of blank paper, directing the purchase of certain shares of stock. Through the mistake of the operator, the message, as sent, was directed to plaintiff individually, and in consequence it remained unopened until his return the next day after its receipt, when the purchase was made; the stock, however, had meantime risen in the market. The defendant was chargeable with negligence, and plaintiff was entitled to recover as damages the difference between the market value of the stock at the time of the receipt of the message and the sum paid for it. *Pearsall v. W. U. T. Co.*, 124 N. Y. 256, aff'g 44 Hun, 532 and judg't for pl'ff.

Where a sale of goods was directed, the measure of damages is the difference in the market price at the time of actual sale and at the time when they would have been sold had the message been duly delivered. *Daughtry v. Am. U. T. Co.*, 75 Ala. 168; 51 Am. Rep. 435.

For misquoting price to a factor; the difference in the price received and that fixed (less expense of keeping for a reasonable time to realize the former). *Western Union Teleg. Co. v. Crawford*, 110 Ala. 460.

For preventing plaintiff's closing an option; the difference between the contract price and the market value at the place of performance, at time of delivery of the telegram. *Brewster v. Western Union Teleg. Co.*, 65 Ark. 537.

"A." telegraphed his agent, "Due 1800; attach if you can find property; will send note by to-morrow's stage." By failure to properly transmit and deliver, prior attachment was made by other creditors and a debt due sender was lost. The company was liable for "A.'s" claim and cost of message. *Parks v. Alta T. Co.*, 13 Cal. 423.

Sendee received telegram quoting apples at \$1.75 rather than \$1.50 as the message was written; he accepted the offer. The facts—that he did not discover the mistake until after the apples had been shipped; that he had already advanced \$200 toward their purchase; that he

could not obtain them without paying the \$1.75 rate; that they were perishable and would be lost by delay in unloading them (the bill of lading was to be delivered on payment); that sendee needed them in his business, authorized sendee to pay the additional price after discovering the error, and to look to the telegraph company for damages. *W. U. T. Co. v. Dubois*, 128 Ill. 288.

For failure to deliver a telegram directing an agent not to purchase on a given day; limited to the difference between the price paid and the market price on the first day thereafter, he should have received instructions as to what to do. *Western Union Teleg. Co. v. North Packing & Co.*, 188 Ill. 366; *aff'g s. c.*, 89 Ill. App. 301.

For delay of a telegram directing the postponement of sale; the difference between the price on the day they were sold and that on the day they should have been. *Western Union Teleg. Co. v. North Packing & Co.*, 89 Ill. App. 301, *aff'd* 188 Ill. 366.

Where the plaintiff lost an employment at \$2 per day, an instruction that the measure of damages would be such sum from the time of sending the message to the commencement of the action, excluding Sundays and money meanwhile earned, or which might have been earned by the exercise of reasonable diligence, was sufficiently favorable to the defendant. *W. U. T. Co. v. McKibben*, 114 Ind. 511.

Where a person, believing that his message asking the market quotations had been sent, acted upon the arrangement that in case no reply was received, he was to consider that there had been no change in the price of cattle, he recovered the loss sustained by purchasing the same, where the message was not properly forwarded. *Garrett v. W. U. T. Co.*, 83 Iowa, 257.

Citing *Turner v. Tel. Co.*, 41 Iowa, 458.

It was not shown that the work of procuring the goods was not worth more than the margin of profit would have been. No recovery was allowed. *Mikelwait v. Western Union Teleg. Co.*, 113 Iowa, 177.

For failure to deliver message advising the withholding of shipment; the difference between the value at the place of shipment and the net receipts in open market at the place of destination after paying cost of shipment, care and sale. *Western Union & C. R. Co. v. Woods*, 56 Kan. 737.

A bank in Colorado receiving a draft from plaintiff's, purchasers of cattle, having letters of credit from a Kansas bank, telegraphed the latter to know whether it was good, which telegram the company failed to deliver. Plaintiffs after waiting some time sent a second message to the Kansas bank requesting transfer of money by wire to another bank there and the wiring of credit to the Colorado bank. After a delay, this with a third message asking for an explanation, was delivered, whereupon the

Kansas City Bank wired back the necessary information to pass the deal. Company was liable for loss of weight, etc., on cattle confined during the delay, *Western Union Teleg. Co. v. Simpson*, 10 Kan. App. 473.

Where, by failure to deliver telegram apprising him of same, a party lost the benefit of a contract for labor, subject to be defeated by the will of the other party, only nominal damages were recoverable. *Merrill v. W. U. T. Co.*, 78 Me. 97.

Plaintiff asked one "R." the price of an article; "R." telegraphed the price; plaintiff telegraphed that he would take a certain amount at the price named. For breach of contract to duly send which action was brought. There was no contract between plaintiff and "R.," and plaintiff was only entitled to recover expense of message. *Beaupre v. Pacific &c. T. Co.*, 21 Minn. 155.

For misquoting a price to a purchaser, the difference in the actual value and the price received. *Reed v. Western Union Teleg. Co.*, 135 Mo. 661.

Sender was to meet sendee in Kansas City to negotiate an employment. He sent a message to announce his coming. The message was: "Am on my way; Missouri Pacific; Kansas City; arrive eight to-night," which was delivered "ten to-night." The arrangement with the sendee was, that if sender did not arrive in Kansas City by eight o'clock, sendee might hire another man, which upon receiving message, he did. Defendant was liable for damages for loss of engagement. *Kemp v. W. U. T. Co.*, 28 Neb. 661; 30 A. & E. Cop. Cas. 607.

Loss of profits of a trade were recovered for failure to deliver telegram directing the principal to come and close it. *Western Union Teleg. Co. v. Wildhelm*, 48 Neb. 910.

See, also, *Evans v. Western &c. Teleg. Co.*, 102 Iowa, 219.

Where, on account of a mistake in a telegram, the sendee is induced to sell stock at market value, the company is not liable although he subsequently purchased other shares at an advanced rate. *Hughes v. W. U. T. Co.*, 114 N. C. 70.

Where a person was misled into making a long and fruitless journey by an error in abbreviating a name of a state from which the message purported to come, the company was liable therefor. *Tobin v. W. U. T. Co.*, 146 Penn. 375.

For omitting the word "actual" before weight, after being notified of its importance; the difference in the price which was received and that which would otherwise have been. *Hoffman v. Western Union Teleg. Co.*, 12 Lanc. L. Rev. (Pa.) 333.

For loss of opportunity to sell; the difference between the contract price and that subsequently obtained plus the cost of keeping them

in the meanwhile. *Wellingford v. Western Union Teleg. Co.*, 53 S. C. 410.

In consequence of a message quoting a commodity at less than its true price, it was ordered shipped to the party inquiring, whereupon the seller accepted the incorrect price quoted in the message and sued the company for the difference between that and the true price. The seller, in the absence of evidence of the market price, was entitled to recover such difference. *Pepper v. W. U. T. Co.*, 87 Tenn. 554.

Company was informed that unless a telegram announcing sale of herd was delivered at once, it would be turned loose. Damage included the expense of and the loss incident to its regathering. *Western Union Teleg. Co. v. Pruett*, (Tex. Civ. App.) 35 S. W. Rep. 78.

Company is liable for such damages as are the direct result of its failure to deliver a message. *W. U. T. Co. v. Broesche*, 72 Tex. 654.

By a telegram it was thought that a trade could be made. No recovery could be had without showing that it could have been made in fact. *Western Union Teleg. Co.*, (Tex. Civ. App.) 33 S. W. Rep. 1025.

Where there is an established rise in value plaintiff need not actually go into the market and buy other goods. *Western Union Teleg. Co. v. Carrier*, 15 Tex. Civ. App. 547.

Company had notice of the importance of the message. Permanent advance in price was recovered. *Western Union Teleg. Co. v. Carver*, 15 Tex. Civ. App. 547.

Where a proposed purchaser of staves telegraphed the vendor, the plaintiff, that he had a barge at a certain place, and to get it to the place where the staves were as soon as possible, and the dispatch was not delivered for thirty hours, whereby from the state of the river the plaintiff was prevented from carrying the barge to the proper point and the staves were lost, a recovery for the loss of the use of the barge only was allowed. *Bodkin v. W. U. T. Co.*, 31 Fed. Rep. 134.

An order to buy 500 bales was altered to 2,500. In an action by sender against the company, he recovered not only damages but commissions due his factor. *W. & N. O. T. Co. v. Hobson*, 15 Gratt. 122.

Where plaintiff's agent, through non-delivery of a message, did not buy wheat, held that the court could not *presume* that if the plaintiff's agent had purchased the wheat for them on the 7th they would have sold it on the 8th, while the market price was higher than on the 7th. The message was, "Buy twenty thousand, seller June A-M, of May 7th," meaning that agent should buy 20,000 bushels No. 2 wheat to be delivered at any time in June at seller's option. Nominal damages were recoverable. *Hibbard v. W. U. T. Co.*, 33 Wis. 558.

Plaintiff purchased at a price above market price but did not allege

that he could have bought for less and that the goods were not worth what he paid for them. No damage was shown. *Western Union Teleg. Co. v. Bell*, (Tex. Civ. App.) 59 S. W. Rep. 918.

(e). MENTAL SUFFERING.*

Damages cannot be recovered from a telegraph company for mental suffering resulting from simple negligence in the prompt delivery of a message announcing the dangerous illness of a relative, as such damages are too uncertain, remote and speculative. *W. U. T. Co. v. Wood*, 57 Fed. Rep. 471.

From opinion.—"Defendant in error contends 'that mental anguish, unaccompanied by injury to person or purse, is actual damage, and may be recovered as such.' He supports his contention with a line of decisions rendered in the supreme court of the state of Texas, with decisions of the supreme courts of Kentucky, Tennessee, Alabama, North Carolina, Indiana, generally following the Texas decisions, and with quotations as to the law on the subject, from several text writers of reputation. *Tel. Co. v. Adams*, 75 Tex. 536; 12 S. W. Rep. 857; *Anderson v. Tel. Co.*, (Tex. Supp.) 19 id. 285; *Martin v. Tel. Co.*, (Tex. Civ. App.) 20 id. 861; *Tel. Co. v. Longwill*, (N. M.) 21 Pac. 339; *Tel. Co. v. Allen*, 66 Miss. 549; 6 South. Rep. 461; *Tel. Co. v. Dubois*, 128 Ill. 248; 21 N. E. Rep. 4; *Young v. Tel. Co.*, 107 N. C. 370; 11 S. E. Rep. 1044; *Chapman v. Tel. Co.*, (Ky.) 13 S. W. Rep. 880; *Wardsworth v. Tel. Co.*, 86 Tenn. 695; 8 S. W. Rep. 574; *Tel. Co. v. Dryburg*, 35 Penn. St. 298; *Reese v. Tel. Co.*, 123 Ind. 294; 24 N. E. Rep. 163; *Shear. & R. Neg.*, sec. 560; *Gray Com. by Tel.* 65 *et. seq.*; *Thomp. Elect.*, sec. 424 *et seq.*; 3 *Suth. Dam.* 314; 2 *Thomp. Neg.*, 847, sec. 11; 5 *Lawson Rights, Rem. & Pr.*, sec. 1972; *Tel. Co. v. Beringer*, 84 Tex. 38; 19 S. W. Rep. 336; *Tel. Co. v. Jones*, 81 Tex. 271; 16 S. W. Rep. 1006; *Tel. Co. v. Moore*, 76 Tex. 67; 12 S. W. Rep. 949; *Tel. Co. v. Edsall*, 74 Tex. 333, 12 S. W. Rep. 41; *Tel. Co. v. Feegles*, 75 Tex. 537; 12 S. W. Rep. 860; *Potts v. Tel. Co.*, 82 Tex. 545; 18 S. W. Rep. 604; *Tel. Co. v. Ward*, (Tex. App.) 19 S. W. Rep. 898; *Tel. Co. v. Rosenreter*, 80 Tex. 406; 16 S. W. Rep. 29; *Tel. Co. v. Nations*, 82 Tex. 89; 18 S. W. Rep. 709.

A careful reading of the cases cited will show that, in the main, they do not declare a general proposition applicable to all cases, that mental anguish resulting from the breach of a contract, or even from the neglect of a duty, unaccompanied

*NOTE.—The March-April (1895) number of the *American Law Review* (p. 209), contains a vigorous article espousing the doctrine that mental distress is a proper element of damages in such cases. It appears from this that the doctrine was first invoked in *So Relle v. W. U. T. Co.*, 55 Tex. 308, apparently overruled in *Gulf, &c. R. Co. v. Levy*, 59 id. 563 (although the court, under the facts, might well have held that the plaintiff was not the person damaged, and the rule, if authorized, had no application), but in *Stuart v. W. U. T. Co.*, 66 Tex. 580, the doctrine was firmly engrafted upon the jurisprudence of Texas, as also appears by the cases cited. It is also stated that *Alabama (W. U. T. Co. v. Henderson)*, 89 Ala. 510; *W. U. T. Co. v. Cunningham*, 14 S. R. 579; *Indiana (Reese v. W. U. T. Co.)*, 123 Ind. 294; *Kentucky (Chapman v. W. U. T. Co.)*, 13 S. W. Rep. 880; *North Carolina (Young v. W. U. T. Co.)*, 107 N. C. 370; *Tennessee (Wardsworth v. W. U. T. Co.)*, 86 Tenn. 695; and practically *Iowa (Curtiss v. Railway Co.)*, 54 N. W. Rep. 339 have committed themselves to the same rule of damages. It is also stated in the above article that the doctrine is approved in *Gray Com. by Telegraph*, sec. 65; *Lawson Rights, Rem. & Pr.*, vol. 5, sec. 1970; 2 *Thom. Neg.* 847, sec. 11; *Shear. & R. Neg.*, sec. 560; *Sedgwick on Dam.* (8th ed.), sec. 894; *Suth. Dam.* (2d ed.), sec. 975; *Thomp. Elect.*, sec. 424.

The article reviews with confessed partisanship the authorities holding or cited to the contrary.

with actual injury to the person or purse, will support an action for damages; but they rather make an exception as against corporations and *quasi* public agencies, which, from the character of their business as common carriers, or in the nature thereof, and from the public privileges enjoyed, are said to be charged with a public duty, as well as obligated to particular individuals under special contracts. The logic seems to be that, as they are charged with duties to the public, they may be held liable for mental anguish, unaccompanied with other injury, resulting from the breach of the contract; and this, not exactly as punitive damages or smart money, but rather as a case where damages should be allowed to the aggrieved individual in order to impress upon the defendant the great importance of faithfully performing his duty to the public. We do not refer to this for the purpose of criticising the argument, but rather to suggest that telegraph companies, and other *quasi* public agencies referred to, are engaged in commerce (*W. U. T. Co. v. Texas*, 105 U. S. 460); that their rights, duties and obligations under contracts in the line of their business are matters arising under the general law, and that in the courts of the United States the questions arising thereunder, in the absence of controlling statutes, are not controlled by the decisions of the courts of last resort of any particular state in reference to like matters, although the cause of action originated in said state. *Railway Co. v. Prentice*, 147 U. S. 105; 13 Sup. Ct. Rep. 261; *Railroad Co. v. Baugh*, 13 Sup. Ct. Rep. 914, recently decided, not yet officially reported (149 U. S. 367).

The general rule that mental anguish and suffering, unattended by any injury to the person, resulting from simple actionable negligence, cannot be sufficient basis for an action for the recovery of damages, is maintained and supported by an unbroken line of English authorities, by the conceded state of general law prior to the *So Relle* case, 55 Tex. 308 (in 1881), and by the uniform decision of the federal courts and decisions of the supreme courts of Nevada, Dakota, Kansas, Maine, Mississippi, Georgia, Massachusetts, and by the opinions of several text writers of unquestioned standing as expounders of the law. *Lynch v. Knight*, 9 H. L. Cas. 577; *Flemington v. Smithers*, 2 Car. & P. 292; *Railway Co. v. Coultas*, 13 App. Cas. 222; *Johnson v. Wells*, 6 Nev. 224; *Russell v. Tel. Co.*, 3 Dak. 315; 19 N. W. Rep. 408; *Salina v. Trosper*, 27 Kas. 564; *West v. Tel. Co.*, 39 id. 95; 17 Pac. Rep. 807; *Wyman v. Leavitt*, 71 Me. 227; *Tel. Co. v. Rogers*, (Miss.) 9 South. Rep. 823; *Chase v. Tel. Co.*, 44 Fed. Rep. 554; *Crawson v. Tel. Co.*, 47 id. 544; *Chapman v. Tel. Co. (Ga.)* 15 S. E. Rep. 901; *Canning v. Williamstown*, 1 Cush. 451; *Wilcox v. Railroad Co.*, 52 Fed. Rep. 264; 3 C. C. A. 73; *Tyler v. Tel. Co.*, 54 Fed. Rep. 634; *Wood's Mayne Dam.*, p. 74, note; *Wood Ry. Law*, p. 1238; 5 Am. & Eng. Enc. Law, p. 42, note 2; *Pierce R.* 302; *Railroad Co. v. Stables*, 62 Ill. 320; *City of Chicago v. McLean*, 133 Ill. 148; 24 N. E. Rep. 527; *Trigg v. Railroad Co.*, 74 Mo. 147; *Walsh v. Railroad Co.*, 42 Wis. 23. See, also, *Kennon v. Gilmer*, 131 U. S. 22; 9 Sup. Ct. Rep. 696; *Terwilliger v. Wands*, 17 N. Y. 54; *Railroad Co. v. Parker*, 9 Bush. 455; *Joch v. Dunkwardt*, 85 Ill. 331; *Paine v. Railroad Co.*, 45 Iowa, 570; *Railroad Co. v. Stevens*, 9 Heisk. 12; *Mulford v. Clewell*, 21 Oh. St. 191; *Freese v. Tripp*, 70 Ill. 497; *Clinton v. Laning*, 61 Mich. 355; 28 N. W. Rep. 125; *Meidel v. Anthis*, 71 Ill. 241; *Masters v. Warren*, 27 Conn. 293; *Stewart v. Ripon*, 38 Wis. 584.

We have carefully considered the question presented, having been aided by able counsel orally and with elaborate briefs, and our conclusion is that upon principle, and the weight of authority, damages cannot be recovered from a telegraph company for mental anguish resulting from simple negligence in the prompt delivery of a telegraphic message, as the same are too uncertain, remote and speculative.

In the case of *Wardsworth v. Tel. Co.*, *supra*, (86 Tenn. 695), Judge Lurton, (dissenting) said:

"The reason why an independent action for such injuries cannot and ought not to be sustained is found in the remoteness of such damages. * * * Such injuries are generally more sentimental than substantial, depending largely upon physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated, and impossible to disprove, it falls within all of the objections to speculative damages which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as mere compensation to the plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority. But the rule in question has not been limited, as claimed, to actions based upon physical pain. It has, as we have already seen, upon the authority of *Mr. Wood*, been applied to actions of slander and libel. No matter how gross the insult, or how harrowing the feelings, there can be no recovery if the slander did not imply a crime, or result in some special damage. The same rule applies in actions brought for the death of another. The plaintiff must have a pecuniary interest in such life, and in such cases there can be no recovery for the injured feelings, the grief or anguish suffered by the plaintiff in consequence of the death for which the suit lies. This is the rule regardless of the relation the deceased bore to the plaintiff. Whether husband or wife, parent or child, the rule is the same. The damages are for the pecuniary loss sustained. * * * The principles upon which this suit is maintained seem to me so radical a departure from the headlands of the law, and to so seriously threaten the uprooting of doctrines that I have been taught to revere as the very foundation stones of the system of our law upon the subject of contracts and damages, as to make it my duty to give expression to my views upon the questions involved."

In the well-considered case of *Tel. Co. v. Rogers*, *supra*, Mr. Justice Cooper, after ably reviewing the adjudged cases, said, for the supreme court of Mississippi (9 So. 823):

"We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced. The difficulty of applying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are far less likely to be made than will be those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither palliate nor compensate the injury he has sustained. 'Mental pain and anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone.' *Lynch v. Knight*, 9 H. L. Cas. 577. The rapid multiplication of cases of this character in the state of Texas since the case of *So Relle*, indicates to some extent the field of speculative litigation opened up by that decision. The course of decision shows how difficult the subject is of control. In *So Relle's* case it was held that the sendee of the undelivered

message, who had paid nothing for its transmission, might recover for the mental suffering flowing from its non-delivery. In *Railroad Co. v. Levy*, 59 Tex. 564, that case was overruled in so far as the right of action was recognized in the sendee, and it was held that only the person entering into the contract with the company might sue. But in *Tel. Co. v. Cooper*, 71 Tex. 507; 9 S. W. Rep. 593, where the husband had sent the dispatch calling the physician to attend his wife in her confinement, it was held that the husband (the sender of the message) could not recover for his mental sufferings caused by the negligence of the company in failing to deliver the message, but that, suing in right of his wife (who was not a party to the contract with the company), he might recover for her mental suffering. It was held in that state that the telegraph company must be informed, either by the face of the message or by extraneous notice, of the relationship of the parties, and the purport of the message, to warrant the recovery of damages for mental suffering. It has been decided that this dispatch did not sufficiently indicate these facts: 'Willie died yesterday at six o'clock. Will be buried at Marshall, Sunday evening.' *Tel. Co. v. Brown*, 71 Tex. 723; 10 S. W. Rep. 323. While the following one did: 'Billie is very low. Come at once.' *Tel. Co. v. Moore*, 76 Tex. 66; 12 S. W. Rep. 949. And a distinction seems to be drawn between the negligence of failing to deliver a dispatch which causes mental pain and suffering, and failing to deliver one which, if delivered, would relieve such suffering. In *Rowell v. Tel. Co.*, 75 Tex. 26; 12 S. W. Rep. 534, the plaintiff and his wife had received information of the dangerous illness of her mother. Subsequently a dispatch was sent containing information of the mother's improved condition. This dispatch the company failed to deliver. Suit was brought, but recovery was denied, the court saying: 'The demurrer was properly sustained. The damage here complained of was the mere continued anxiety caused by the failure promptly to deliver the message. Some kind of unpleasant emotion in the mind of the injured party is probably the result of a breach of contract, in most cases. But the cases are rare in which such emotion can be held to be an element of the damages resulting from the breach. For injuries to feelings, in such cases, the courts cannot give redress. Any other rule would result in intolerable litigation.' The manifest effect of this decision is to deny to a party injured redress for mental suffering contemplated by the parties to the contract as the probable consequence of its breach. The distinction drawn by the court is so unsubstantial that it was evidently resorted to for the purpose of obstructing the tide of 'intolerable litigation' flowing from the decisions following the *So Relle* case. Kentucky, Tennessee, Indiana and Alabama have but recently established the rule, the dangers and difficulties of which are becoming apparent in Texas. The 'intolerable litigation' invited and appearing in Texas has not yet fairly commenced in those states. It will, however, appear in due time, and the courts will be forced to resort to refined limitations, as Texas has done, to restrict it. We prefer the safety afforded by the conversation of the old law, as we understand it to be, and are of the opinion that no recovery for mental suffering can be had under the circumstances of this case."

Mental suffering is an element of damage. *Western Union Teleg. Co.*, 115 Ala. 441; *Sherrill v. Western Union Teleg. Co.*, 117 N. C. 352.

From being unable to attend father's funeral. *Western Union Teleg. Co. v. McNair*, 120 Ala. 99.

See, also, *Western Union Teleg. Co. v. Smith*, (Tex. Civ. App.) 33 S. W. Rep. 742; *Roach v. Jones*, 18 Tex. Civ. App. 231.

It must be accompanied with physical injury. *Play v. Western Union Teleg. Co.*, 64 Ark. 538; *Kline v. Western Union Teleg. Co.*, 3 Oh. N. W. 143; *Lewis v. Western Union Teleg. Co.*, 57 S. C. 325; *Western Union Teleg. Co. v. Preston*, (Tex. Civ. App.) 54 S. W. Rep. 650; *Davis v. Western U. T. Co.*, 46 W. Va. 48; *Western Union Teleg. Co. v. Sweetman*, 19 Tex. Civ. App. 435.

Mental suffering, on account of not being able to attend a friend's funeral, and on account of being jeered at for being late, is not an element. *Gideens v. Western Union Teleg. Co.*, 111 Ga. 824.

See, also, *Western Union Teleg. Co. v. Cleave*, (Ky.) 54 S. W. Rep. 827; *Western Union Teleg. Co. v. Steinbergen*, (Ky.) 54 S. W. Rep. 829; *Davidson v. Western Union Teleg. Co.*, (Ky.) 54 S. W. Rep. 830.

Mental anguish alone, on account of a delay in the announcement of sickness, is not. *Western Union Teleg. Co. v. Halton*, 71 Ill. App. 63.

Contra in case of notice of death of mother. *Western Union Teleg. Co. v. Briscoe*, 18 Ind. App. 22.

See, also, *Western Union Teleg. Co. v. Fisher*, (Ky.) 54 S. W. Rep. 830; *Western Union Teleg. Co. v. McIvory*, (Ky.) 55 S. W. Rep. 428.

Where that result may be reasonably anticipated from the contents of the message. *Western Union Teleg. Co. v. Todd*, (Ind.) 53 N. E. Rep. 194.

Western Union Teleg. Co. v. Warren, (Tex. Civ. App.) 36 S. W. Rep. 314; *Ward v. Western Union Teleg. Co.*, (Tex. Civ. App.) 51 S. W. Rep. 259.

No recovery can be had for injury to one's feelings and affections. *Morton v. Western Union Teleg. Co.*, 53 Oh. St. 431.

Mental anguish on account of the delay in reaching the death bed of a mother, is an element. *Harvener v. Western Union Teleg. Co.*, 117 N. C. 540.

See, also, *Western Union Teleg. Co. v. Teague*, (Tex. Civ. App.) 36 S. W. Rep. 301; *Western Union Teleg. Co. v. Birchfield*, 14 Tex. Civ. App. 664; *Western Union Teleg. Co. v. Stacey*, (Tex. Civ. App.) 41 S. W. Rep. 100.

But, mental anguish at not being able to see an aunt conscious before death, could not be recovered on a telegram reading "Meet me to-morrow twelve o'clock." *Kennon v. Western Union Teleg. Co.*, 126 N. C. 232.

As company must have knowledge of the importance of the message. *Darlington v. Western Union Teleg. Co.*, 127 N. C. 448.

Father may recover for mental anguish, where a minister telegraphed for failed to arrive in time to give baptism to his dying daughter. *Western Union Teleg. Co. v. Robinson*, 97 Tenn. 638.

Anxiety as to condition of a father during the interval caused by the delay of a telegram announcing his illness did not give recovery, where

plaintiff could not have gone to the funeral had it been delivered promptly. *Western Union Teleg. Co. v. Edmonson*, 91 Tex. 206; rev'g s. c., 40 S. W. Rep. 622.

See, also, *McCarthy v. Western Union Teleg. Co.*, (Tex. Civ. App.) 56 S. W. Rep. 568; *Morrison v. Western Union Teleg. Co.*, (Tex. Civ. App.) 59 S. W. Rep. 1127.

There was no recovery for anxiety for sick wife and child left at home, on account of delay in returning owing to a failure to deliver a telegram requesting prompt preparations for the interment of another child plaintiff was taking elsewhere. *Western Union Teleg. Co. v. Giffin*, 93 Tex. 530.

Anxiety and increased expense in search, caused by delay of message to father announcing that his son had run away, cannot be recovered. *Baldwin v. Western Union Teleg. Co.*, (Tex. Civ. App.) 33 S. W. Rep. 890.

Anxiety of plaintiff's wife due to a failure to receive a reply to a telegram sent by her announcing to her husband her mother's serious illness, held not recoverable for. *Johnson v. Western Union Teleg. Co.*, 14 Tex. Civ. App. 536.

Mental anguish due to an announcement of death instead of recovery is an element. *Western Union Teleg. Co. v. Odom*, 21 Tex. Civ. App. 537.

So, where telegram given as "Mother started at nine to-night" was delivered as "Mother died at nine to-night." *Western Union &c. R. Co. v. Hines*, 22 Tex. Civ. App. 315.

So, worry at not hearing from husband, who agreed to telegraph if well, where he was not subjected to great danger. *Morrison v. Western Union Teleg. Co.*, (Tex. Civ. App.) 59 S. W. 1127.

So, as to mental distress and mortification in arriving with the body of a deceased child without the preparations for interment, as telegraphed for. *Western Union Teleg. Co. v. Giffin*, (Tex. Civ. App.) 57 S. W. Rep. 327.

Sorrow at not being able to be present at funeral of a child is too remote. *Western Union Teleg. Co. v. Lovett*, (Tex. Civ. App.) 58 S. W. Rep. 204.

No recovery was had for mental anguish which occurred prior to defendant's default. *Western Union Teleg. Co. v. Burgess*, (Tex. Civ. App.) 60 S. W. Rep. 1023.

Mental anguish of husband due to estrangement of family who imputed his failure to be present at his child's death to his negligence, held not to be the natural consequence of a failure to deliver telegram. *McBride v. Sunset Teleg. Co.*, 96 Fed. Rep. 81.

(f). MISCELLANEOUS ELEMENTS.

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No recovery for non-delivery of telegram, where shipper received the same information elsewhere. *Reynolds v. Western Union Teleg. Co.*, 81 Mo. App. 223.

Damages may be given for false assurance that the telegram had been sent. *Laudie v. Western Union Teleg. Co.*, 126 N. C. 431.

Owner was prevented from making certain arrangements, but his agent had full power to make them. No recovery. *Mitchell v. Western Union Teleg. Co.*, (Tex. Civ. App.) 56 S. W. Rep. 439.

Expense in sending flowers and a representative to a funeral, was a direct result of erroneous transmission. *Western Union Teleg. Co. v. Hines*, 22 Tex. Civ. App. 315.

XXV. Proximate Cause.

A telegram simply asked for prices and made suggestions as to sales. Loss of commission is not the proximate cause of a failure to deliver it. *Postal Teleg. C. Co. v. Barwise*, 11 Colo. App. 328.

Loss of custom by inability to perform a contract was too remote. *Ferrero v. Western Union Teleg. Co.*, 9 App. D. C. 455.

Profits lost by failure to receive goods sent is not too remote. *Walden v. Western Union Teleg. Co.*, 105 Ga. 275.

See, also, *Evans v. Western Union Teleg. Co.*, 102 Iowa, 219.

Mental distress and nervous prostration by reason of there being no one at the station to meet the sender was reasonably to be anticipated. *Western Union Teleg. Co. v. Henley*, 23 Ind. App. 14.

Mental anguish at not receiving a reply to a telegram making inquiry about another's condition held not the proximate cause of failure to deliver because it might not have been replied to or if sent some miscarriage without fault of the company might have prevented its reaching its destination. *Teliferro v. Western Union Teleg. Co.*, (Ky.) 54 S. W. Rep. 825.

Failure to deliver telegram asking for a conveyance, was not the proximate cause of sickness from walking, where plaintiff still could have secured one. *Yazoo &c. R. Co. v. Foster*, (Miss.) 23 South. Rep. 581.

Profits dependent on fluctuations of markets are too speculative. *Reynolds v. Western Union Teleg. Co.*, 81 Mo. App. 223.

Failure to deliver a telegram requesting a ticket, was not the proxi-

mate cause of injury in attempting to steal the ride. *Barnes v. Western Union Teleg. Co.*, (Nev.) 50 Pac. Rep. 438.

Damages for not reaching a funeral in time was not rendered speculative because burial was within the hands of another. *Jones v. Roach*, 21 Tex. Civ. App. 301; s. c. aff'd, 54 S. W. Rep. 240.

Company misstated the place from which transmission was made. It was not permitted to set up failure to repeat. *Western Union Teleg. Co. v. Tobin*, (Tex. Civ. App.) 56 S. W. Rep. 540.

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